



COMMONS REGISTRATION ACT 1965

Reference Nos. 262/D/508-509
262/U/461

In the Matter of Yottenfews Green or Pinfold,
St Bridget, Beckermat

DECISION

This dispute relates to the registration at Entry No. 1 in the Land and Rights Sections of Register Unit No. CL 431 in the Register of Common Land maintained by the former Cumberland County Council and is occasioned by Objection No. 192 made by Mr John Bateman and noted in the Register on 4 August 1972.

I held a hearing for the purpose of inquiring into the dispute at Whitehaven on 3 March 1982. The hearing was attended by Mrs Susan Johnson the applicant appearing in person, Mr F G Lambic of Messrs Brockbank, Tyson and Company, Solicitors of Whitehaven appearing for Mr J Bateman, the Objector Mr T Creer for the registration Authority and Mr Spedding of Counsel instructed by Messrs Dickinson Dees Solicitors of Newcastle-upon-Tyne, Solicitors for the Earl of Lonsdale.

The reference 262/D/508-509 first came on for hearing before Mr L J Morris Smith on 23 July 1981. At the hearing Mr Lambic had indicated that he wished to establish his client's ownership. Mr Spedding appeared at that hearing for a client who was not a party to the dispute but who wished to claim ownership. As the question of ownership was not then in issue the hearing was adjourned to come on at a later date when the question of ownership had been formally raised. The question of ownership is now before me under Reference 262/U/461.

Before the case was opened the following statements were made in relation to records. Neither the Court Records for the period 1761-1921 nor the Manorial Books for the period 1682-1747 show any dealing with the Register Unit by the Lord of the Manor. In the Field Book which goes with a map dated 1793 Yottenfews is described as 'Town Green and Roads'.

Mrs Johnson referred to letters she had received from the County Archivist in August and December 1970 and March 1977 stating that the 1793 survey of the Manor of Calder listed holdings under the names of individual tenants and showing a number and name for each field but without numbers or acreage Town Green 2a 3r 15p, Roads 2a 2r 03p. The place name is shown as Yetton Pass.

The Objector's Solicitors had been asked for proof of any disposal with the unit since 1921 but had been unable to produce any evidence of a disposal. In her submission the unit was manorial waste or common land.

The Ordnance Survey Area Book and Map of 1863 shows the unit and gives its area as 2.987 acres with two roads or 2.558 acres without the two roads. 2a 3r 15p is the equivalent of 2.34 acres.

Mrs Johnson produced a 6" O.S. map sheet of the area which had belonged to her late father the Rev. H H Symonds, an authority on the Lake District, in the



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early 1950s. Her father had shaded the register unit in pencil and added a note at the edge of the map 'Pinfold an area of grass which within living memory was gated at N and S'.

The land had remained unfenced. In the case of rich agricultural land there could be no reason for the absence of fencing except some such status as common land.

The existence of gates at the North-East and North-West ends of the green were shown on the O.S. Map of 1865. Gate-irons at the southern end of the green for a gate to cut off the green were remembered by a Mr J A Hewetson. In support of this the witness produced a hand-written letter from Mr Hewetson dated 13 June 1977 and marked D. This letter, said Mrs Johnson, was written in reply to a letter from her asking him what he knew about the green.

Mrs Johnson also produced a document marked 'C'. It was in her handwriting and dated 4 April 1977. It was signed by Mrs Emily Jane Marlow, who gave her age as 91½, in Mrs Johnson's presence. Mrs Marlow had lived in Calder Bridge since 1920 and remembered the green at Yottenfews being known as the Pinfold. The letter had been written in Mrs Marlow's house. The contents of the letter came from Mrs Marlow.

Mrs Johnson stated that Mr Bateman's application in the Rights Section and his objection in the Land Section were inconsistent and made the point that the right to store textilers and machinery was not a common right.

In 1979 she had been shown by a Mr Ed. Hewetson (since deceased) a tenancy agreement made in 1934 of High House Farm near the S.E. corner of the green which included 'Rights of Common on Yottenfews green, the middle position being one acre, one rood Op'. The tenant was Thomas Mossop Hewetson. Mr Ed. Hewetson had suggested to the owner in 1968 that these rights be registered but nothing had been done.

In 1976-8 the County Department of Transportation built four small link roads across the green. Mrs Johnson had been advised that there was nothing she could do to prevent this and was prepared to exclude these roads from her application in the Land Section.

