

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 13 miles and a variable width between 3rd and 3rds 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 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 Re in Trees Gill. Apart from the Gill, there is no fence or other obstruction to m i 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).





There are only 2 Entries in the Rights Section: both made on the application of Mr J E Birbeck of "(a) mineral rights, (b) shooting rights, (c) to graze 350/150 sheep over the whole of the land comprised in this Register Unit"; as to Entry No 1, his application was as tenant for 350 sheep and the rights are attached to Shaw Paddock Farm and High Paddock Farm, and as to Entry No 2 his application was as owner of 150 sheep and the rights are attached to White Birks Farm.

In support of the ownership claim by Mrs D and Mr A Ashton, evidence was given (1) orally by Mrs D Ashton, (2) by affidavit (sworn 3 February 1977) of Mr R T D Johnson, (3) orally by Mr A Ashton, (4) orally by Mrs S M Caygill and (5) orally by Mr J C Holden. In support of the ownership claim of Mr J E Birbeck, evidence was given orally by him and by Mr G H Ashton. In the course of the hearing and subsequently the documents specified in the Schedule hereto were produced or put to the witnesses or sent to the office of the Commons Commissioners as is in such Schedule stated.

On the tithe map, the Unit Land is shown (disregarding changes obviously consequential on the building of the railway) as two pieces numbered 1526 and 1488; the Yellow Land corresponds with number 1488, and the rest of the Unit Land corresponds with number 1526, being in the map called "Shaw Paddock Common". The parcels of the 1927 conveyance (as abstracted) are: "(inter alia) ALL the Farm &c...and comprising (inter alia) so much of the fields numbered (inter alia) 1488 on the Tithe Map of the Township of Hawes as has not already been taken by the Midland Railway Co", and the habendum as to the leasehold portion is "for the residue then unexpired of the term of 2000 years from the day of 1619 subject to the payment to the person legally entitled thereto of the annual rent of £1.10.0 at the days and times usually accustomed (which rent has never been demanded from or paid by the Vendor or any person to his knowledge)..." The 1935 conveyance was of Shaws Farm (53a 33p), Shaw Paddock Pasture and Rough Pasture, the former Pasture being described by reference to the 1927 conveyance and being conveyed for the residue of the 2000 year term granted by the 1619 lease. On these conveyances and the probate produced, I conclude that the paper title of Mrs D and Mr A Ashton to a 2000 year term in the Yellow Land has been regularly deduced. They relied also on Mr Edward Ashton having been in possession personally until about 1946 and afterwards by his tenant Mr 4 H Ashton (his brother) up to about 1962 or 1963.

On behalf of Mr Birbeck the possession of Mr Edward Ashton was disputed, and Mr Holder contended that he (Mr Birbeck) had acquired a title by possession.

Mr Birbeck in 1961 took over Shaw Paddock Farm (over 100 acres) and High Paddock Farm (over 50 acres) from his father in law Mr G H Ashton; a considerable part of the east boundary of the Unit Land adjoins these two farms. Having previously rented White Birks Farm (over 74 acres) he became the owner (Mr Holder gave me the date 29 March 1963, I suppose from the conveyance); the farm is north of the other two farms and another part of the east boundary of the Unit Land also adjoins it. Shaws Farm which Mr Edward Ashton acquired in 1935 is about half a mile to the east of the Yellow Land (Lunds Church being in between).

Mrs D Ashton said (in effect):- When her husband acquired Shaws Farm his father Mr Arthur Ashton was tenant, and he continued tenant to her husband until he retired in about 1938; during his tenancy he put hogs onto the Yellow Land. Afterwards her husband took over Shaws Farm and also put hogs on the Yellow Land until he retired (Mrs Ashton seemed uncertain of the date, but her son Mr A Ashton said it was 1946). From then until about 1962 or 1963, the Yellow Land was let by her husband to his brother Mr G & Ashton who paid a rent for it \bar{x}^3 or x^3 year; her husband tried to increase it but it was not until he put the matter





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 coased 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 JEBl, and I shall in my direction annex an extract from such plan with the line of division marked on it PQRST.

In repsect 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

DAl	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 uy Miss M S S Macfie as personal representative of Mr R A S Macfie to Mr Edward Ashton





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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 overShaw Paddock Pasture; injunctions; etc
		by Mr E T D Johnson
RTDJl	•	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, 24 inches x 30 inches) of Plan of the Township of Hawes from a survey made by T Bradley;
	1840	Corrected 'to present time" J E Oates and certified by Tithe Commissioners as that referred to in Hawes Apportionment Award;
	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 O 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

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



3 February 1977



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 41C day of April -

1977

a.a. Baden Filler

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 Act1965 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 each 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 Metcafe and Mr B B Allen for the registration of rights of turbary. Mr Metcafe 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 15k - day of February -

1977

a.a. Baden Feller



