



COMMONS REGISTRATION ACT 1965

Reference No.44/D/21

In the Matter of a Piece of land,
Farndale East, Yorkshire, (North
Riding) (No.1).

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.169 in the Register of Common Land maintained by the North Riding of Yorkshire County Council and is occasioned by Objection No. 05 made by the late Lord Hotham and noted in the Register on 4th December 1968.

I held a hearing for the purpose of inquiring into the dispute at Malton on 11th April 1973. The hearing was attended by Mr. P. Thompson, solicitor, on behalf of Mrs. M.A. Wass, who was deemed to have applied for the registration. The next case on the list was a dispute (No.44/D/22) relating to the registration on the application of Mrs. Wass of rights over the land in question, which was also the subject of an objection made by Lord Hotham when he was the owner of the land. After the objection was made, Mrs. J.E. Morris succeeded to the interest of Lord Hotham and was therefore entitled to be heard in dispute No.44/D/22 by virtue of reg.19(2)(f) of the Commons Commissioners Regulations 1971. Mr. W.D. Pinkney, solicitor, applied on behalf of Mrs. Morris to be heard in this dispute as well as in dispute No.44/D/22. I granted this application and heard both disputes together.

The registration of the land in question as common land was supported by an allegation that it is subject to rights of common belonging to Mrs. Wass as the owner of certain land known as Lowna Farm.

The evidence adduced by Mr. Thompson was partly documentary and partly oral. The earliest document was an assignment dated 8th December 1742 made between (1) Eleanor Hobson, (2) John Wilson, and (3) James Hobson of a mortgage of Lowna Farm. The parcels in this document consist of a specific description of the land followed, as was not uncommon in deeds of that period, by a long string of general words. These general words include "horsegates, beastgates, sheepgates, commons, common of pasture and turbary".

Lowna Farm came into the ownership of Mrs. Wass's family by an indenture of feoffment made 6th April 1803 between (1) John Mark and Dinah his wife (the granddaughter and devisee of John Wilson), and (2) Thomas Baxter and William Harding, his trustee. This deed also contains general words which, though not identical with those in the deed of 1742, include "commons" and "common rights".

There were produced copies of "The Blackface Sheep-Keepers' Guide for the North-Eastern Moors of Yorkshire" published in 1897 and 1924. Both show John Baxter of Lowna as a sheep-keeper, but listed under Farndale West





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Low Quarter, the land the subject of this dispute being in Farndale East. Since Lowna is not in the parish of Farndale West, the correct inference seems to be that the sheep-keepers are listed under the names of the moors on which their sheep were kept. Since there are a number of other sheep-keepers listed under Farndale East, these guides seem to indicate that in 1897 and in 1924 Mr. Baxter was not keeping sheep in Farndale East.

This inference from the guides is, however, contradicted by the oral evidence. Mrs. Wass, who is a daughter of Mr. Baxter (who died in 1966), was born at Lowna Farm in 1909 and remembers her father's grazing between 100 and 150 breeding ewes on the land the subject of the dispute every year until he sold the whole flock in the 1920's. In addition, Mr. Baxter used to turn out about 20 cows and young cattle until he retired in 1942 on Mrs. Wass's marriage. Thereafter Mrs. Wass's husband, Mr. J.P. Wass, used to turn out cows and young cattle until about 1960. Mrs. Wass also said that her father used to rent some land known as Hagg Land to the west of the land in question (as her husband still does), but that the tenancy does not include any grazing rights over other land.

Mrs. Wass's evidence was corroborated by her sister, Miss Elizabeth Baxter, who said that her father sold his flock in 1924. Miss Baxter also stated that her father took wood and peat for fuel from the land in question during the General Strike in 1926.

Evidence was also given by Mr. Alfred Jackson, who was Mr. Baxter's foreman between 1920 and 1929. Mr. Jackson said that Mr. Baxter ran about 150 sheep on the land in question until he sold his flock in 1924 after he had trouble about some of his sheep breaking into the fields of the adjoining farm known as Grouse Hall. Supporting evidence was given by Mr. W.H. Johns, who worked for Mr. Baxter for seven years from 1923, and by Mr. G.H. Leng, who was born in 1899 and whose father was Mr. Baxter's shepherd for 17 years until 1924.

Mr. J.P. Wass produced the tenancy agreement dated 15th September 1959 under which he holds Hagg Land. This does not contain any reference to grazing rights.

