



## In the Matter of Swinemoor, Beverley, Humberside (No. 4)

## DECISION

This dispute relates to the registration at Entry No. 1 in the Ownership section of Register Unit No. CL 29 in the Register of Common Land maintained by the Humberside County Council and is occasioned by the conflicting registration at Entry No. 2 in the same section of the Register Unit.

I held a hearing for the purpose of inquiring into the dispute at Hull on 23 and 24 March 1977 and at Watergate House, WC2, on 17 May 1977. The hearing was attended by Mr Charles Cross, of counsel, on behalf of the Beverley Borough Council, the successor authority of the former Mayor, Aldermen and Burgesses of the Borough of Beverley, the applicants for the registration, and by Mr Patrick Ground, of counsel, on behalf of The Pasture Masters, The Freemen and Widows of Freemen of the Borough of Beverley, the applicants for the conflicting registration.

The land comprised in this Register Unit is a tract of about 263 acres which has been the subject of rights of pasture for many centuries. The question of the ownership of the soil has been a matter of dispute for a very long period, and when in 1836 the land with other common pastures was made subject to the provisions of An Act to provide for the better Regulation of certain Common Pastures within the Borough of Beverley in the East Riding of the County of York (6 Will. IV, c. 100) (hereafter referred to as "the Act of 1836") it was provided by section 83 that nothing in the Act contained should extend to settle, determine, effect, or prejudice the right, title, or interest of any of the parties named in the Act of, in, and to the beneficial ownership of the soil of the common pastures. Among the parties named in the Act were the respective applicants for these conflicting registrations. It is now my duty to resolve the matter which was left unresolved in 1836 and further to consider whether it has been affected by subsequent events.

In the twelfth century (and possibly earlier) Beverley formed part of the temporalities of the archbishopric of York. In the time of Archbishop Thurstan (1119 - 1140) it contained tenements held on burgage tenure, for in an undated charter confirming to the "Men of Beverley" the liberties which they of York had in their city the Archbishop described them as "my Burgesses of Beverley". In 1284 Archbishop William granted a charter to 107 named men and "all and singular the men of the whole Commonalty of Beverley", in which he referred to a composition made between Archbishop Sewald (1256-1258) and the Commonalty. This charter shows that by 1284 the Commonalty was regarded as capable of holding land, for it included the grant of a messuage in the market of Beverley. By a charter dated 2 April 1380, recited in an inspeximus dated two days later, Archbishop Neville confirmed to twelve named men "our Burgesses of Beverley and to all and singular the Burgesses and their successors and to the commonalty of the same town "all the soil and wood called Westwood in Beverley. This document bore the seal of the Archbishop, the seals of the twelve named burgesses, and the seal of the commonalty. Westwood is the subject of one of the disputes which I heard at the same time as this dispute, and this charter contains the earliest evidence of local ownership of any of the land the ownership of which is the subject of the disputes. Save that no charters are known to survive in respect of any of the land other than Westwood, the evidence relating to the



other land is in all material respects identical with that relating to Westwood.

In a royal charter dated 24 July 1573 it was recited that the "Burgesses and Inhabitants of our Town of Beverley" had from time immemorial held and enjoyed certain rights and liberties and had petitioned to be created another body politic and corporate. The charter then constituted the Burgesses and Inhabitants to be a body corporate by the name of the Mayor, Governors and Burgesses of the Town of Beverley and named a charter Mayor and twelve charter Governors to be called the Common Council. The new corporation was to hold and enjoy all the lands, tenements, and hereditaments which the Men and Burgesses of the Town of Beverley then had.

King Charles II by letters patent granted and confirmed to the Mayor, Governors, and Burgesses, power to make bye-laws for the good, common profit, and good government of the town. About 1664 in the exercise of this power, the Mayor, Governors, and Burgesses made bye-laws for the regulation of the times of opening and shutting and the mode of stocking the several common pastures "belonging to the said Town", which were named as Westwood, Hurn, Figholm, and Swinemoor, thus covering all the land in the disputes now before me.

