NORTH YORKSHIRE COUNCIL

COMMONS ACT 2006 – SCHEDULE 2, PARAGRAPH 4

Notice of an application to register waste land of the manor as common land

Application Reference Number: CA13 035

High Ellington Green (CL387) (part of)

Application has been made to the North Yorkshire Council by The Open Spaces Society under Schedule 2(4) of the Commons Act 2006 and in accordance with Schedule 4(14) of the Commons Registration (England) Regulations 2014.

The application, which includes documentary evidence, can be viewed at: https://www.northyorks.gov.uk/environment-and-neighbourhoods/land-and-waterways/common-land-and-village-greens/common-land-applications-and-decision-notices

or you can request a copy by contacting the Commons Registration Officer: -

email: commons.registration@northyorks.gov.uk ,

telephone: 01609 532364

or write to: North Yorkshire Council, Commons Registration, County Hall, Northallerton, North Yorkshire DL7 8AD

Any person wishing to make a representation regarding this amendment:

- should quote the Application No. CA13 035
- must state the name and postal address of the person making the representation and the nature of that person's interest (if any) in any land affected by the application.
- may include an e-mail address of the person making the representation
- must be signed by the person making the representation
- must state the grounds on which the representation is made
- should send the representation to: Commons Registration Officer, Commons Registration North Yorkshire Council, County Hall, Northallerton, North Yorkshire DL7 8AD or e-mail to commons.registration@northyorks.gov.uk on or before 7 January 2025.

Representations cannot be treated as confidential, and a copy will be sent to the applicant in accordance with Regulation 25 of the 2014 Regulations. Should the application be referred to the Planning Inspectorate for determination, in accordance with Regulation 26 of the 2014 Regulations, any representations will be forwarded to the Planning Inspectorate.

A summary of the effect of the application (if granted) is as follows: the Registration Authority will register the application land as common land.

Dated: 18 November 2024

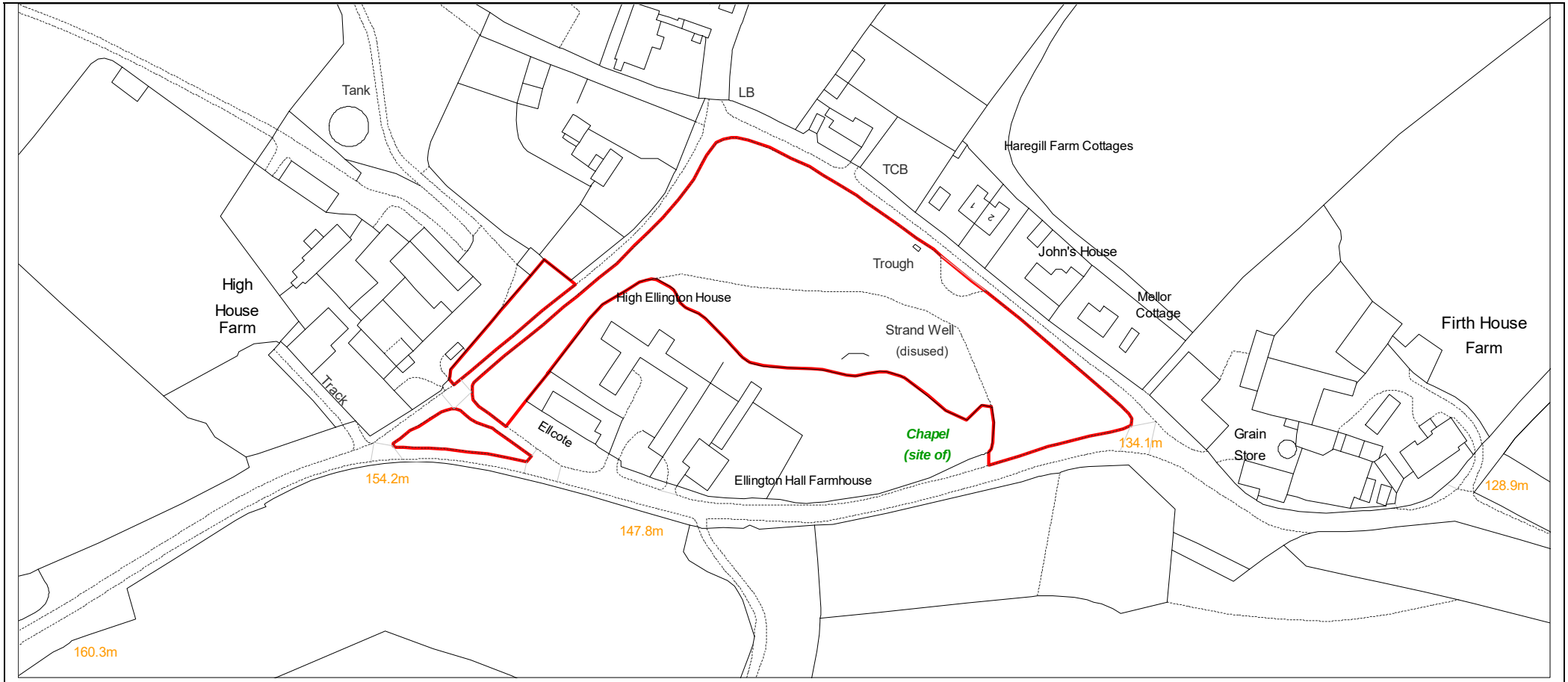
Karl Battersby

Corporate Director – Environment
North Yorkshire Council

Schedule

Description of the land seeking to be registered as common land

High Ellington Green, as edged red on the notice plan.



NORTH YORKSHIRE COUNCIL

COMMONS ACT 2006

CA13 APPLICATION (Ref. No. CA13 035) SEEKING TO REGISTER LAND AS COMMON LAND KNOWN AS HIGH ELLINGTON GREEN
LOCATION PLAN

NOTICE PLAN

Application site

FORM CA13

Commons Act 2006: Schedule 2

Application to correct non-registration or mistaken registration

This section is for office use only

Official stamp

COMMONS ACT 2006

NORTH YORKSHIRE COUNCIL

COMMONS REGISTRATION AUTHORITY

DATE: 30 SEP 2024

Application number

CA13 035

Register unit number allocated at registration (for missed commons only)

Applicants are advised to read 'Part 1 of the Commons Act 2006: Guidance to applicants' and to note:

- Any person can apply under Schedule 2 to the Commons Act 2006.
- All applicants should complete boxes 1-10.
- Applications must be submitted by a prescribed deadline. From that date onwards no further applications can be submitted. Ask the registration authority for details.
- You will be required to pay a fee unless your application is submitted under paragraph 2, 3, 4 or 5 of Schedule 2. Ask the registration authority for details. You would have to pay a separate fee should your application relate to any of paragraphs 6 to 9 of Schedule 2 and be referred to the Planning Inspectorate.

Note 1

Insert name of commons registration authority.

1. Commons Registration Authority

To the: North Yorkshire Council

Tick the box to confirm that you have:

enclosed the appropriate fee for this application: ☐

or

have applied under paragraph 2, 3, 4 or 5, so no fee has been enclosed: ☑

Note 2
If there is more than one applicant, list all their names and addresses in full. Use a separate sheet if necessary. State the full title of the organisation if the applicant is a body corporate or an unincorporated association. If you supply an email address in the box provided, you may receive communications from the registration authority or other persons (e.g. objectors) via email. If box 3 is not completed all correspondence and notices will be sent to the first named applicant.

2. Name and address of the applicant

Name: The Open Spaces Society

Postal address:

c/o Frances Kerner
The Open Spaces Society
25a Bell Street
Henley-on-Thames
Oxfordshire

Postcode RG9 2BA

Telephone number: 01491 573535

Fax number:

E-mail address: [redacted]

Note 3
This box should be completed if a representative, e.g. a solicitor, is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here. If you supply an email address in the box provided, the representative may receive communications from the registration authority or other persons (e.g. objectors) via email.

3. Name and address of representative, if any

Name:

Firm:

Postal address:

Postcode

Telephone number:

Fax number:

E-mail address:

Note 4
For further details of the requirements of an application refer to Schedule 4, paragraph 14 to the Commons Registration (England) Regulations 2014.

4. Basis of application for correction and qualifying criteria

Tick one of the following boxes to indicate the purpose for which you are applying under Schedule 2 of the Commons Act 2006.

To register land as common land (paragraph 2): ☐

To register land as a town or village green (paragraph 3): ☐

To register waste land of a manor as common land (paragraph 4): ☑

To deregister common land as a town or village green (paragraph 5): ☐

To deregister a building wrongly registered as common land (paragraph 6): ☐

To deregister any other land wrongly registered as common land (paragraph 7): ☐

To deregister a building wrongly registered as town or village green (paragraph 8): ☐

To deregister any other land wrongly registered as town or village green (paragraph 9): ☐

For waste land of a manor (paragraph 4), tick one of the following boxes to indicate why the provisional registration was cancelled.

The Commons Commissioner refused to confirm the registration having determined that the land was no longer part of a manor (paragraph 4(3)): ☐

The Commons Commissioner had determined that the land was not subject to rights of common but did not consider whether it was waste land of a manor (paragraph 4(4)): ☐

The applicant requested or agreed to cancel the application (whether before or after its referral to a Commons Commissioner) (paragraph 4(5)): ☑

Please specify the register unit number(s) (if any) to which this application relates:

CL 387(part of)

Note 5
Explain why the land should be registered or, as the case may be, deregistered.

5. Description of the reason for applying to correct the register:

The application land was provisionally registered as common land on 6 April 1970. Following an objection the registration was withdrawn. Part of the application land is eligible for registration under para.4(5) of Schedule 2 to the Commons Act 2006.

Continuation Sheet to Q5 describes the registration history and provides evidence that the application land is waste land of a manor.

Note 6
You must provide an Ordnance map of the land relevant to your application. The relevant area must be hatched in blue. The map must be at a scale of at least 1:2,500, or 1:10,560 if the land is wholly or predominantly moorland. Give a grid reference or other identifying detail.

