



COMMONS REGISTRATION ACT 1965

Reference No 268/U/95

In the Matter of White Birks Common,
Hawes, Richmondshire District, North
Yorkshire

DECISION

This reference relates to the question of the ownership of land known as White Birks Common, Hawes, Richmondshire District, being the land comprised in the Land Section of Register Unit No CL. 38 in the Register of Common Land maintained by the North Yorkshire County Council of which no person is registered under section 4 of the Commons Registration Act 1965 as the owner.

Following upon the public notice of this reference Hawes Parish Council, Mr J E Birbeck and the Executors of Edward Ashton deceased severally claimed ownership of or of some share in or part of the land in question. No other person claimed to be the freehold owner of the land or to have information as to its ownership.

I held a hearing for the purpose of inquiring into the question of the ownership of the land at Richmond on 8 February 1977. At the hearing Mrs Daisy Ashton and Mr Arthur Ashton (executors of Edward Ashton who died 5 February 1973) were represented by Mr C O J Behrens of counsel instructed by J P Mewies & Co Solicitors of Skipton and Mr John Ernest Birbeck was represented by Mr P A Holder of counsel instructed by Fell Kilvington & Co, Solicitors of Appleby.

The land ("the Unit Land") is a tract having a length, a northwest-southeast line, of about $1\frac{1}{2}$ miles and a variable width between $\frac{1}{3}$ rd and $\frac{2}{3}$ rd of a mile. For the most part it is a short distance west or southwest of the railway from Settle to Appleby and the road B6259 from the Moorcock Inn on the south to Kirkby Stephen on the north; the railway for a short distance ("the Tunnel") runs under the southeast corner of the Unit Land, and near the Tunnel the Unit Land adjoins the B6259 road, being at this point about 1,100 feet above sea level, and about $\frac{1}{3}$ of a mile (in a direct line) west of Lunds Church. The northwest corner of the Unit Land is Swarth Fell Pike, over 2,100 feet; the north boundary is the old County boundary between the North Riding and Westmorland (now between North Yorkshire and Cumbria), being the line of the watershed between the River Ure on the south and the River Eden on the north.

At the hearing it was agreed I was only concerned with the part ("the Yellow Land") of the Unit Land situate at the south corner as edged yellow on the plan produced by Mr Behrens and put to Mr J Birbeck in the course of his evidence. The Yellow Land contains approximately 38 acres and is known as Shaw Paddock Pasture; the eastern part of its northern boundary is Roman Trees Gill. Apart from the Gill, there is no fence or other obstruction to man or animals between the Yellow Land and the rest of the Unit Land (all to the north except for a comparatively small piece over and near the Tunnel).





in the hands of Mr Johnson (a solicitor) that he agreed to pay £13. In about 1963 Mr Birbeck came to see her husband with a view to taking the Yellow Land; Mr Birbeck did not agree; he refused to pay the rent asked; there was an argument, and Mr Birbeck went away saying her husband could not stop him grazing because there was no fence.

There was a conflict of evidence between that given by Mrs D Ashton and her daughter Mrs Caygill and that given by Mr Birbeck and Mr G H Ashton as to how and for what period Mr G H Ashton paid rent, as to the date of the discussion between Mr Birbeck and Mr Edward Ashton as to Mr Birbeck continuing to pay this rent and as to whether Mr Birbeck in fact said Mr Edward Ashton could not stop him grazing because there was no fence. I find (and this much was not I think seriously disputed) that Mr G H Ashton did pay rent for the Yellow Land at least in respect of the period from 1946 to 1961 and that after Mr G H Ashton ceased to pay rent Mr Birbeck did discuss with Mr Edward Ashton whether he should pay rent in respect of the Yellow Land without any agreement being reached because Mr Edward Ashton wanted more than Mr Birbeck was prepared to pay. I also find that at all material times, any sheep on the part of the Unit Land north of the Yellow Land which was inclined to go on to the Yellow Land would have met with no substantial obstruction.