In 1685 the Mayor, Governors and Burgesses by writing under their common seal surrendered all their powers, franchises, liberties, privileges and authorities, and by a royal charter dated 11 March 1685 the burgesses and inhabitants of Beverley were reincorporated by the name of the Mayor, Aldermen and Burgesses of the Town of Beverley, with a Common Council consisting of the Mayor, twelve Aldermen, and thirteen Capital Burgesses. The corporation was to hold and enjoy all the lands, tenements, and hereditaments which the previous corporation had, and was given similar powers, though with much greater verbiage, to make bye-laws. The 1664 bye-laws were continued, and the Council annually appointed Pasture Masters from their own body for the management of the pastures. It appears from the Corporation's Order Book C, S.31 that Pasture Masters were being appointed as early as 1637.

#### Municipal Corporations

The Act of 1835 provided for the regulation of municipal corporations, including that of Beverley, which was included in Section 2 of Schedule (A.) to the Act. S.1 of the Act repealed and annulled so much of all laws, statutes, and usages, and so much of all royal and other charters, grants, and letters patent then in force relating to the borough as were inconsistent with or contrary to the provisions of the Act. Subject to any such repeal or annulment, the corporation remained in existence, as is shown by s.6 of the Act, which changed the names of those corporations which were not previously styled Mayor, Aldermen, and Burgesses. S.2 of the Act preserved the rights of the freemen of the borough to have and enjoy the same share and benefit of the common lands of the borough as they previously had.

S.25 of the Act of 1835 set up a new body, called the Council, consisting of the Mayor, six Aldermen, and eighteen Councillors. Subsequent sections of the Act conferred upon the Council powers which gave it the effective government of the affairs of the borough.

After the passing of the Act of 1835 doubts were entertained as to the power of the new Borough Council to appoint Pasture Masters and to make and enforce bye-laws for the regulation of the common pastures. The Act received the Royal Assent on 9 September 1835. The Council proceeded to seek the opinion of the Attorney-General, Sir John Campbell, who advised on 15 February 1836 that the Council did not have the power formerly vested in the Corporation to make bye-laws for the regulation of the pastures. In his opinion the Attorney-General said: "The pastures now belong to persons who are not corporators and the Council is a



body established for municipal purposes, having its powers defined by the statute which creates it".

On 22 February 1836 a meeting of the freemen of the Borough was held in the Guildhall, at which Sir John Campbell's opinion was considered, and it was resolved that in consequence of the Act of 1835 having abrogated the powers and authorities which had been vested in the Corporation relative to the pastures "belonging to the Freemen of the Town" without giving similar powers to the new Council, the meeting deemed it absolutely necessary that application be made to Parliament for obtaining a Bill for the purpose of granting to a body of Pasture Masters, to be annually appointed by the freemen, powers for the protection and regulation of the rights of the freemen with respect to the Pastures. The Corporation was agreeable to this course.

The Corporation did not, however, agree with the description of the pastures as "belonging to the Freemen of the Town", and sought the opinion of Mr Thomas Coltman Q.C., who was a native of Beverley. On 2 May 1836 Mr Coltman advised that the word "commonalty" in Archbishop Neville's charter of 2 April 1380 ought not to be construed as meaning the whole of the inhabitants of the town and that the effect of the charter was to convey the soil of the pastures to the Corporation, subject to the rights of the freemen to stock the pastures. The Corporation submitted a further case for the opinion of the Attorney-General in identical terms to that submitted to Mr Coltman and received an opinion, also dated 2 May 1836, that by the grant of 1380 the legal estate in the pastures was vested in the Corporation, with the right of stocking belonging to the freemen, and that the rents of the mills, stand on the racecourse, and lime quarries belonged to the Corporation in its new form to be carried by the Treasurer to the account of the Borough Fund. This opinion has the appearance of being in conflict with that given by the Attorney-General on 15 February 1836, in which he stated: "The pastures now belong to persons who are not corporators". However, it must be borne in mind that on that occasion the Attorney-General was asked only to advise on the power of the Council to make bye-laws, while his opinion of 2 May 1836 was given upon instructions which directed his attention to the wording of Archbishop Neville's charter of 1380 and asked for his opinion upon it. I therefore regard the later opinion as the true expression of his view upon this question.

When the Bill was introduced in the House of Commons, its provisions were not confined to the appointment of Pasture Masters and the protection and regulation of the freemen's rights of common, but also included a clause incorporating the Pasture Masters, followed by a clause providing that the common pastures and the ground and soil thereof and the complete legal estate of inheritance in fee simple therein should be vested in the corporation thereby established. The Corporation accordingly petitioned against the Bill and briefed Mr Coltman.