6. Description of land

Name by which the land is usually known:

High Ellington Green

Location:

About 4 kilometers north west of Masham, North Yorkshire.

Tick the box to confirm that you have attached an Ordnance map of the land: ☑

Note 7
This can include any written declarations sent to the applicant (i.e. a letter), and any such declaration made on the form itself.

If your application is to register common land or a town or village green and part of the land is covered by a building or is within the curtilage of a building, you will need to obtain the consent of the landowner.

7. Declarations of consent

Note 8
List all supporting documents and maps accompanying the application, including if relevant any written consents. This will include a copy of any relevant enactment referred to in paragraphs 2(2)(b) or 3(2) (a) of Schedule 2 to the Commons Act 2006 or, in relation to paragraph 4 (waste land of a manor) evidence which shows why the provisional registration was cancelled. There is no need to submit copies of documents issued by the registration authority or to which it was a party but they should still be listed. Use a separate sheet if necessary.

8. Supporting documentation

1.Site Visit Photographs

2. Documents relating to the Commons Registration Act 1965 on which we rely are not included pursuant to r.16(3):

a) Register of Common Land (CL387)
b) Register Map (North Yorkshire NR51D INSET CL387)
c) Objection No. 92

Note 9 *List any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.*	**9. Any other information relating to the application**

Note 10 *The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or an unincorporated association.*	**10. Signature** Date: 30 September 2024 Signatures: [redacted]

REMINDER TO APPLICANT

You are responsible for telling the truth in presenting the application and accompanying evidence. You may commit a criminal offence if you deliberately provide misleading or untrue evidence and if you do so you may be prosecuted.

You are advised to keep a copy of the application and all associated documentation.

Data Protection Act 1998

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the commons registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.

A copy of this form and any accompanying documents may be disclosed upon receipt of a request for information under the Environmental Information Regulations 2004 or the Freedom of Information Act 2000.

Continuation Sheet to Q5

Registration History

The application land was provisionally registered on 6 April 1970 and given the register unit No. CL387. The application land was also provisionally registered on 6 April 1970 as a village green and given the register unit No. VG 211. The dual registrations were in conflict and treated as an objection to each other.

On 5 May 1970, Mary Constance Cunliffe-Lister, the Countess of Swinton, made an objection (No.092) to CL387:

> I am the owner as tenant for life under a settlement of this —[1] ~~of~~ land the subject of this[2] ~~two~~ registration~~s~~ I deny ~~they are~~ it is common land and ask that any common rights claimed should be precisely defined, though I deny any exist

Objection No.092 was recorded in the register of common land on 2 June 1970. Following the objection, the register of common land records that the provisional registration was withdrawn on 16 July 1973.

NOTE: The Countess of Swinton made an objection to VG 211 (Objection No.091). Following the objection the register of town or village green records that the provisional registration was withdrawn on 16 July 1973.

The application land is therefore eligible for registration as common land under paragraph 4(5) of Schedule 2 to the Commons Act 2006.

Description of the Application Land

In recognition that two parts of the provisionally registered land do not meet all the criteria for registration, these have been excluded from the application (see application plan).

First, the application land is of manorial origin as demonstrated by the historical evidence (see below). Second, the application land fulfills the descriptive character of waste land of a manor as defined in the case of *Attorney General v Hanmer,* i.e., the application land is, 'the open, uncultivated and unoccupied lands parcel of the manor…other than the demesne lands of the manor'.[3] The following description of the land is supplemented by photographs which are in the Appendix.

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[1] Word crossed out is not clear.
[2] Changed from 'these' to 'this'.
[3] (1858) 27 LJ Ch 837.

Open

Most of the application land is mown. The area within the tree cover is very overgrown with nettles and brambles but there is no sign of any internal fences or walls. All the application land is open to the road. Where the application land meets adjoining property there are walls. This is to be expected because a hedge, wall or fence often marks the boundary of waste where it meets an adjacent field or property. No land lacks physical boundaries, even on commons, there is generally a custom on adjoining owners to fence against a common.

Uncultivated

The land is not cultivated. There is no engagement with farming or activity with the soil which causes it to be broken for productive purposes and therefore the land is uncultivated. Regular mowing of grass often takes place on common land. In *R v Doncaster Metropolitan Borough Council Ex p. Braim*, the High Court observed, *obiter*, that rights of access under s.193 of the Law of Property Act 1925 applied to land enclosed by a racecourse because it was manorial waste for the purposes of subs.(1) of that section: 'The racecourse, the golf course and possibly other parts of the common would be mown, but not for the purpose of gathering a crop; I would not have thought this was cultivation'.[4]

Unoccupied

The land is unoccupied. There is no profitable use of the land to the exclusion of others.

Historical Evidence

The application land was situated in the parish of Masham and in the township of High and Low Ellington and is waste land of the manor of High Ellington which was a subordinate manor of the manor of Masham.

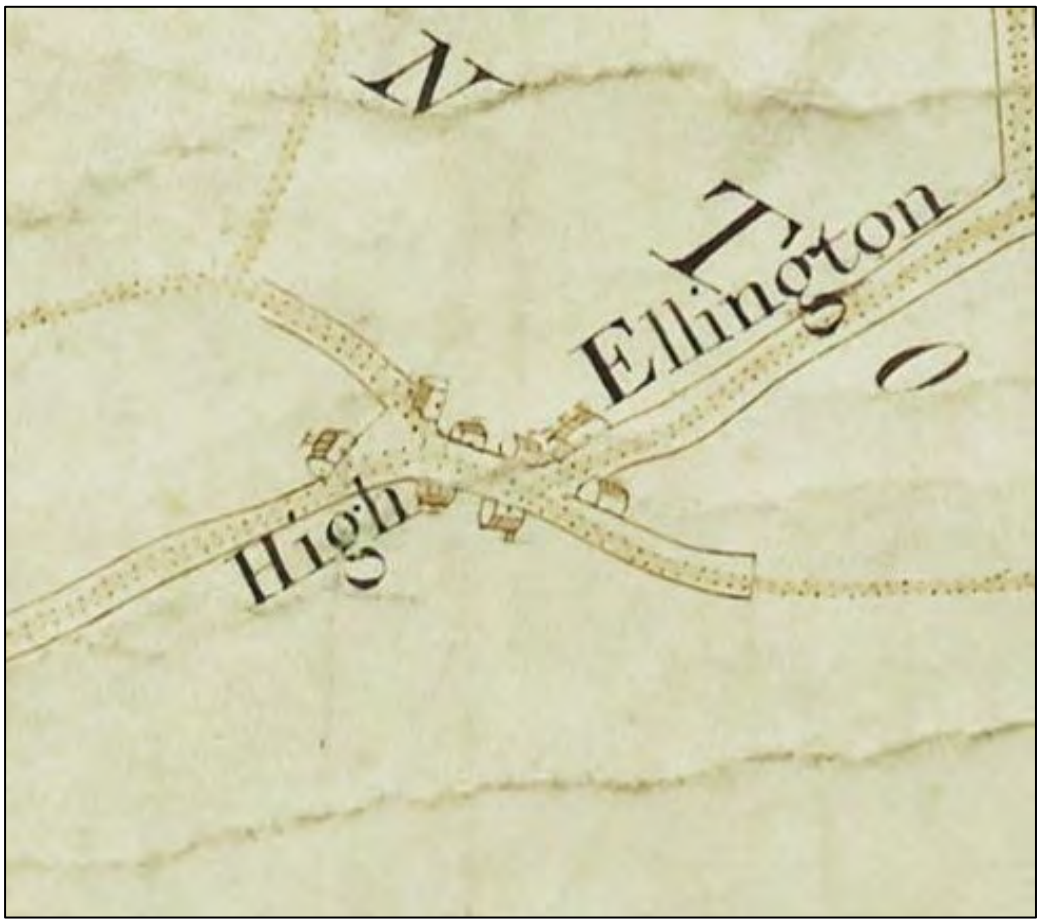
In the eighteenth century, the hamlet of High Ellington comprised a few properties clustered at the junction of four route ways. At the centre of the hamlet was an unenclosed space which the Society believes is a remnant of manorial waste. This category of land was often situated at the junction of roads or at the side of a highway (see Figures 1 and 2).

[4] A copy of the case is provided with this application.

Figure 1: Extract from A Plan of Mashamshire….taken for William Danby, 1770. Red Arrow points to High Ellington and application land.

Source: North Yorkshire County Record Office (NYCR0): ZS Mashamshire.