Mr. D.B. Wass, the son of Mr. and Mrs. J.P. Wass, who farms in partnership with his father, stated that he wished to turn out sheep on the moor, but that he had not been able to find a suitable flock of moor sheep for sale. He explained that it would be useless to buy a flock from some other moor because they would stray back to their native moor.

I accept Mrs. Wass and the other witnesses called in support of her claim as being both truthful and accurate in their recollection. I find as a fact that Mr. Baxter turned out about 150 sheep on the land in question until he sold his flock in 1924.

The questions which I have to determine are whether Mr. Baxter turned out his sheep in the exercise of a right of pasture and, if so, whether such right still exists.



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Mr. Thompson argued that the reference to common of pasture and turbary in the deed of 1742 proves that such rights attach to Lowna Farm. To that Mr. Pinkney replied that general words in a deed do not operate as a grant. The locus classicus for the law on this point is in the judgment of Lindley L.J. in Baring v. Anderson [1893] 2 Ch.374, at p.388, where he said:-

"I do not understand that the introduction of general words in a grant amounts to a warranty by the grantor that there is anything to answer them. I understand them to be put in for an entirely different object - to cover anything which may not have been specifically mentioned, to sweep in anything which may have been overlooked, and they may, if not in all cases, certainly in the great majority of cases, be read as if the words "if any" were added to them. There is no warranty that there are any ways, commons or other things belonging or appertaining to the piece of land conveyed; there may or may not be, and if there are the grantee is to have them".

It is therefore not to be inferred from the deed of 1742 or from that of 1803 that there were any rights of common annexed to Lowna Farm. On the other hand, those deeds are consistent with the existence of such rights. That there was a right of pasture is, to my mind, indicated by the fact that Mr. Baxter kept a flock of blackface sheep which he turned out to graze on the land in question until 1924. Had Mr. Baxter no right to do this, one would expect the tenant farmers, who, so Mrs. Wass said, had a right to graze a stinted number of sheep on this land, to have objected to this trespass. It seems clear that Mr. Baxter had no right to do this in his capacity as a tenant of Hagg Land, so that the only inference is that he did it in his capacity of owner of Lowna Farm. I am accordingly satisfied that Mr. Baxter had a right to graze sheep on this land.

It is now necessary to consider what has been the effect of the non-exercise of this right for a period of nearly half a century. A right of common is not lost by non-exercise. On the other hand, non-exercise for a substantial period can be evidence from which an abandonment of the right can be inferred. In considering what importance I should attach to Mr. Baxter's sale of his flock in 1924 I have in mind Mr. D.B. Wass's evidence as to the difficulty involved in re-establishing a flock of moorland sheep and Mr. Jackson's evidence as to the reason why Mr. Baxter sold his flock. It must have been clear to Mr. Baxter, who was a sheep-keeper with many years' experience, that once he had disposed of his flock he would have great difficulty in re-establishing it. Yet he chose to dispose of his flock rather than take steps to ensure that the sheep did not go on breaking into the fields of Grouse Hall Farm, and he never sought to re-establish a flock of moorland sheep during the remaining 42 years of his life. I feel driven to the conclusion that he decided to abandon his right to graze sheep on this land.

The position with regard to the cows and other cattle is somewhat different, for Mr. J.P. Wass continued to turn them out onto this land until about 1960. Mr. Wass said that his reason for ceasing to do so was that the fast traffic along the road across the moor made it too dangerous to exercise his right until there was some form of fencing to keep the animals off the road. On this evidence I should not be prepared to hold that the right to graze



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cattle had been abandoned. Nevertheless, it does not seem to me that it would be right to confirm this registration on the ground that there is a right to graze cattle on this land. This registration was made in consequence of Mrs. Wass's application for registration in the Rights Section of the Register Unit of rights (a) to graze sheep; (b) to cut and take away peat; and (c) to take estovers. For me to confirm this registration would be to treat it as if it had been made in consequence of a different registration in the Rights Section, namely to graze cattle, and this I am not prepared to do, since, in my view, I have no power to modify the registration in the Rights Section by adding to it a right to graze cattle.

The only evidence concerning the taking of wood and peat was that given by Miss Baxter about what happened in 1926. In my view this is wholly insufficient to support a claim that what was done was in the exercise of a legal right.

For these reasons I refuse to 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 7th day of May 1973


Chief Commons Commissioners