



Reference Nos 262/D/277  
262/D/278  
262/D/279

In the Matter of Pasture End,  
Murton, Eden District,  
Cumbria

DECISION

These disputes relate to the registrations at Entry Nos 6, 7, 8, 9, 12, 14, 15, 16 and 20 in the Rights Section of Register Unit No. CL 29 in the Register of Common Land maintained by the Cumbria (formerly Westmoreland) County Council and are occasioned by Objections No. 2/162 and No. 2/163 made by Murton Commoners Association and noted in the Register on 29 June 1972 and by Objection No. 2/216 made by Mr John Henry Beadle and noted in the Register on 4 August 1972.

I held a hearing for the purpose of inquiring into the dispute at Penrith on 2 and 4 July 1980. At the hearing (1) Murton Commoners Association were represented by Miss B M Balmer; (2) Mr John Henry Beadle attended in person; (3) Miss Eileen Mary Chadwick as successor of Mrs Evelyn Maud Binks on whose application the registration at Entry No. 7 was made, was represented by Mr M C Dutchman-Smith, Solicitor of Little & Shepherd, Solicitors of Penrith; (4) Mr Alexander Brian Hogg on whose application the registration at Entry No. 9 was made, attended in person; (5) Mr Walter Idle and Mr Robert Idle on whose application the registration at Entry No. 12 was made, were represented on the first day by Mr J B Owen, Solicitor of E & E A Heelis, Solicitors of Appleby, and represented on the second day by Mr P J Birtles, Solicitor of Hewitson & Harker, Solicitors of Kirkby Stephen; (6) Mr Stanley Harker, Mr Raymond Harker and Mr Nathan Harker on whose application the registration at Entry No. 14 was made were also represented (on both days) by Mr P J Birtles; and (7) Mr Joseph Elliott, Mr Robert Elliott and Mr Thomas Elliott as successors in title of Captain William Parlour on whose application the registration at Entry No. 20 was made, were represented by Mr T A Hodges, solicitor with Fell Kilvington & Co of Kirkby Stephen.

The land ("the Unit Land") in this Register Unit is a tract of grassland containing (according to the OS 1915 map, being the same as plot No. 134) about 44.465 acres. To the south and adjoining it is another tract ("the Ghyll") which is crossed by Murton Beck, which contains (according to the same map being part of plot No. 144) about 11.893 acres and which is the land in Register Unit No. CL 30. Access to the Unit Land from the crossroads in the middle of the Village of Murton is by going westwards along a side road for about 400 yards to a gate leading into the Ghyll and thence along a track by the north side of the Ghyll (CL 30) for about the same distance, and thence northwards for a short distance to the Unit Land. On the opposite (east) side of the said road through the Village is a strip of land which extends for about  $\frac{1}{4}$  of a mile from the road, which is known as the Green and which is the land in Register Unit VG 7. Beyond the Green rises up Murton Fell, being a very large area which was said to contain about 3,500 acres and which is the land in Register Unit No. CL 26.

In the Rights Section are 18 registrations of rights of grazing in all cases sheep and in some cases other animals over the Unit Land and in all cases (except one) over the Ghyll (the CL 30 land) and in many cases over the Green (the VG 7 land) and Murton Fell (the CL 26 land). Two of the registrations include turbarry. Of these 18 registrations, 9 being undisputed, have become final.



Of the remaining 9 (disputed) registrations, the grounds of Objection No. 2/162 (to all 9 disputed registrations except No. 20) are that the rights should be for fewer animals (a smaller number of ewes and nil horses); the grounds of Objection No. 2/163 to the registration at Entry No. 20 is (in effect, although not so expressed) that the applicant being the owner has no right to graze a specific number of animals only the balance after the commoners have had sufficiency. The ground of Objection No. 2/216 to the registration at Entry No. 14 (Messrs Harker) are (in effect) that the animals should be fewer (even less than suggested in Objection No. 2/162).

In the Ownership Section Captain William Parlour is registered as the owner of all the Unit Land, and such registration being undisputed has become final.