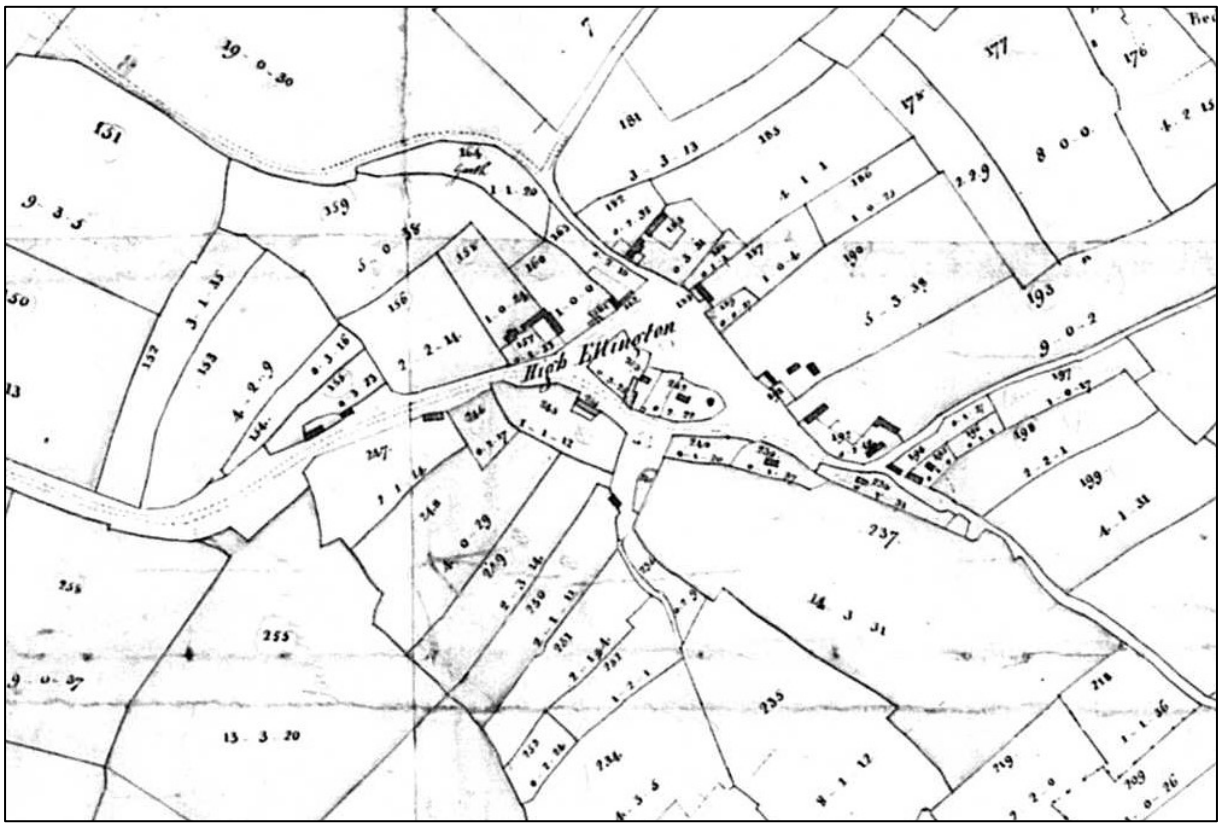
Figure 2: Extract from A Plan of Mashamshire….taken for William Danby, 1770. Close up of High Ellington showing application land at junction of route ways.



Source: North Yorkshire County Record Office (NYCR0): ZS Mashamshire.

A plan made in 1801 shows that part of the open space in the centre of the hamlet had been enclosed and that a building had been erected within the enclosure. This enclosure survives today but the land outside of it remains open and is the surviving remnant of manorial waste (see Figure 3).

Figure 3: Extract from ‘A plan of the townships of Ellington and Ellingstring and Sutton-Pen in the township of Healey in Mashamshire made 1801’.



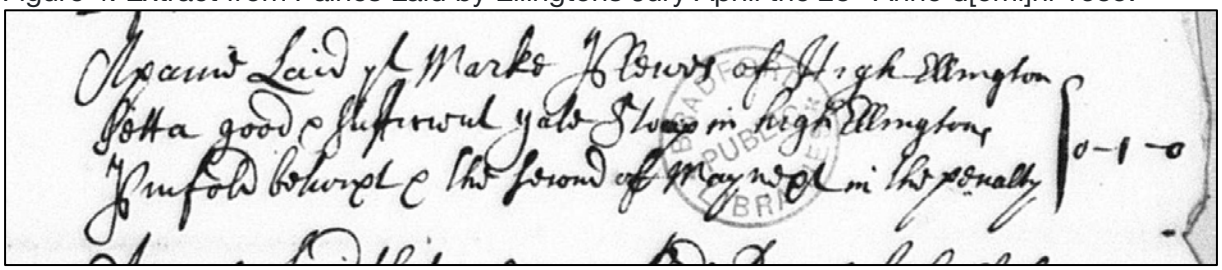
Source: North Yorkshire County Record Office (NYCRO)- ZS MIC 2023/13-25.

The application land was situated in the manor of High Ellington (Over Ellington). Together with the manor of Low Ellington (Nether Ellington), the manor of High Ellington was administered by the manor of Masham.[5] In recognition of the hierarchy of manors, there were four distinct juries in the manor of Masham which dealt with the business of the manor, *i.e.*, the jury for Ellington, the jury for Healy, the Forest jury and the jury for Masham.

Presentments made to the jury for Ellington comprise a variety of depredations and include, for example, pecuniary payments levied for affray, the un-ringing of pigs and failure to keep fences in good order. Paines, also known elsewhere in England as orders or bye-laws, were issued by juries to regulate certain activity in the manor. In 1685 a paine issued by the jury for Ellington required the pinfold at High Ellington to be gated (see Figure 4 with transcription).

[5] 'Parishes: Masham', in *A History of the County of York North Riding: Volume 1*, (London, 1914) pp. 323-332. *British History Online* https://www.british-history.ac.uk/vch/yorks/north/vol1/pp323-332 [accessed 3 June 2024].

Figure 4: Extract from Paines Laid by Ellingtons Jury Aprill the 28th Anno d[omi]ni 1685.



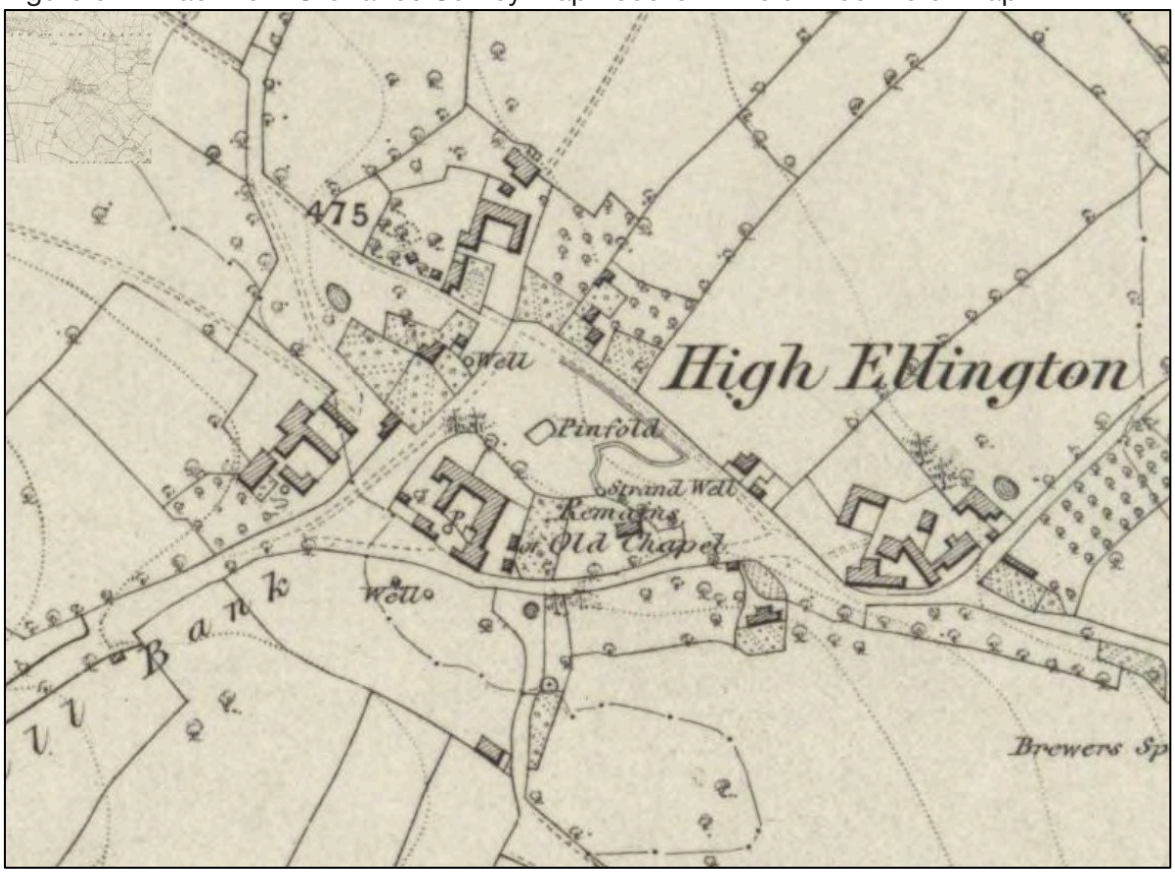
Source: NYCRO-MIC 3129.

Transcription:

A paine Laid that Marke Plewes of High Ellington
sett a good & sufficient gate Sto[ ]p in high Ellingtones } 0 1 0
Pinfold betwixt & the second of May next in penalty

The pinfold can be seen on the Ordnance Survey map of 1853-6 (see Figure 5).