It appears from Mr Coltman's brief that the promoters of the Bill were not contending that the freehold of the pastures was not vested in the Corporation, but that the Corporation was merely a trustee for the exclusive benefit of the freemen, the matter in issue between the parties being the rents and produce of the mills, the stand on the race-course, and the lime quarries, etc., the Corporation making no claim to the herbage.

Mr John Wilson, "a Conveyance of eminence" and "a Gentleman in great practice" was instructed to draw a clause reserving the rights of the Corporation to be substituted for the one by which those rights were vested in the Pasture Masters, and objections were also made to the drafting of a number of other clauses. In the absence of a copy of the Bill, it is not possible to trace the amendments in detail, but the filled-up Bill contained a clause, possibly was drafted by Mr Wilson, which became s.73 of the Act of 1836 with the side-note: "Act not to



affect Claim to Beneficial Ownership of the Soil of the Pastures".

Had that been the end of the matter, I should have hesitated a long time before disagreeing with the opinions of such eminent lawyers as Sir John Campbell, later Lord Chancellor, and Mr Coltman, later a Judge of the Court of Common Pleas. I can only say that I find them most convincing. In my view, they are reinforced by the fact that the commonalty had a seal of its own which was attached to the charter of 1380, a matter not mentioned in either opinion, presumably because it was not mentioned in the instructions.

Mr Ground, however, while not accepting the correctness of the opinions taken in 1836, contended that they were immaterial, since the matter was settled by agreement three years later.

After the passing of the Act of 1836, the dispute which had led the Corporation to petition against the Bill continued. It was brought to a head in 1838, when the Pasture Masters marked to be felled for sale certain trees in the pastures. The Corporation filed a bill of complaint in Chancery against the Clerk to the Pasture Masters, praying for an injunction to prevent the Pasture Masters from felling such trees, this form of procedure being in accordance with s.25 of the Act of 1836, which provided that the Pasture Masters could sue and be sued in the name of their Clerk. An interim injunction was granted, and while it was in force a committee of the Council was appointed to meet the Pasture Masters. After meeting "in a spirit of amicable and free communication" terms were agreed for the dismissal of the bill in Chancery and for settling all disputes between the parties.

The terms, upon which my decision in this and the related references must depend, are somewhat lengthy, and it will be convenient to divide them into numbered paragraphs.

The bill was to be dismissed and the interim injunction dissolved upon the terms:-

- 1 " That the Pasture Masters shall be left or put into quiet possession of the trees growing on the Beverley common pastures, and shall be put into or left in possession of the mills, race-stand, and other erections on any of the Beverley pastures, and of the receipt of the rents and profits thereof, and into like possession of the chalk, gravel, sand, and clay of the said pastures, so far as this Corporation can put them into possession thereof.
- 2 "That the counterparts of all existing leases of any part of the said mills, or race-stand, now in the Corporation's possession, shall be given up to the said Pasture Masters by this Corporation.
- 3 "That this Corporation will at all reasonable times, when necessary, produce to and for the said Pasture Masters, but at the expense (if any) of the said Pasture Masters, all grants and other muniments relative to the said pastures which are amongst the muniments of this Corporation, and will under their common Seal direct the tenants of all the said mills, race-stand, and erections, to attorn tenant to the said Pasture Masters; and
- 4 "Will, on being indemnified by the said Pasture Masters, allow this Corporation's name and seal, when necessary, to be used by the said Pasture Masters, for distraining for any rent reserved by such leases, and for suing for any breach of any of the covenants thereof."



These terms were set out in the minutes of a meeting of the Council held on 4 February 1839 with the side-note "Freehold Rights given up".

The resolution of the Council agreeing to the settlement was not unanimous. Relying upon the requirement of s.94 of the Act of 1835 that any alienation of land belonging to the Corporation should be approved by the Lords Commissioners of the Treasury, five days later three aldermen, five councillors and thirty-two ratepayers sent to the Lords Commissioners a memorial praying that they would not approve of the Council carrying the resolution into effect. On 6 May 1839 the Mayor, Aldermen and Burgesses in Common Council assembled sent a reply to the memorial. After setting out arguments in support of the resolution on its merits, the reply stated:-

"The Memorial calls your Lordships' attention to the 94th Section of the Municipal Act, and the Council would submit, that neither under that or any other section of the Act of Parliament, have your Lordships any power given to interfere with regard to the Resolutions submitted to you. The Council have not presumed to sell, mortgage, or alienate the lands, tenements, or hereditaments of this Corporation, and had they been desirous so to do, they doubt not they should have been able to have laid before your Lordships such satisfactory statements as would have induced you, under the powers given your Lordships in the 94th Section, to grant your approbation of their proposal. In this case the Council have consented that the rents of the premises should be paid over to the Pasture Masters, but they have no intention to alienate the premises themselves".