Mr John Russell Atkinson of Mid Tarn Farm giving evidence on behalf of the Objector said that his farm was about a mile from the Register Unit. He did not remember any gate at either end of the area. He had seen Mr Bateman's cattle grazing on the unit. Mr Bateman was the only person he had seen using the unit. He stored fertiliser and machines on it. The witness did not recall ever seeing any irons for gates on the Unit.

Mr John Bateman, the Objector, said he was 61 and farmed Yottenfews Farm, Calderbridge. This farm had been farmed by members of the Bateman family since 1702. He produced a copy of the O.S. Map of 1863. The register unit is shown numbered 647 and is described in the area book as 'Pasture, Stream and Pond 2.558 acres'. Archey Moor and Sellfield Banks in the same book are described as



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Commons. The witness produced a map, belonging to his family and made in about 1800, of the Village of Yottenfews. This map shows a stream not shown on the Manorial Map. This stream now crosses the road at two places. A neighbour used to water 12-15 cattle on the register unit until 1930. Mr Bateman and his predecessors at the farm used to clean out the ditches and gutters. Owing to the increase in traffic, grazing of cattle on the Unit ceased in about 1943 and it was used instead for storing equipment, feed and fertilisers.

Two plots on the register unit had been sold by Mr Bateman or his forebears. Whenever the Highway Authority repaired the roads he or his father were always asked to give permission for chippings to be piled on the unit.

In cross-examination by Mr Spedding, the witness, said that from 1943 onwards the odd beast was left out to graze on the register unit from time to time. There was a gutter along the whole length of the road which the witness or his father cleared out from time to time. This work took more than one day to complete.

Mr Spedding for the Earl of Lonsdale referred to a Vesting Deed in 1951 as establishing his client's paper title to the register unit. He supported Mrs Johnson's submission that the land had been waste land of the Manor and relied on the 1798 Survey and the description of the unit as town green.

He submitted that there was no evidence to show that any person had acquired a possessory title, against his client as Lord of the Manor.

He accepted that grazing and watering of stock were rights of common but submitted that the other rights referred to in column 4 of the Rights Section were not profits. There was no evidence of fencing. The burden of proving adverse possession was on Mr Bateman and he had not discharged that burden.

He referred to Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B.P. Ltd (1975) 1 QB 94 and Leight v Jack (1879) 5 Exch. D. 264 for the proposition that absence of user and enjoyment by the owner is not a discontinuance of possession when land is not capable of use and enjoyment. He also referred to the decision of the Court of Appeal in Red House Farms (Thorndon) Ltd v Catchpole given on 12 November 1976 and reported in the Estates Gazette Law Reports and to paragraph 8(4) of the First Schedule to the Limitation Act, 1980.

Before I can confirm the registration in the Land Section I must be satisfied either that the unit is subject to rights of common or that it is waste land of the manor.

There is in my view no sufficient evidence of grazing or watering cattle to establish a right of common in Mr Bateman. Mr Atkinson said he had seen Mr Bateman's cattle grazing on the unit but neither Mr Atkinson nor Mr Bateman gave any positive evidence either as to the number of cattle grazing or the length of time before 1943 when grazing ceased, that such rights had been

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exercised to satisfy me that I ought to confirm the registration in the Rights Section.

Mr Bateman admitted that until 1930 a neighbour used to water his cattle on the register unit but apart from this there is no evidence of any use being made of the area by any person other than Mr Bateman. There may have been gates in the ninetieth century as suggested by Mrs Johnson but I am not satisfied that there were any gates in existence in 1930.

Mr Bateman said that since 1943 he had used the area for storing equipment, feed and fertilisers and this part of his evidence was not challenged. Nor was it suggested by Mr Spedding that the area was included in any tenancy to Mr Bateman.

In a number of cases reported in the period 1960-1980 it had been held in a number of cases that a person could be in possession of land by implied licence as opposed to being in adverse possession if his occupation was not inconsistent with the owner's present or future enjoyment of the land. Since 1981 paragraph 8(4) of the First Schedule of the Limitation Act 1980 prohibits the assumption of an implied licence in such circumstances except in a case where such implication is based on findings of fact.

In my view Mr Bateman was in adverse possession of the register unit from 1943 onwards because he treated the area as his own to the exclusion of all other persons and by 1956 had acquired a possessory title thereto. Between 1943 and the hearing he had sold two plots part of the register unit to third parties on the basis that he was absolute owner.

It therefore follows that the Earl of Lonsdale's claim to ownership fails and the land is not common land as defined by S. 22 of the Act of 1965. See *Re Box Hill Common, Box Parish Council v Lacy* (1980) Ch. 109.

For these reasons I refuse to confirm either 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

26th

day of

November

1982

George Herbert