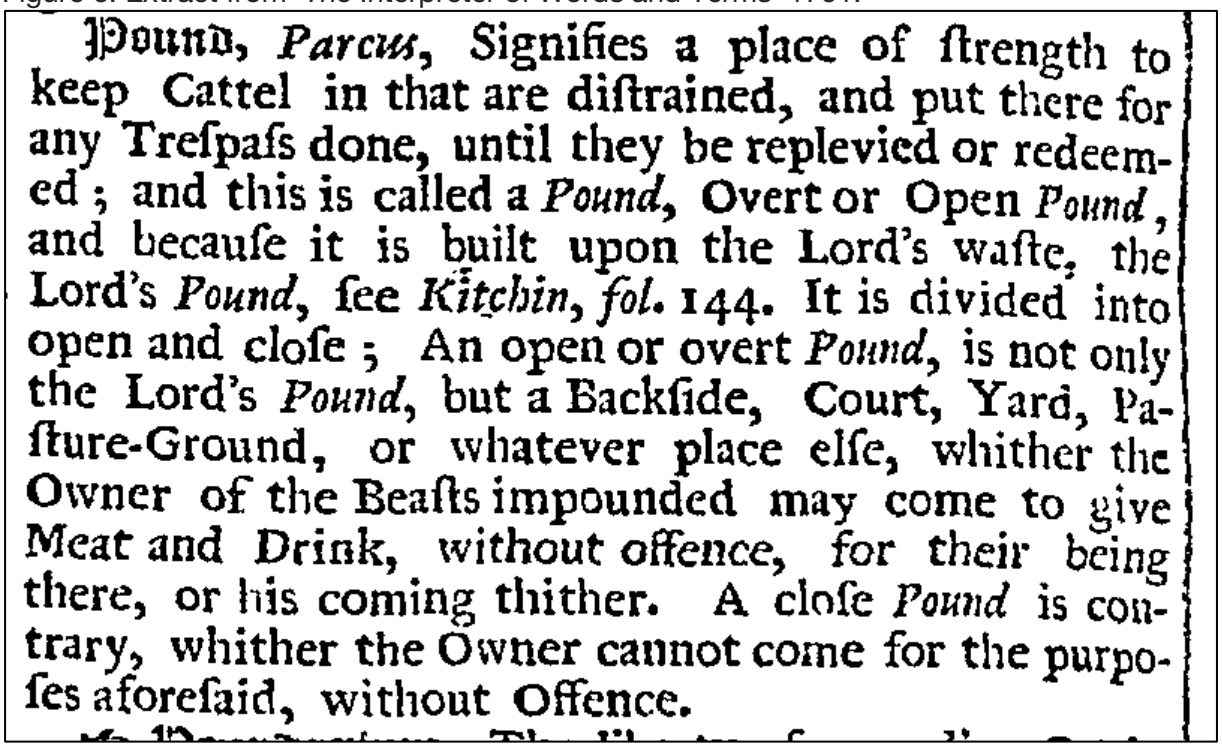
Figure 5: Extract from Ordnance Survey map 1853-6. Pinfold in centre of map.



Source: Yorkshire Sheet 85 1853-6.

A pinfold, also known as a pound, was usually sited on manorial waste and was used to distrain stray animals. A law dictionary of 1684 provides the following definition of a pound (see Figure 6).

Figure 6: Extract from 'The Interpreter of Words and Terms' 1701.



Pound, *Parcus*, Signifies a place of ſtrength to keep Cattel in that are diſtrained, and put there for any Treſpaſs done, until they be replevied or redeemed; and this is called a *Pound*, Overt or Open *Pound*, and becauſe it is built upon the Lord's waſte, the Lord's *Pound*, ſee *Kitchin*, *fol.* 144. It is divided into open and cloſe; An open or overt *Pound*, is not only the Lord's *Pound*, but a Backſide, Court, Yard, Paſture-Ground, or whatever place elſe, whither the Owner of the Beaſts impounded may come to give Meat and Drink, without offence, for their being there, or his coming thither. A cloſe *Pound* is contrary, whither the Owner cannot come for the purpoſes aforeſaid, without Offence.

Source: *The Interpreter of Words and Terms used either in the Common or Statute Laws of this Realm*. First published by Dr Cowel in the year 1607, continued by Thomas Manley in 1684…. and further improved in 1701.

The pinfold at High Ellington was subject to regulation by the lord of the manor as demonstrated in the extract above relating to the paine issued by Ellington jury in 1685. It is well documented that a pinfold was usually sited at a significantly important location and that it had to be easily accessible.[6] The pinfold's situation at High Ellington was therefore typical, at the junction of route ways and on land which was held by the lord of the manor. It is highly probable that the pinfold recorded in 1685 was on the same site as the one identified on the Ordnance Survey map of 1853–6.

In summary, the application land is waste land of the manor of High Ellington, a subordinate manor of the manor of Masham and is open, uncultivated and unoccupied.

[6] Jonathan Healey, The politics of the common pound in early modern England, in *The Local Historian*, Vol. 49, No.1, Jan. 2019; Harold Fox, *Dartmoor's Alluring Uplands*, (Exeter University Press, 2012), p.94.

Appendix

Photographs

Photograph 1: Looking west at trees and undergrowth.

Photograph 2: Looking west at central trees and undergrowth.

Photograph 3: Looking at the west side of the application land.

Photograph 4: Looking at the west side of the application land.

Photograph 5: Looking south-west, application land on each side of the highway.

Photograph 6: Looking north-east. Application land partly overgrown.

Photograph 7: Looking north-east at detached triangular area of application land.

Photograph 8: Looking south-east at detached triangular area. Application land on right.

R. v. DONCASTER METROPOLITAN BOROUGH COUNCIL, Ex p. BRAIM

QUEEN'S BENCH DIVISION (McCullough J.): October 1, 1986

Commons—Intended lease of part of Doncaster Common—No notice given to public—Whether notice required—Whether Common "open space"—Whether used for public recreation—Whether use as of right—Whether public could be beneficiary of trust to take recreation—Whether trust to be presumed.

Doncaster Common, some 190 acres in extent, passed into the ownership of the Doncaster Corporation in about 1505. Its best known use was as a racecourse upon which the St. Leger was run, its other principal use being for the playing of golf. Public access to the Common could be gained via a number of routes, and the Common was used for a variety of recreational purposes including walking, jogging, flying kites and picnicking. Continuous user stemmed from as far back as 1860. No evidence existed that such persons had been treated as trespassers, nor of any notice prohibiting or restricting such use. The borough council intended to lease part of the Common to the Town Moor Golf Club. The applicant contended that the Common was "open space" and, therefore, that notice of the intended disposal must be advertised in a local newspaper and objections considered as required by section 123(2A) of the Local Government Act 1972, as amended. The council argued that the Common was not open space as defined in section 290(1) of the Town and Country Planning Act 1971 as it was not used for the purposes of public recreation.

Held, allowing the application:

(1) that the only reasonable factual inference to be drawn was that from some date prior to 1860 and at all times thereafter the public had, as of right, used Doncaster Common for what could be conveniently termed recreation;

(2) the rights were those of the public as a whole and not merely the inhabitants of the locality;

(3) since the public already enjoyed such rights, section 193 of the Law of Property Act 1925 added nothing;

(4) hence, the fact that the land was not registered under the Commons Registration Act 1965 could not have detracted from the rights of the public in 1970;

(5) the public could lawfully have been the beneficiary of a trust the object of which was to give them the right to take recreation on Doncaster Common;

(6) a presumption that the public's use of Doncaster Common for the purposes of recreation was not only lawful but as of right was to be drawn;

(7) even if the public's use of Doncaster Common depended upon a bare licence, the corporation would be obliged to comply with section 123(2A) of the Local Government Act 1972, as amended, unless reasonable notice of termination was given and had expired.

Cases cited:

(1) *Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188, distinguished.

(2) *Box Hill Common, Re* [1980] 1 Ch. 109; [1979] 2 W.L.R. 177; [1979] 1 All E.R. 113; 37 P. & C.R. 181, C.A.

(3) *Ellenborough Park, Re* [1956] Ch. 131, [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667, C.A.

(4) *Goodman* v. *Saltash Corporation* (1882) 7 A.C. 633, H.L., considered.

(5) *Hadden, Re Public Trustee* v. *More* [1932] 1 Ch. 133, considered.

(6) *International Tea Stores Co.* v. *Hobbs* [1903] 2 Ch. 165.

(7) *Lord Rivers* v. *Adams* (1878) 3 Ex.L. 361.
(8) *Mounsey* v. *Ismay* (1865) 3 H. & C. 486, considered.
(9) *Tyne Improvement Commissioners* v. *Imrie; Att.-Gen.* v. *Tyne Improvement Commissioners* (1899) 81 L.T. 174.

Legislation construed:
Town and Country Planning Act 1971 (c. 78), s.290(1). This provision is set out at p. 3, *post.*

Application by way of judicial review. The applicant, Mr. Eric Lawrence Braim, applied by way of judicial review for a declaration that the area of land known as Doncaster Common and lying within the Metropolitan Borough of Doncaster constituted "open space" within the meaning of section 123(2A) of the Local Government Act 1972 (as amended by the Local Government Planning and Land Act 1980, s.118, Sched. 23, paras. 14 and 15.)

The grounds of the application were:

(1) that for section 123(2A), as amended, to apply, it was not necessary for the applicant to demonstrate that the public use was as of right. It was sufficient that the use was lawful;

(2) alternatively, that if use as of right had to be established, the evidence established it;

(3) that the public's use as of right dated from before 1926. It owed nothing to section 193 of the Law of Property Act 1925 and, therefore, after 1970 it continued exactly as it had both before 1926 and between 1926 and 1970. The evidence of such user was not consistent with the exercise of a bare licence and was only consistent with use as of right;

(4) alternatively, in 1926 such a right was created by section 193 of the Law of Property Act 1925 and was not extinguished by non-registration under the Commons Registration Act 1965;

(5) that there was nothing in law which prevented the court from inferring that rights of the kind in question were granted to the public.

C. George for the applicant.
C. Whybrow for the respondent.

McCULLOUGH J. Mr. E. L. Braim applies by way of judicial review for a declaration that the area of land which is known as Doncaster Common and lies within the Metropolitan Borough of Doncaster constitutes "open space" within the meaning of section 123(2A) of the Local Government Act 1972 (as amended by the Local Government Planning and Land Act 1980, s.118, Sched. 23, paras. 14 and 15).

The land is owned by the Metropolitan Borough Council. Mr. Braim's application is prompted by the council's intention to lease part of the land to the Town Moor Golf Club. If, as Mr. Braim contends, the land is "open space," the intended disposal will be subject to section 123(2A) of the Act of 1972 which provides that:

> A principal council [and the Doncaster Metropolitan Borough Council is such] may not dispose of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so to be advertised in a newspaper

circulating in the area in which the land is situated and consider any objections to the proposed disposal which may be made to them.

The council have not so advertised and do not intend to do so, because they say that the land is not "open space."

"Open space" is defined in section 290(1) of the Town and Country Planning Act 1971 (to which one is led by way of section 270(1) of the Act of 1972 as amended by the Local Government Planning and Land Act 1980, s.118, Sched. 23, para. 20). It is:

> Any land laid out as a public garden or used for the purposes of public recreation or land which is a disused burial ground.