Before any evidence was given, the matters in dispute were simplified by the following statements. Mr Beadle said that he is now Chairman of the Murton Commoners Association, and that they held a meeting on 30 June (two days before the first hearing day). Miss Balmer who was at the meeting said it had agreed that she should act as Secretary for this hearing (she had signed Objection Nos 2/162 and 2/163 as Secretary). As to Entry No. 5 made on the application of Mr George Arthur Wilkinson Slack to "graze 50 sheep and 1 horse", Mr Beadle said that Mr Slack had sold the land to which the right was attached to Mr John Chappleton of High Garth and that he (Mr Beadle) had spoken to Mr Chappleton before the meeting and he said he would accept whatever the Association wanted; in the grounds of Objection No. 2/162, 20 ewes and nil horses was put forward, so I can modify the registration to 20 sheep and no horses. As to Entry No. 7, made on the application of Miss Binks to "graze (a) 10 sheep and (b) 1 horse", Mr Beadle said that the Association would accept no sheep and 1 horse; Mr Dutchman-Smith on behalf of Miss Chadwick agreed, so I can modify this registration accordingly. As to Entry No. 8 made on the application of Mr George Arthur Slack to "graze (a) 20 sheep and (b) 10 horses", Mr Beadle said that prior to the meeting Mr Slack told him that he would accept 6 sheep and no horse; so in the absence of any evidence or argument in support of the registration as it now stands, I can modify this registration to 6 sheep and no horses. As to Entry No. 14 made on the application of Messrs S, R and N Harker to "graze (a) 2,000 ewes/hoggs with their followers, (b) 60 head of cattle with their followers and (c) 15 horses with their followers together with the right of turbary, Mr Beadle said that the meeting suggested 1,400 sheep but no followers, no cattle and no horses; Mr Birtles on behalf of Messrs Harker agreed, so I can modify this registration by limiting it to 1,400 sheep and turbary. As to Entry No. 15, also made on the application of Messrs S, R and N Harker to "graze (a) 60 ewes/hoggs with their followers or (b) 15 horses with their followers together with the right of turbary", Mr Beadle said that the meeting suggested 24 sheep but no horses or followers; Mr Birtles on behalf of Messrs Harker agreed, so I can modify the registration to 24 sheep and turbary only.

During the first day of the hearing it was assumed that the registration at Entry No. 16 made on the application of Miss Effie Margaret Harker had become final; this was a mistake, because this Entry No. is included in Objection No. 2/162; as to this see later in this decision. However, on this mistaken assumption, on the second day of the hearing I concerned myself only with the registrations at Entry No. 9 (Mr Hogg) No. 12 (Messrs Idle), and No. 14 (Messrs Elliott as successors of Captain Parlour).



Mr W Idle who was one of the applicants for the registration at Entry No. 12 being of a right attached to Cragg House Farm to graze 200 sheep and 2 horses, said (in effect):- He is now 47 years of age and has worked and lived at the farm since he was 17 years of age and understood from his father that they could "trace us back to 1600". He described the use made of the Unit Land by animals from the Farm. I need not consider his evidence in detail, because after Mr Hogg had concluded his evidence as below stated, Mr Birtles said and Miss Balmer confirmed that Messrs W and F R Idle and Murton Commoners Association were in agreement with the registration at Entry No. 12 being modified by substituting "170" for "200".

Mr Hodges in the course of his evidence produced a statement which he had prepared of the history of the Unit Land, the Ghyll, the Green and Murton Fell and also a copy of an award dated 21 December 1754 which he had borrowed from the owners (or their solicitors) of the Ghyll and which was included among their title deeds. He said:- The principal common grazing land for Murton is Murton Fell which is unenclosed throughout the year; in the severe weather conditions that can affect the eastern Fellside, however it is often necessary for sheep to be brought off the Fell and taken down to safer pasturing grounds. By tradition the Unit Land and the Ghyll had been used by the people of Murton as safe pasturing land through the winter; through the summer these lands are enclosed but in the winter the gates are removed and are left open from 10 October to 26 April annually. This tradition is supported by the 1754 award which contains an order: "every Owner or Occupier of land within the said Township of Murton may at all times hereafter Yearly and every Year on or after 10th day of October turn his or her Commonable Cattle levant and couchant into and upon the said several parcels of ground called or known by the respective names of Pasture End and the Gill or either of them thereto to depasture till the 26th day of April following inclusive".

Mr Hodges on behalf of Messrs Elliott was concerned with the registration at Entry No. 20 (Captain William Parlour) of a right attached to Harbour Flatt Farm to graze (a) 200 sheep, (b) 40 head of cattle and (c) 2 horses. In the course of his evidence he produced a conveyance dated 1 February 1980 by which the personal representatives of Captain Parlour (he died 18 September 1977) conveyed to Messrs Elliott, Flatt House Farm containing 954.98 acres including in the land thereby conveyed the Unit Land described as "Rough Pasture" by reference to OS map 1915; he also produced a conveyance dated 7 December 1961 by Mr George Gerrard Shiel who as the successor of the Rt Hon J S R Baron Hothfield (he died 21 December 1952) conveyed to Mr William Parlour, Harbour Flatt Farm by a description closely corresponding to that of the 1980 conveyance.

Mr Hodges contention was to the following effect:- Normally a freehold owner can rely simply upon the unlimited grazing rights implied by his ownership. As to the Unit Land however the registered rights are so ludicrously high that the freehold owners are left with no sufficiency to take up; they have the same rights on Murton Fell and therefore the same need to use the Unit Land between 10 October and 31 December. So although it may be that the owners of the land cannot have a legal right of common over their own land, he contended that some sort of specific grazing rights ought to be allocated to Messrs Elliott Brothers to appear on the Rights Register as otherwise they might be unfairly prejudiced.