On 19 August 1839 the Mayor was informed by letter that the Lords Commissioners were advised that the resolution of 4 February 1839 did not require the sanction of the Board, and that their Lordships would not be warranted in interfering in the matter.

Since then the precise legal effect of the terms agreed in 1839 has been a matter of doubt between the Corporation and the Pasture Masters. However, the parties seem to have managed to maintain the spirit of "amicable and free communication" in which they agreed to the terms. Thus, when in 1919 part of the pastures called Hurn was exchanged for some other land the Corporation and the Pasture Masters were both parties to the deed of exchange, and in 1970 and 1975 they joined in granting way-leaves to the North Eastern Gas Board and the Yorkshire Water Authority, each receiving half of the consideration money on each occasion. It is, perhaps, unfortunate that the provisions of the Commons Registration Act 1965 make it necessary now to define what has remained undefined for nearly 140 years without any apparent ill-effect.

Having considered the copious evidence which has been adduced, I find myself in no doubt as to the present legal position. As I have already indicated, in my view the successive corporations of Beverley were for many centuries the owners of the freehold of the common pastures, and the ownership remained unchanged in the Corporation created by the charter of 1685 after the coming into operation of the Act of 1835.

In considering the effect upon this position of the agreement arrived at in 1839 it would not, in my view, be proper to have regard to the side-note "Freehold Rights given up" in the Council minute book. This cannot be regarded as more than an expression of opinion by the clerk who entered the minutes, and it may not even have been a considered opinion, for it is apparent from the form of the minute book that the side-notes were intended to be a guide to anyone



subsequently searching it.

Turning to the text of the agreed terms, the fundamental term is that numbered 1 above, the remainder being ancillary. This does no more than provide that the Pasture Masters shall be left or put into quiet possession of the trees growing on the common pastures, and the mills, race-stand, and other erections and the receipt of the rents and profits thereof, and the like possession of the chalk, gravel, sand, and clay of the pastures. It does not deal with the possession of the pastures generally, but only with the income-producing parts, the profits from which had been the subject of controversy. More important, the freehold interest is nowhere mentioned nor is it implicit in the express words, for possession and receipt of rents and profits are consistent with an interest in land less than the freehold, for example, one can be in possession of land and in receipt of the rents and profits as a lessee or as a licensee. In my view, the Corporation correctly summarised the position in the passage in the reply of 6 May 1839 where it is stated that the Council had consented that the rents of the premises should be paid over to the Pasture Masters, but that they had no intention to alienate the premises themselves.

If this construction of the agreed terms is incorrect and the wording was apt to deal with the freehold, it seems to me that the action taken was ineffective for the attainment of that end. In the first place, a body corporate could only make a valid conveyance under its common seal. Secondly, any alienation of the freehold would require Treasury approval under s.94 of the Act of 1835. It was stated in the letter of 19 August 1839 that the resolution of 4 February did not require the sanction of the Board. Presumably this letter was written because the contention in the reply of 6 May 1839 was thought to be correct, but whether that view was correct or not, the fact remains that approval under s.94 of the Act of 1835 was neither sought nor obtained.

I have therefore come to the conclusion that the freehold of the common pastures remained in the Corporation and has now passed to the Borough Council under the Local Government Act 1972 and the Local Authorities (England) (Property etc.) Order 1973 (S.I. 1973 No. 1851). I say nothing as to the respective rights of the Borough Council and the Pasture Masters, since my jurisdiction is confined to the question of ownership as defined in s.22(2) of the Act of 1965, namely the ownership of a legal estate in fee simple in the land. I can only express the hope that nothing in my decision will impair the spirit of amicable and free communication which appears to have prevailed since 1839.

For these reasons I 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 23<sup>rd</sup> day of July 1977.

CHIEF COMMONS COMMISSIONER