The words with which this case is concerned are "land used for the purposes of public recreation." The principal question which arises is whether Doncaster Common is so used. Mr. Braim says it is; the council says not.

Doncaster Common, which is also known as Doncaster Town Moor, is some 190 acres in extent. It passed into the ownership of the Doncaster Corporation, who were the council's predecessors in title, when that body became Lords of the Manor in about 1505. Its best known use is as the racecourse upon which the St. Leger is run. Racing there apparently dates from about 1600. The racecourse has two circuits, there being a National Hunt course inside and adjacent to the flat. A section of the flat on the north side of the course is extended to make a straight mile. The racecourse lies partly within and partly outside the common. No racecourse building is within it. Most of the common, but not all of it, is encompassed by the racecourse. One of the parts outside is a triangular area on the south side of the course alongside the Bawtry Road. Over the years the number of days of racing has increased. In 1939 there were six. This year, 25 or 28.

The other principal use of the common is for playing golf. This dates from about 1894. It appears that in 1911 the Town Moor Golf Club was given permission to use the links which lie within the National Hunt course on the understanding that no exclusive use of the land was being granted. The present clubhouse is on the opposite side of the Bawtry Road from the common. Golfers first cross the road, then walk straight on to the triangular area of the common, and then cross the flat and National Hunt courses and so reach the links. To do so they have to duck under the rails on either side of the courses, but otherwise their passage is unimpeded. The club intends to build a new clubhouse on the triangular area and has obtained planning permission to do so. The intention is to lease to the club the land on which it is desired to build the clubhouse.

There are other parts where access to the common can be gained. On the north side, roughly half way along the straight mile, there is a width of some 60 feet where one can walk straight on to the common having ducked under the rails of the racecourse. On the south side Rose Hill Rise leads from the Bawtry Road. Between Rose Hill Rise and the racecourse there are houses. Nineteen houses have gates which lead directly from their gardens to the common. At the east end of this road, beyond the gardens, there is a point of access to the common. At the west end of Rose Hill Rise there is a place where one can conveniently cross the racecourse from the triangular area to that part of the common

which lies within the racecourse. There is unimpeded access to the whole of the triangular area which lies next to Bawtry Road. A post-and-rail barrier at this place separates the carriageway from the pavement. Between pavement and common there is no barrier at all. Further to the west there is a vehicle access from Bawtry Road. For a vehicle to cross the racecourse a gate has to be unlocked, but for pedestrians this point of access is unobstructed.

There are before the court affidavits from a number of people who walk on the common and have done so for many years. One is a Mr. Barr, aged 75, who speaks of doing so since 1920. It is clear that people use it to walk, to jog, to fly kites and model aeroplanes and to picnic. Children kick balls about and play tennis, French cricket and the like. The staff at the racecourse understandably discourage use of the tracks save for crossing, and on racing days they do so in the interests of safety. However, there is no evidence that anyone using the common for the purposes to which I have referred has been treated as a trespasser. Nor on the evidence has there ever been a notice prohibiting or restricting such use.

Mr. Clifford Ward, the Deputy Director of Legal and Administrative Services of the council, who has been in its service since 1974, asserts that their use of the common for the purposes of recreation only occurs because the council "has chosen in effect not to enforce its rights in trespass strictly." However, no minute of the council, nor any other record or document, supporting this view has been placed before the court. Save for his assertion, there is no indication that the council or its predecessors have ever regarded those using the common in the ways I have described as trespassers.

In argument Mr. Whybrow, counsel for the Metropolitan Borough Council, has accepted that Doncaster Common has been lawfully used by the public for the purposes of recreation since at least 1887. He submits that:

> (1) for section 123(2A) of the 1972 Act as amended to apply the use of the land for the purposes of public recreation must be use as of right. Use in pursuance of a bare licence would not suffice. It is for the applicant to show that this use has the necessary quality.
>
> (2) The evidence of public user of Doncaster Common before 1926 when the Law of Property Act 1925 came into force is consistent with the grant of a bare licence.
>
> (3) From 1926 the public had a right to use Doncaster Common for air and exercise, this being derived from section 193 of the Law of Property Act 1925. However, since the land was not registered under the Commons Registration Act 1965, this right was extinguished in 1970. Between 1926 and 1970 the evidence of public user is consistent with the mere exercise of this right.
>
> (4) User after 1970 is again consistent with the grant of a bare licence.
>
> (5) The applicant being unable to produce direct evidence of a grant to the public of such rights, the law does not permit the court to infer that there was such a grant.

Mr. George, counsel for the applicant's, principal submissions are that:

(1) for section 123(2A) as amended to apply it is not necessary for the applicant to demonstrate that the public use was as of right. It is sufficient that the use was, as Mr. Whybrow concedes that it was, lawful.

(2) Alternatively, if use as of right has to be established, the evidence establishes it.

(3) The public's use of Doncaster Common as of right dates from before 1926. It owed nothing to section 193. Therefore, after 1970 it continued exactly as it had both before 1926 and between 1926 and 1970. The evidence of such user is not consistent with the exercise of a bare licence and is only consistent with use as of right.

(4) Alternatively, in 1926, as the council concedes, such a right was created by section 193 of the Law of Property Act 1925. It was not extinguished by non-registration under the Commons Registration Act 1965.

(5) There is nothing in law which prevents the court from inferring that rights of the kind in question were granted to the public.

I will first consider the evidence of user. The facts are largely beyond dispute. What is in issue are the inferences to be drawn from them.

There is evidence of user from as far back as 1860. All the indications are that the user was continuous. At no time in the period is there even a hint that such user was regarded, either by the corporation or by the users or by anyone else, as user by mere tolerance or permission of the corporation. Looking at the evidence as a whole, I have no hesitation in drawing the conclusion that the user was regarded by all as being the *right* of those who enjoyed it.

There are one or two references to the rights of the burgesses rather than of the public as a whole, but I attach little significance to them. Except on race days most of those using the common would no doubt be inhabitants of Doncaster. On race days, however, there would inevitably have been a large influx of persons from outside, and there is a reference to the common being used for big demonstrations such as gatherings of the Yorkshire miners. I am satisfied that the rights which everyone believed to exist were those of the public as a whole and not merely the inhabitants of the locality; and, as I understand it, Mr. Whybrow accepts that in so far as there were rights, they were not rights of this limited class.

Both parties are agreed that between 1926 and 1970 the public did enjoy, at the least, a right of access for air and exercise. For this reason it would not be right to regard reference in this period to the rights of the public as having the same significance as earlier references. A number of the earlier references are contained in newspaper reports. One would not expect reporters to differentiate precisely between something enjoyed as of right and something enjoyed on the sufferance of the landowner, any more than they would be alive to the distinction between rights enjoyed by the general public and rights enjoyed by the local inhabitants. Nor necessarily would one expect councillors always to have such distinctions in mind. However, the general tenor of the references prior to 1926 suggests very strongly that the rights of the public which were believed to exist over Doncaster Common did not

depend upon the tolerance or permission of the corporation. No one i reported as speaking in terms which acknowledge the possibility of use so precariously based.

At a meeting in 1890 concerned with a proposal that the corporation should buy out the rights of common over Doncaster Common and at which seven members of the corporation were present, Alderman Wainright referred repeatedly to the rights of the public, as did Councillor Athron. (The rights were bought out in 1893.) In a draft lease of 1895 (the draft being that of the corporation), there are references to the eatage being let "subject to the use and enjoyment of the common by the public as heretofore"; to "the right of the public to stray and recreation as heretofore enjoyed thereon"; and to "the free use and enjoyment of the common by the public as heretofore." At a public inquiry in 1908 concerned with a proposal to erect an additional stand for the racecourse, attended by 14 members of the corporation together with the town clerk and other employees of the corporation, Councillor Wightman spoke of doing nothing "to infringe upon the legitimate rights of the people on the Town Moor," and referred also to the question of "encroachment upon the liberties of the public." There is nothing to suggest that anyone else regarded such phraseology as inapt.

In March 1939 the town clerk wrote to the Under Secretary of State at the Home Office in connection with the proposed Doncaster County Borough By-Laws under the Advertisements Regulations Acts 1907 and 1925 to the effect that the common was a public park or pleasure ground open to and used by the general public. The by-laws themselves dated February 1940 reflected this. However, by this date one is beyond 1926.

The Doncaster Corporation Act was passed in 1950 (a date again within the period 1926 to 1970). Section 134(3) empowered the corporation for the regulation and protection of the common to make by-laws for a variety of purposes. One purpose, in section 134(3)(*c*), was to regulate the assemblage of persons on Doncaster Common. Several other purposes referred to in section 134(3) involved prohibitions of one kind and another. Mr. George relies on the absence of a provision enabling the corporation to prohibit the assemblage of persons on Doncaster Common, but I do not find this significant. Such a provision might well have been inconsistent with section 193 of the Act of 1925. Of greater impact is the fact that substantially the same powers were given to the Doncaster Borough Council by section 9 of the South Yorkshire Act 1980 passed 10 years after 1970, *i.e.* 10 years after the extinction of any rights created by section 193 of the Law of Property Act 1925. Nevertheless, no power to make a by-law prohibiting the assemblage of persons on the common was granted.

The Act of 1980 provides a further pointer. Section 10 empowers the council to set apart portions of Doncaster Common for bookmakers during and immediately before racing periods. Such a provision would not have been required if the rights of the public over Doncaster Common were merely those of bare licensees.

By this stage, the 1980s, one is well into the periods referred to in the affidavits from those who now use the common.

At no stage is there anything to suggest that the public only used the common on the sufferance of the corporation. No notice to this effect

has ever been erected. No assertion of the right to bring such user to an end was ever made before the present dispute arose. There is nothing to suggest that anyone regarded the years 1926 to 1970 as being governed by any considerations other than those that had appertained before and have appertained since.