The situation described by Mr Hodges is not without precedent in that it often happens the grazing on a common the owner of which also owns farm lands nearby, is customarily regulated on the basis that the owner may from his farm graze on the common on the same basis as those who have rights of common attached to lands not owned by him; that is, he has a quasi right of common over his own land. If



there be a rule that there may not be registered under the 1965 Act a right of common attached to land which is in the same ownership as the common, then the situation outlined above could I suppose be circumvented by a proviso that each of the registered rights attached to land not in the same ownership as the common should be diminished for the benefit of the owner. Such a provision would be very cumbersome on any register. There have been many registrations under the 1965 Act essentially similar to that at Entry No. 20, now under consideration the purpose and object of which although possibly open to legal objection is clear enough for practical purposes. That such a quasi right of common is for some purposes recognised by law is shown by *Misgrave v Inclosure Commissioners* (1874) 9 QB 162; in that case such a right was held to be within the words "right of pasturage which may have been usually enjoyed by such lord or his tenants" used in Section 27 of the Inclosure Act 1845. The 1965 Act although it defines "rights of common" as including certain rights and not including other rights contains nothing to prevent me giving the definition a meaning which includes quasi rights. Accordingly I conclude that there is no legal reason why such rights as Captain Parlour registered should not if proved or agreed be treated as properly registered.

It was not disputed by Mr Beadle and Miss Balmer that the Commoners Association at their meeting in June 1980 agreed that the quasi right of common mentioned by Mr Hodges did exist. However as I interpret my copy of the register (is not altogether clear on this point because it is by reference to a map referred to in the Rights Section of Register Unit No. CL 26) includes the Unit Land itself. This inclusion cannot be right. So subject to excluding the Unit Land from column 5 of the registration, and to making an alteration in column 4 as below mentioned, my decision is that the Objection fails. <sup>it</sup>

Mr Hodges mentioned that it was unfortunate that none of the registrations in the Rights Section of this Register Unit mentioned that the rights were limited to from 10 October to 26 April; and indeed when I made my inspection the gates of the Unit Land and of the Ghyll were closed, and the Unit Land was being grazed by Messrs Elliot as part of their farm. It is not I think necessary that the registration of a right of common should in order to be valid, include a description of the right in such detail as to enable every possible dispute as to its exercise to be determined merely by looking at the register; nevertheless as this question is not now before me, I ought not to think express an opinion about it, although I draw attention to the introductory words which are set out at the beginning of the Rights Section which are apparently intended to apply to all the registrations therein contained and which may make the point raised by Mr Hodges of no practical consequence.

Mr Hogg was concerned with the registration at Entry No. 9 of a right attached to OS plot Nos 178, 310 and 312 to graze (a) 25 sheep and (b) 5 horses. In support of this registration, in the course of his evidence, he said (in effect):- He bought these lands in 1964. Having been in the parish since 1950 as a farm-worker and working on his own in the farming business, he understood that if you had lands in the Township you could graze Murton Fell as you wished. He had fell ponies (not 16 hands) not horses. He had been told at a meeting of the Murton Commoners Association (the first meeting held about 10 years ago) that you had to register at least 4 horses and he had intended to register "sheep or ponies". He did not agree with the idea that (for registration purposes)



5 sheep should be considered as equal to one cow and 10 sheep as equal to one horse. Generally he did not agree that he was bound in any way by the views expressed by the Murton Commoners Association; at those meetings he attended he had expressed disagreement. He agreed that the areas of his land Nos 310, 312 and 178 were 0.378 acres, 0.380 acres and 0.365 acres.

The grounds of Objection No. 2/162 are:- "... recommend ... 5 ewes, horses nil". Miss Balmer in support of the Objection said (in effect):- She had been appointed Secretary of the Association on 26 June 1970. As regards the registration generally the view of the Association was: rough land should carry 1 sheep per acre, poor land carry 2 to 3 sheep per acre, and good land carry 4 sheep per acre. Mr Hogg's land was all either rough or poor for which 5 sheep was the appropriate total. That number of sheep even as an alternative, would not qualify for any horses.