Mr Holder contended that Mr Birbeck was after 1961 in possession of the Yellow Land because his sheep had grazed on it. In his evidence Mr Birbeck said (in effect):- He never put any sheep on to the Yellow Land; they went there from some other part of the Unit Land. When he put sheep on to the Unit Land he put them through one of the six gates which are between the Unit Land and his three farms; none of these gates provide access directly to the Yellow Land. When he took over the tenancy of Shaw Paddock Farm and High Paddock Farm he took over the flocks hefted with these farms; when he bought Birks Farm he took over the flock which was hefted with that farm.

Mr Holder asked me to bear in mind the judgment of Lord Morris in *Wuta-Ofei v Danquah* 1961 3 All ER 596 and the judgment of Stamp LJ in *Wallis v Shell* 1974 3 All ER 574, also 1975 1 QB 94 and I have since looked at the judgments in *Treloar v Nute* 1977 1 All ER 230. The evidence shows I think that the Yellow Land up to 1961 and possibly up to 1963 and 1964 was as regards grazing a piece of land distinct from the rest of the Unit Land. In my opinion it so continued, and accordingly Mr Birbeck never entered into or was in possession of the Yellow Land by reason of his sheep having strayed on to it from the rest of the Unit Land. There was no other evidence of Mr Birbeck ever having been in possession, and indeed it was at no time suggested that the Yellow Land was used for any purpose other than the grazing of sheep (the witnesses used the word "hogs" as meaning gimmer hogs). Accordingly the difficult questions of law discussed in the three cases cited do not arise.

Further I do not accept the suggestion that Mr Birbeck was ever in possession of any part of the Unit Land; his grazing of sheep can be ascribed to the grazing right which he registered under the 1965 Act. Also if he encroached from Shaws Paddock Farm and High Paddock Farm, he would do so not for his own benefit but for the benefit of his landlord.

For the above reasons I reject the claim of Birbeck. But in case these proceedings are taken to a higher court, and it becomes important to resolve the questions about which there was some conflict of evidence, I record that where any such conflict





exists, I consider the evidence of Mrs Ashton, Mr A Ashton and Mrs Caygill more reliable than that given by Mr Birbeck and Mr G H Ashton.

In my opinion neither Mr Edward Ashton nor Mrs D and Mr A Ashton as his executors were ever dispossessed by Mr Birbeck of the Yellow Land, and accordingly their paper title and his possession as recipient of rent show that at the date of the hearing they were entitled to it for a term of 2000 years. Under the 1965 Act I am only concerned with the legal estate in fee simple, see section 22; however it being likely that they could by a deed made under section 153 of the Law of Property Act 1925 convert this term into a fee simple estate, I have postponed my decision to enable such a deed to be left at the office of the Commons Commissioners. This has been done; from the non-payment of the rent for so many years, I conclude that it has since been barred by lapse of time or otherwise ceased to be payable within paragraph (b) of subsection 1 of the said section 153, and I am therefore satisfied that they are now the owners of the Yellow Land. I shall accordingly direct Derbyshire County Council as registration authority to register Mrs Daisy Ashton of 1 Moorcock Cottages, Lunds, Sedbergh, Cumbria and Mr Arthur Ashton of 6 Hill Crest, Horton-in-Ribblesdale as the owners of the land edged yellow on the plan produced at the hearing and then marked JEB1, and I shall in my direction annex an extract from such plan with the line of division marked on it PQRST.

In respect of the remainder of the Unit Land, no one at the hearing offered any evidence as to ownership. In the absence of evidence I am not satisfied that any person is the owner of such part of the Unit Land and it will therefore be subject to protection under section 9 of the Act of 1965.

I shall order that the costs of Mrs Daisy Ashton be taxed in accordance with the provisions of the Second Schedule of the Legal Aid Act 1974.

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.

SCHEDULE

(Documents produced by or put to witnesses)

by Mrs D Ashton

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|-----|------------------|--|
| DA1 | 4 September 1973 | Probate of will of Mr Edward Ashton granted to Mrs Daisy Ashton and Mr Arthur Ashton |
| DA2 | 1935 | Abstract of title of Miss S S Macfie. As to part of the property commencing with a conveyance dated 26 May 1927 by Mr G M Beck with the concurrence of his trustees to Mr R A S Macfie |
| DA3 | 26 November 1935 | Conveyance by Miss M S S Macfie as personal representative of Mr R A S Macfie to Mr Edward Ashton |