In my judgment, the only reasonable factual inference to draw is that from some date prior to 1860 and at all times thereafter the public has as of right used Doncaster Common for what can conveniently be termed recreation. I use the expression "factual inference" because it remains to be considered whether the law permits the court to infer that the public did acquire this right.

Before turning to this question I ought to say something more about section 193 of the Law of Property Act 1925 and the Commons Registration Act 1965. Section 193 granted to members of the public rights of access for air and exercise over four categories of land, one of which was "manorial wastes within boroughs and urban districts." Counsel agree that "manorial waste" can, for present purposes at least, be regarded as land within the parcel of a manor which is open, uncultivated and unoccupied (see *Re Box Hill Common*). Mr. Whybrow, for the Metropolitan Borough Council, argues that Doncaster Common was "manorial waste." Mr. George, for Mr. Braim, accepts that Doncaster Common was "parcel of a manor." Initially he was disinclined to agree that Doncaster Common was "uncultivated" and "unoccupied," but later in his argument he accepted that it probably had these characteristics as well. In this I think he was right. The racecourse, the golf course and possibly other parts of the common would be mown, but not for the purpose of gathering a crop; I would not have thought this was cultivation. The golf club enjoyed certain rights over part of the common, but it did not have exclusive possession, and I would not have thought that it could be said to occupy the land. The racecourse was run by the corporation itself. I do not think the parts of the course which lay on the common could be described as occupied.

It would follow that, in so far as the public did not already enjoy rights over Doncaster Common of the types referred to in section 193, such rights came into existence in 1926 as a result of that section. However, in my judgment the public did already have such rights. A right to what I have described as recreation must, as both counsel accept, include a right to take air and exercise. Therefore, section 193 added nothing.

Mr. Whybrow accepts that if, as I have held, section 193 gave to the public nothing which it did not already have, then the fact that the land was not registered under the Common Registration Act 1965 cannot have detracted from the rights of the public in 1970. The position would have been the same from 1970 onwards as it had been before 1926. If I were wrong in saying that by 1925 the public already enjoyed rights over Doncaster Common which were large enough to embrace what would otherwise have been given by section 193, then it would follow that section 193 added to the public's rights, and it would then be necessary to decide whether what had been added in 1926 was taken away by the fact of non-registration in 1970. Mr. Whybrow submits that it would go; Mr. George submits that it would survive. Since, in my view, the question is academic, I shall do no more than state my conclusion,

which is that I prefer Mr. Whybrow's argument. Mr. George's submission to the contrary was based on the argument that Parliament in 1925, having given rights under section 193 in express terms, should not be taken as legislating in 1965 for their extinguishment in the absence of express words to that effect. I find this less compelling than Mr. Whybrow's submission that a clear implication that rights granted by section 193 were to be extinguished by non-registration arises from the 1965 Act, and in particular section 1(2) and section 21(1).

I turn to the question of whether the law will permit the court to infer that the public have acquired a right to recreation over Doncaster Common. There are two parts to the question. (1) Is such a right one known to the law? (2) If so, does the law permit the inference of its existence to be drawn in this case?

What is claimed is not an easement or a profit or a right of common. It is akin to the right which local inhabitants may enjoy over a town or village green (see the definition in section 22(1) of the Commons Registration Act 1965). But there are differences. Rights over town and village greens are those not of the public as a whole, but of the local inhabitants, and they derive from custom. The present claim is that the rights are those of the public and it is not, and could not be, based upon custom.

Neither counsel has been able to produce a decided case which is on all fours with the situation here. Mr. George, who helpfully summarised this part of his case in writing, begins by submitting that a person is capable in law of dedicating his land to the use of the public for recreation, for example, by the express creation of a trust or by act of dedication. Mr. Whybrow accepted this proposition. [However, I am not sure that "dedication" is strictly the correct word. Generally, I think, that word is used in relation to highways.] In support Mr. George cited *Re Hadden*. This was a case in which a testator sought to leave the residue of his estate on a trust which Clauson J. construed as one to benefit as many people as possible by the provision of such facilities as playing fields, parks and gymnasiums for their recreation. This was held to create a valid charitable trust. It was no objection that the beneficiaries were the public. Mr. George goes on to submit that such an act of dedication would have been within the powers of the Doncaster Corporation between 1507 and 1888. Mr. Whybrow accepts this. [Again I doubt the use of the word "dedication."] This is not an area of the law with which I have great familiarity, and my opinions are the more hesitant on that account. What I take to be agreed between counsel is that Doncaster Corporation, being a corporation capable of disposing of property by way of trust, had the power to declare in proper legal manner that the common was thenceforth held by it in trust for the public with the object of giving it the right to indulge in recreation thereon.

That being agreed, it seems to me not to matter that there is no decided case concerning a corporation which has so declared. I could therefore proceed at once to consider whether, there being no direct evidence that this was done, it is permissible in law to infer that it was done. However, during the citation of authority on the point of whether or not it is open to the court to draw the inference, attention was also focused on passages which, it was submitted, dealt with the question of

whether a public right of recreation could exist in law. In particular, Mr. Whybrow, who likened it to a *jus spatiandi*, drew attention to passages suggesting that a *jus spatiandi* was unknown to English law. As I deal with the cases I will therefore consider this question as well as that of whether the inference may lawfully be drawn.

The earliest cited was *Mounsey* v. *Ismay* which involved a claim by the inhabitants of Carlisle to hold horse races on the defendant's land at Kingsmoor on each Ascension Day. Long uninterrupted user was established. The argument was whether the inhabitants could invoke section 2 of the Prescription Act 1831, the applicability of which turned on whether the claim was a claim at common law by custom to an easement.[1] Martin B. held that what was claimed was not an easement; there was no dominant tenement and the right claimed was not on behalf of the individual but of a class.[2] Further, the word "easement" in section 2 had to be taken as analogous to a right of way and a right of watercourse. It had to be "a right of utility and benefit, not one of mere recreation or amusement."[3] During the argument Martin B. had said "it" (which I take to mean a right to hold races) "cannot properly be a subject of a grant; it is a mere licence."

The decision itself does not stand in Mr. George's way. Mr. George is not relying on custom or arguing for an easement. It is Martin B.'s remark during argument which is more to the point since one holding of races is a form of recreation. This remark was questioned in *Re Ellenborough Park*[4] by Lord Evershed M.R. who delivered the judgment of the court. However, Lord Evershed went no further than to say that the remark must at least be confined to exclusion of rights to indulge in such recreations as were in question in the case before the court (horse racing, or perhaps playing games) and had no application to the facts of *Re Ellenborough* where the right of those who lived in houses around a town square to use the garden in the square was held to be clearly beneficial to the premises to which it was attached and therefore not fairly to be described as one of mere recreation or amusement.

Even so, I do not think that I should regard Martin B.'s remark as fatal to Mr. George's submission. It was made *obiter*. Further, in *Tyne Improvement Commissioners* v. *Imrie*; *Att.-Gen.* v. *Tyne Improvement Commissioners*, Phillimore J. expressed a contrary view,[5] namely, that a landowner may dedicate the use of his land to the public to bathe and fish. (I see he used the word "dedicate"). Bathing, to say nothing of fishing, is pure recreation. Then there is the decision in *Re Hadden*, and Clauson J.'s opinion therein[6] that Parliament recognised in the Mortmain and Charitable Uses Act 1888, s.6, that land may be dedicated to the recreation of the public. And there is Mr. Whybrow's assent to Mr. George's first proposition in this part of the case.

Mr. George goes on to submit that what he has called "dedication" ought in an appropriate case (and this he submits is one) to be inferred

[1] (1865) 3 H. & C. 486 at pp.496–497.
[2] *Ibid.* at p.497.
[3] *Ibid.* at p.498.
[4] [1956] 1 Ch. 131 at pp.178–179.
[5] (1899) 81 L.T. 174 at p.179.
[6] [1932] 1 Ch. 133 at pp.141–142.

in the absence of direct evidence of an express grant to trustees or other act of dedication. In this he relies on *Goodman & Anor.* v. *Mayor of Saltash*. In issue in that case were (a) whether the corporation had established a prescriptive right to a several oyster fishery, and (b) whether the local inhabitants had established a prescriptive right to dredge for oysters therein for part of each year and to carry them away without stint for sale or otherwise. There was convincing evidence of some 200 years of uninterrupted user as of right in support of both (a) and (b). Despite the putting in evidence of the corporation's charters, minutes and other documents, neither side was able to produce in evidence a grant in its favour.

Lord Selborne L.C. said[7]:

> An open and uninterrupted enjoyment from time immemorial under a claim of right seems to me all that is necessary for a presumption that it had such an origin as would establish the right if a lawful origin was reasonably possible in law.

In his opinion the facts were consistent with the grant of the fishery to the corporation's predecessors subject to a condition that the inhabitants of the borough were entitled to fish in the accustomed way.[8] There being no good reason in law why their right might not have been so founded, he held that it should be presumed that this was its origin.[9] Lord Selborne went on to say, instancing *Lord Rivers* v. *Adams*, that had the borough been able to produce title deeds which showed no such trust, the presumption could not have been made.[10] But the borough was not able to do this. No more need be said about the case than that Lords Watson, Bramwell and Fitzgerald agreed with Lord Selborne's approach, whereas Lord Blackburn dissented, the basis of his dissent being that no form of grant could be framed giving a profit to a fluctuating body such as local inhabitants.[11]

Mr. Whybrow makes three points in support of his submission that the presumption which was made in *Goodman's* case should not be made here. The first is that in *Goodman's* case what the inhabitants were claiming was a profit; not so here. The second is that in *Goodman's* case the claim was made not, as here, by the public as a whole, but by a limited class, namely, the inhabitants. I do not think that either distinction is in point. Once one has concluded, as I have, that the public *could* lawfully have been the beneficiary of a trust, the object of which was to give them the right to take recreation on Doncaster Common (and there is nothing in *Goodman's* case to the contrary), the only remaining question is whether the law permits the court to presume that this *was* done. It is only Mr. Whybrow's third point which bears on this. This is that in *Goodman's* case there was no reference to the fishery in any of the documents produced; so there was nothing to say that when the borough acquired it (whenever and however it did) the

[7] (1882) 7 A.C. 633 at p.639.
[8] *Ibid.* at p.642.
[9] *Ibid.* at pp.642 and 647.
[10] *Ibid.* at p.647.
[11] *Ibid.* at p.655.

acquisition was not subject to the presumed trust in favour of the inhabitants. Contrast the position here where it is known (and agreed by the parties) when and how Doncaster Common was acquired. Mr. Braim, in paragraph 3 of his affidavit, says:

> I verily believe that the Council derive title from a charter of Henry VII by which the Doncaster Corporation became Lords of the Manor and thereby acquired ownership of the common.