The activities of the Association are in my view some evidence that the customary or immemorial rights accord with the animals and numbers fixed by the Association. Mr Hogg can only justify greater rights by showing by actual use for a sufficiently long time by himself and his predecessors in title some special right attached to his lands: or that the Association has as between him and other commoners treated him unfairly or irregularly (so that the numbers they put forward should not be treated as decisive). Mr Hogg showed me OS Nos 310 and 312 <sup>I walked</sup> ~~and~~ over them. He indicated the locality of OS No. 178 (some distance away). He also showed where he kept a pony that he said he had grazed on Murton Fell including (as I understood ~~it~~) on occasions the Unit Land. As to his having some right independent of a customary or immemorial right, based on use only, a 20 year period of use is by law a requisite and by analogy with section 16 of the 1965 Act I consider that this period should be measured back to the date of the Objection (22 June 1972). Mr Hogg's evidence of use was far too short to establish any such right. As to the number fixed by the Association, having inspected OS Nos 310 and 312 and heard what Mr Hogg said about OS No. 178, in my opinion the Association's classification of these lands as either poor land or rough land is reasonable. Accordingly my decision is that the Objection as regards this registration succeeds.

As regards the registration at Entry No. 20 (Captain Parlour), I found when I prepared my first draft of this decision that I was uncertain how column 4 should read if I accepted (as I have Mr Hodges' contention). On 22 October 1980 I held a hearing at Penrith for the purpose of inquiring into disputes relating to the registrations in the Rights Section of Register Unit No. CL 30 (the Ghyll); these CL 30 registrations are expressed in words essentially the same as the CL 29 registrations which I am now considering. In the course of the October 1980 hearing, Mr Robert Elliott in person and on behalf of Mr Joseph Elliott and Mr Thomas Elliott, and Miss Balmer on behalf of the Murton Commoners Association said that they were agreed that on the basis of Mr Hodges' contention the number as regards the CL 29 Entry No. 30 should be nil sheep, 40 head of cattle from 10 October to 31 December and nil horses. I consider I should accept these figures and dates.

As regards Entry No. 16 (applicant Mrs Effie Margaret Harker), I have a letter <sup>written</sup> dated 21 August 1980 (after the July 1980 hearing) from Miss Balmer ~~with~~ on behalf of the Commoners Association saying that they wished to sustain the Objection



"5 ewes, horses nil, hoggs nil" as such Objection is based on the acreage of her in by land ie 1,040 acres, plot 302 OS 1915. Notice of the July hearing was sent out by letter dated 22 May 1980 to Messrs Hewitson & Harker, the solicitors named on Mrs Harker's application (CR Form 9) for registration. In a letter dated 10 October 1980 they were asked if they wished on behalf of Mrs Harker to make any comments or representations about her registration. At the said October 1980 hearing in relation to the CL 30 land (the Ghyll) about an identical registration (No. 17), Miss Balmer said that 5 ewes is appropriate for inby land of 1.04 acres and that it appeared from the minutes of the meeting of the Murton Commoners Association held on 19 May 1972 that Mr Nathan Harker (husband of Mrs E M Harker) was present, and it was agreed that 5 ewes was the appropriate number. In these circumstances, not having received any reply to a letter of 10 October 1980, my decision is as regards the CL 29 registration at Entry No. 16, the Objection succeeds.

Upon the considerations above summarised, I confirm all the disputed registrations with the following modifications:—~~At~~ Entry No. 6 (applicant Mr Slack) that in column 4 for "50 sheep and one horse" there be substituted "20 sheep"; at Entry No. 7 (applicant Mrs Binks) that in column 4 for "(a) 10 sheep and (b) 1 horse", there be substituted "1 horse"; at Entry No. 8 (applicant Mr Slack) that in column 4 for "(a) 20 sheep and (b) 10 horses" there be substituted "6 sheep"; at Entry No. 9 (applicant Mr Hogg) in column 4 for "(a) 25 sheep and 5 horses" there be substituted "5 sheep"; at Entry No. 12 (applicants Messrs Idle) in column 4 for "200 sheep" there be substituted "170 sheep"; at Entry No. 14 (applicant Messrs S, R and N Harker) in column 4 for "(a) 2,000 ewes/hoggs with their followers (b) 60 head of cattle with their followers or (c) 15 horses with their followers" there be substituted "1,400 sheep"; at Entry No. 15 (applicants Messrs S, R and N Harker) in column 4 for "(a) 60 ewes/hoggs with their followers and (b) 15 horses with their followers" there be substituted "24 sheep"; at Entry No. 16 (applicant Mrs E M Harker) in column 4 for "(a) 10 ewes and their followers, (b) 5 hoggs and their followers and (c) 10 horses with their followers there be substituted "5 sheep"; at Entry No. 20 (applicant Mr Parlour) in column 4 for all the words in this column there be substituted "To graze from 29 October to 31 December 40 head of cattle", and in column 5 there be added at the end: "but excluding from the land hereinbefore described as Harbour Flatt Farm all the land in this Register Unit so far if at all as it is included in the land coloured blue on the said supplemental map".

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 8<sup>th</sup> — day of January — 1981

a. a. Baden Fuller

Commons Commissioner