DA4 20 June 1975

High Court Writ (Chancery Division, Leeds District Registry): Daisy Ashton and Arthur Ashton v John Ernest Birbeck: 1975-D-57; claiming declaration that defendant not entitled to enter or cross or have or exercise any grazing rights over...Shaw Paddock Pasture...; injunctions; etc

by Mr E T D Johnson

RTDJ1 -

Plan of Shaw Paddock Pasture

RTDJ2 7 May 1959

Letter from Willan & Johnson to Edward Ashton Esq

by Mr J C Holden

- 1820

Copy (8 sheets, 2 1/4 inches x 30 inches) of Plan of the Township of Hawes from a survey made by T Bradley; Corrected 'to present time' J E Oates and certified by Tithe Commissioners as that referred to in Hawes Apportionment Award;

1840

20 June 1896

Endorsement "Map detached from Tithe Apportionment pursuant to an order of Board of Agriculture and annexed to the Award"

put to Mr J E Birbeck

JEB1 -

Extract from Register map showing Shaw Paddock Pasture (Yellow Land) edged yellow

- -

Copy Register map supplied to Commons Commissioners by County Council, on which witness marked position of the 6 gates through which he put animals on to the Unit Land

XX/1 28 February 1975

Letter from Fell Kershaw & Co Solicitors for J E Birbeck to J P Mewies & Co in reply to letter of 21 February below

XX/2 21 February 1975

Copy letter from J P Mewies & Co on behalf of Mrs D Ashton to J E Birbeck

JEB2 14 September 1965

Copy application (CR form 9) signed John E Birbeck for rights of common with land showing extent of (1) Shaw Paddock Farm, (2) High Paddock Farm and (3) White Birks Farm

by J P Mewies & Co

- 3 February 1977

Law Society-Legal Aid Acts 1949-1969 - Offer and acceptance of a Civil Aid certificate form 1(2), attached Solicitor's copy of a memorandum as to action required





- 9 February 1977

Civil Aid certificate under the above Act form 1(1), corresponding with the said offer; Reference No 9177/214J granted to Mrs Daisy Ashton to make application to the Commons Commissioners as to the ownership of White Birks Common, Hawes, solicitor being J P M Moody Esq; by West Yorkshire Local Committee Legal Aid Area No 9

- 16 February 1977

Deed of enlargement made by Daisy Ashton and Arthur Ashton supplemental to an assignment dated 26 November 1935 between M S S Macfie and E Ashton in exercise of the power conferred by Law of Property Act 1925 enlarging the term of 2000 years in the assignment mentioned into a fee simple

Dated this 4th day of April — 1977

a. a. Baden Fuller

Commons Commissioner





COMMONS REGISTRATION ACT 1965

Reference No 268/U/96

In the Matter of Spilling Moss and Tongue
Moss Peat Grounds, Hawes, Richmondshire
District, North Yorkshire

DECISION

This reference relates to the question of the ownership of land known as Spilling Moss and Tongue Moss Peat Grounds, Hawes, Richmondshire District being the land comprised in the Land Section of Register Unit No CL. 72 in the Register of Common Land maintained by the North Yorkshire County Council of which no person is registered under section 4 of the Commons Registration Act 1965 as the owner.

Following upon the public notice of this reference no person claimed to be the freehold owner of the land in question and no person claimed to have information as to its ownership.

I held a hearing for the purpose of inquiring into the question of the ownership of the land at Richmond on 8 February 1977.

There was no appearance at the hearing.

The land (according to the Register map) is about 3 miles south of Hawes, a little to the west of the road to Langstrothdale and Wharfedale, and is about 1 mile long from east to west and of varying width (in many places more than $\frac{1}{2}$ a mile) from north to south; near its west boundary it is crossed by West Cam Road. It was registered in consequence of applications by Mr W Metcalf and Mr B B Allen for the registration of rights of turbary. Mr Metcalf in a letter dated 27 January 1977 said the registrations were made to preserve the rights of people living at Hawes and Sayle, the rights being written down in the Bainbridge Inclosure Award 1805. Mr Allen in a letter dated 2 February 1977 mentions the Inclosure Award of 1805.

In the absence of any evidence I am not satisfied that any person is the owner of the land, and it will therefore 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 15th — day of February — 1977

A. A. Baden Fuller

Commons Commissioner