Mr. Ward's affidavit, in paragraph 4, states:

> I verily believe from the researches I have undertaken that the Doncaster Corporation, in pursuance of its charter powers, became both the Lord of the Manor and the owner of the soil of . . . the present extent of the common in 1505 . . .

Mr. Whybrow's argument is that, this being known, there is no room for the presumption that the acquisition was subject to a trust in favour of the public giving it the rights now claimed. Unfortunately, as it seems to me, neither deponent says whether the corporation's document of title exists, or whether he has looked at it, or whether or not it says anything about the rights now claimed.

What then should I presume? If the document of title exists, it is likely that it would have been inspected, and had it said anything about the rights, this would surely have been said in the affidavits. So the choice is between assuming that it does not exist and assuming that it does exist but is silent on the matter. In the former event a presumption of the type drawn in *Goodman's* case could be made; in the latter it could not. I think the former is the more likely. The phraseology of the extracts which I have read from each affidavit is not such as I would have expected had the document existed. So the court could make a *Goodman* presumption.

What if the document does exist and is silent? In that event, I see nothing to prevent the court from presuming that at some time between 1505 and 1888 the corporation created in favour of the public a trust by means of an instrument now lost granting the rights in question. While the presumption would not be the same as that made in *Goodman's* case, the drawing of it would rest on the same principles.

In *Tyne Improvement Commissioners* v. *Imrie* and *Att.-Gen.* v. *Tyne Improvement Commissioners*, the question was whether the general public had a right of way over part or all of a pier one mile long built by the commissioners between 1854 and 1895. The right asserted was a right of way to use it to go to the sands for boating and bathing. The claimants argued for a presumption of lost modern grant. The commissioners argued that the right claimed would be incompatible with the proper performance of their statutory duties. Phillimore J. rejected the claim save to a right of way over a limited portion of the pier.[12] Beyond that the user had been interrupted.[13] The commissioners had bought the land as recently as 1857. It is implicit that there was no mention of any right of way in their deeds. Phillimore J. held that it would be ridiculous in such a case to presume a lost modern grant unless

[12] (1898) 81 L.T. 174 at p.182.
[13] *Ibid.* at p.181.

driven to it; had any grant been made one would expect a record of it to have been strictly preserved.[14]

These matters serve to distinguish that case from the present, but certain further dicta in it call for consideration. First Phillimore J. said that,[15] assuming that there could be dedication for bathing and fishing, it would be "rather difficult to prove and would require very conclusive evidence." A little later he said[16]:

> As between the two possible views, the one that there has been a dedication by an owner of his land for such purposes as bathing and fishing and recreation, and the other view that the whole thing has been permissive, there is a strong probability that the user is permissive rather than of right. In fact, to put it shortly, the very largeness of the defendants' claim militates exceedingly against its being proved.

While expressed in general terms, these remarks must be considered in the context in which they were made. The landowner in question was a public body charged with statutory responsibilities in pursuance of which it had built the pier. In the present case the landowner is a borough corporation. The land, so far as the evidence goes, has never been used for anything other than recreation of one kind or another. The corporation would have had an interest in affording the amenity to its residents and a further interest in encouraging others from outside the borough to attend the races, in particular the St. Leger, which in the eyes of many must have been Doncaster's most celebrated attribute. Phillimore J. did not suggest that the presumption could never be drawn. The present is a case in which I think it clearly should be drawn.

Counsel for the Tyne Improvement Commissioners had submitted that what was being claimed was a *jus spatiandi* which he submitted was not known to English law.[17] Mr. George submitted that Phillimore J.'s belief that there could be a right to bathe, to fish and to recreation[18] amounted to a rejection of this submission. I am not sure that the two are the same. Phillimore J. did not use the phrase "*jus spatiandi*" in his judgment so far as I have detected. The term *jus spatiandi* has been treated elsewhere as a right to stray rather than to use a defined way between one point and another. No doubt a right to enjoy recreation on a particular piece of land includes the right to wander over it at will, but that is not to equate the two (see Lord Evershed M.R. in *Re Ellenborough Park*.[19]) I prefer not to regard Phillimore J. as having expressed any view about a *jus spatiandi*.

Att.-Gen. v. *Antrobus* was an action brought against the owner of the land upon which Stonehenge stands after he had erected certain fences around it. On the relation of the chairman of the local parish

[14] *Ibid.* at p.178.
[15] *Ibid.* at p.179.
[16] *Ibid.*
[17] *Ibid.* at p.177.
[18] *Ibid.* at p.179.
[19] [1956] 1 Ch. 131 at p.179.

council and others the Attorney-General sought an order for the removal of the fencing and an injunction against the erection of any further fencing. It was put on two grounds: (1) that Stonehenge was subject to a trust for its free user by the public; (2) that the fencing blocked what were public roads. Both grounds were held to be bad and the action failed.

The first ground is relevant for present purposes. Farwell J. said[20]:

> The plaintiff produces no evidence in support of his first claim, but he asks the court to presume a lost grant or a lost Act of Parliament because for many years past the public have been in the habit of visiting Stonehenge. The defendant, on the other hand, produces his title-deeds shewing a purchase in fee by his great-great-uncle from the trustees of the Duke of Queensberry more than seventy years ago, and an absolute fee simple title in himself.
>
> It is impossible for the court, under those circumstances, to make any such presumption as is suggested. The public as such cannot prescribe, nor is *jus spatiandi* known to our law as a possible subject-matter of grant or prescription; "and for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good." It is true that in some cases in the books the courts have presumed trusts, but they have been cases where corporations holding the fee have been held to be trustees for some of their corporators, or of the inhabitants, to the exclusion of the others. *Goodman* v. *Saltash Corporation* is a good illustration of this, but in that case Lord Selborne expressly negatives the application of such a principle to a case like the present. "The principle," he says, "on which I have arrived at this conclusion, would not, in my opinion, be applicable to such a case as *Lord Rivers* v. *Adams*, in which, if the defendants had alleged the plaintiff to be their trustee, that allegation would have been met by the production of the plaintiff's title-deeds, shewing that he held under conveyances made to him and his ancestors (in the usual way in which titles to land are established in this country), without any trust. Against such a title, a trust could not, in my opinion, be presumed from any evidence of mere fishing in a stream which passed, and of which the plaintiff had possession, under those conveyances." Moreover, I adhere to the view that I expressed in *Att.-Gen.* v. *Simpson* that the gist of the principle on which such presumptions are made is that the state of affairs is unexplained without such presumption. But the liberality with which landowners in this country have for years past allowed visitors free access to objects of interest on their property is amply sufficient to explain the access which has undoubtedly been allowed for many years to visitors to Stonehenge from all parts of the world. It would indeed be unfortunate if the courts were to presume novel and unheard of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their gates in order to preserve their property.

[20] [1905] 2 Ch. 188 at pp.198–199.

Considering the unique character and great archaeological interes of Stonehenge and its position on downs where no harm is likely t be done to the land, it is most improbable that permission t visitors to inspect would have been ever refused, and as the right o walking around and inspecting the stones is not one which could be the subject-matter of a grant, the owner may well have dispensec with requests for permission, relying on the fact that no right could grow thereout.

Farwell J.'s reasons for rejecting the first ground were[21]:

(1) The plaintiff produced no evidence to support it. He asked the court to presume lost grant or lost Act of Parliament from the fact that the public had for many years visited Stonehenge. On the other hand, the landowner produced his title deeds which went back to 1826. They did not mention the right claimed. This made it impossible to presume a lost grant. The case was like *Lord Rivers* v. *Adams* and distinct from *Goodman* v. *Saltash Corporation*.

(2) A public right cannot be based on prescription.

(3) A *jus spatiandi* is not known to our law as a possible subject-matter of grant or prescription.

(4) *Goodman's* case was distinguishable because the presumed trust was for the benefit of only some inhabitants to the exclusion of others.

(5) No presumption of a grant could be made unless the state of affairs could not be explained without it, which was not the case. The liberality of the landowner was sufficient explanation.

I need say nothing about:

(1) save to observe that in the matter of title deeds the position in the present case is akin to that in *Goodman's* case and distinct from that in *Lord Rivers* v. *Adams*.

(2) calls for no comment. Mr. George is not relying upon prescription.

(3), which was about the *jus spatiandi*, was not necessary to the decision. There is an extended discussion in *Re Ellenborough Park* about *jus spatiandi*.[22] Farwell J.'s remarks about it in *Antrobus* are considered and also other *obiter* of his to the same effect in *International Tea Stores* v. *Hobbs*. On neither occasion had Farwell J. cited authority for his opinion. The Court of Appeal did not go so far as to say that the public *could* enjoy a *jus spatiandi*, for the case which they were deciding concerned private rights. Even so, considerable doubt must now attach to Farwell J.'s view, even in relation to public rights. I have already referred to the part of the discussion which is to the effect that a right to use a garden in the ordinary way is not a mere *jus spatiandi*.[23] This must the more be true of a right to use an area like Doncaster Common for recreation in general.

[21] *Ibid.*
[22] [1956] Ch. 131 at pp.177–185.
[23] *Ibid.* at p.179.

In favour of the possibility of the existence of public rights of recreation are Phillimore J.'s remarks in *Tyne Improvement Commissioners*[24] and *Re Hadden*, to both of which I have already referred.

I need say no more about point (4) than I already have.

Point (5) is in reality a distinction of fact. In the present case I do not regard liberality on the part of the Doncaster Corporation as a sufficient explanation.

Before leaving *Ellenborough Park* I ought perhaps to refer to a passage where it was said that there was[25]:

> no doubt but that *Antrobus* was rightly decided; for no right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription.

The right claimed in the present case is not to wander over an undefined area. It is a right to take recreation in a defined area. *Re Hadden* recognises that such can be granted.

For these reasons I accept:

(1) that had an *express* grant of the rights now claimed by the public been produced the law would have recognised their validity;

(2) that the law allows the court to presume that at some time prior to 1860 these rights were validly granted;

(3) that the evidence before the court cannot sufficiently be explained by mere sufferance or by licence from the corporation; and

(4) that the presumption is therefore to be drawn.

In other words, what everyone had assumed to be the case until 1984 was and is correct, namely, that the public's use of Doncaster Common for purposes of recreation is not only lawful but as of right.

One further point remains. What quality of user "for purposes of public recreation" is required before the land is "open space" for the purposes of section 123(2A) of the Local Government Act 1972 as amended? Mr. Whybrow contends that it must be as of right, *i.e.* that user under a bare licence will not suffice. He suggests that any other construction would be absurd and inconvenient. I do not agree. Section 123(2A) appears to have been enacted to protect the interests of those lawfully using open spaces. A bare licensee has no interest in land, but so long as his licence exists he has something which he can enjoy. It can only be brought to an end on giving him reasonable notice. In many cases such notice need only be very short, but it is possible to envisage circumstances in which a significant period would be required. Where a licence has been given, there is no hardship or absurdity in a council having to choose between postponing its disposal of the land until such notice has been given and expired and, alternatively, advertising the intended disposal in the way required.

Thus, even if I were wrong in holding that the public's use of Doncaster Common is as of right, and its use depended upon the

[24] (1899) 81 L.T. 174 at p.179.
[25] [1956] Ch. 131 at p.184.

existence of a bare licence, the corporation would be obliged to comply with section 123(2A) unless it first gave reasonable notice of termination and that period had expired. Such notice has not been given. The applicant is entitled to relief, and the court makes the declaration sought in paragraph (1) of the notice of application.

Application allowed with costs.

Solicitors—Dibb & Clegg, Doncaster; Sharpe Pritchard & Co., agents for W. R. Bugler; solicitor for the Doncaster Metropolitan Borough Council.

C.R.
Form 2

COMMONS REGISTRATION ACT 1965

NOTE: This section contains the registration of the land comprised in this register unit.

Registration authority North Riding County Council

Register unit No. C.L. 387

Edition No.

See Overleaf for Notes

Register of COMMON LAND

COMMONS REGISTRATION ACT 1965
NORTH RIDING COUNTY COUNCIL
REGISTRATION AUTHORITY
Date 9 APR 1970

LAND SECTION—Sheet No. 1

No. and date of entry	*Description of the land, reference to the register map, registration particulars etc.*
~~1~~	~~The pieces of land known as High Ellington Green in the Parish of High Ellington as shown with a green verge line inside theboundary on Sheet 5~~1D ~~of the~~
~~6th April,70~~	~~register map and distinguished by the number of this register unit. Registered by the Registration Authority without application.~~
	(Registration Provisional)
~~2~~	~~The registration at Entry No. 1 above is in conflict with the registration at Entry No. 1 in the Land Section of the Register of Town or Village Greens~~
~~6th April,70~~	~~Register Unit No. 211 and each of those registrations is accordingly to be treated as an objection to the other to the extent of the conflict.~~
	REGISTRATION WITHDRAWN, 16th JULY, 1973.

No. and date of note	Notes	No. and date of note	Notes
~~1~~	~~The objection no. 092 of The Countess of Swinton, Swinton, Masham,~~		
~~2nd June, 70~~	~~Ripon made the 5th May, 1970 is noted in respect of registration~~		
	~~entry no. 1 in this section.~~		
	Objection Upheld, Registration Withdrawn, 16thnJuly, 1973.		

SE 18 SE-1

51D INSET

Common Land Map CL 387 (51D Inset 1)

COMMONS REGISTRATION ACT, 1965

Provisional Register Map of Common Land/Town or Village Greens

(Sheet No. 51D (INSET)) This is the 1st edition of this sheet

Official Stamp

COMMONS REGISTRATION ACT 1965
NORTH RIDING COUNTY COUNCIL
REGISTRATION AUTHORITY.
Date 9 APR 1970

Signed ..... Clerk of the County Council

KEY TO COLOURING AND SYMBOLS

Colouring and/or Symbol	Meaning
Yellow verged inside the boundary and the word "Exempted"	Boundary of land to which, by virtue of an order under Section 11 of the Act, the provisions of Sections 1 to 10 thereof do not apply.
Green verged inside the boundary and the appropriate register unit number	Boundary of land comprised in the register unit shown.
Red interrupted line verged yellow or green, as the case may be, inside the boundary	Boundary of land where no boundary feature appears on the Ordnance Survey map.
Red continuous line suitably lettered, or lettering alone.	Limit of land over which a registered right of common is exercisable or to which a registration of ownership applies, so far as that limit does not coincide with the boundary of land comprised in a register unit, and cannot conveniently be described by reference to any feature appearing on the map.
Violet hatching, and where necessary, lettering as well.	Land which has been removed from the register under Section 13 of the Act, or of which the registration has been cancelled.
Blue interupted line.	Boundary of Registration Area falling within the map.
Other colourings and symbols :—	

Ellington Firth

XXV. 5.

E L L I N G T O N

High Ellington

Low Ellington

Ewemire House

School House

New House

Methodist Church (Wesleyan)

Institute

Trough

Strand Well (Disused)

Site of Chapel

Broad Beck

Friends' Burial Ground (Disused)

F.B.

F.P.

G.P

T.S.

B.M. 358·3

B.M. 350·9

B.M. 378·4

Middleham 6
Masham 3

257 6·612
258 12·637
259 1·398
260 3·824
261 ·078
262 ·553
284 ·384
220 4·842
219 10·650
218 ·759
217 8·436
222 1·469
224 ·273
210 ·214
211 ·554
212 3·880
213 3·344
208 4·179
214 10·482
207 4·102
215 10·703
205 13·071
206 5·254
204 9·700
225 7·655
230 11·153
195 17·747
200 2·354
199 1·041
196 1·511
201 ·889
203 2·631
202 ·549
198 1·231
197 2·326
194 14·399
177 1·508
176 ·562
179 2·378
151 11·409
153 7·009
154 17·025
152 ·419
174 8·784
175 ·948
171 7·457
172 ·940
170 ·905
171A ·321
169 ·943
168 ·883
167 1·240
166 2·392
165 ·429
164 2·164
163 7·052
162 ·774
161 2·676
160 1·599
159 ·832
158 1·473
157 ·246
156 ·820
155 ·636
156
64 ·052

C.L. 387

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Re-Surveyed in 1891. Revised in 1927. Re-Levelled 1928.

CHARACTERISTICS AND SYMBOLS FOR BOUNDARIES, &c.

County	— — —	C	Municipal Wards	W	Change of Boundary, indicating the point at which the character of a Boundary changes	51	Every parcel is numbered thus
Boroughs: County	— — —	C	Urban Districts	D	Antiquities (Site of)	3·011	Its area is given underneath in Acres, thus
Boroughs: Parliamentary	— ⊥ —	P	Civil Parishes	P	Trigonometrical Station		Braces indicating that the spaces so connected are included in the same reference number and area
Boroughs: Municipal	— — —	M	Rural Districts	R	Poor Law Union	U	For other information see Characteristic Sheet

LXXXV. 10.

Printed and Published by the Director General at the Ordnance Survey Office, S

The altitudes of bench marks and surface heights are given in Feet above the mean level of the sea at Newlyn, and are b
Altitudes indicated thus (B.M. 54·7) refer to bench marks on buildings, walls, &c., those marked (+) preceded or f

Note – To convert Decimal parts of an Acre into Roods and Perches, multiply by 4, this will give R
multiply this Decimal by 40 thus obtaining Perches and Decimals of a Perch. Examp

This portion to be detached and sent to the registration authority.

C.R. Form 26 (OBJECTION FORM)

For official use only

Official stamp of registration authority indicating date of receipt.

Objection No. 092

OBJECTION to registration(s) under the Commons Registration Act 1965.

To the (name of registration authority) North Riding of Yorkshire Council.

I hereby object to the under-noted registration(s) on the grounds stated.

1. Name and address of person making the objection. Mary Constance CUNLIFFE-LISTER The Countess of Swinton Masham Nr Ripon Yorkshire

2. Name and address of solicitor if any. (Fill this space only if a solicitor has been instructed for the purposes of the objection. If it is filled, all correspondence and notices will be sent to the solicitor.) Eccles Haldane Young Masham Nr Ripon Yorkshire

3. Reference (if any) of the objector or his solicitor. NCC

4. Register in which the registration(s) objected to appear(s). *Common Land/~~Town or Village Greens~~

5. Register unit number. 387 ~~388~~

6. Section of register in which registration appears. *Land/~~Rights/Ownership~~

7. Registration entry number(s). 1 & 2

8. Grounds of objection. (If a plan is sent, the fact should be mentioned here. The plan must be signed by the person who signs the form.)

I am the owner as tenant-for-life under a settlement of the ~~area of~~ land the subject of these ~~two~~ registrations. I deny ~~that it is~~ common land and ask that any common rights claimed should be precisely defined. Though I deny any exist.

Dated 5 May 1970. Signature [redacted]

(In the case of an objection by a body corporate or unincorporate, or charity trustees, this form must be signed by the secretary or some other duly authorised officer.)

*Strike out whichever does not apply.