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THE UNIVERSITY OF DURHAM

Department of Law

The Law Relating to Common Land in England

Having Regard to the

Commons Registration Act 1965

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Mrs Rosalind Amanda Jennie Oswald

Submitted 1983 for the degree of Bachelor of Civil Law



-5. DEC. 1983

ABSTRACT

This thesis is intended to examine the Commons Registration 1965 Act in its historical context.

The first part consists of a brief account of the history of common land making reference to the emergence of identifiable common rights, the inclosure movement and the progress towards protection for common land which was made in the late nineteenth and early twentieth centuries.

The second part includes an examination of the problems which seriously affected common land during the twentieth century and which led to the appointment of a Royal Commission in 1955. The problems are examined from the points of view of various parties who might have an interest in common land, that is, the owner, the commoner, a Rambler and a conservationist. Finally, a factual account is given of the problems which emerged when proposals were made to build Cow Green reservoir in Teesdale; the site in question consisted in part of common land.

The third part contains an examination of the recommendations made by the Royal Commission in their Report regarding a system of registration for common land and town or village greens and new proposals regarding its maintenance and management.

The provisions of the Commons Registration Act 1965 and related statutory instruments are considered in part four, the section being divided into three parts containing details of its aims, the provisions themselves and its effects. Of particular interest is the section regarding the effects because some of these cannot have been intended and merit detailed consideration. A modest body of case law has emerged as a result of the effect of the provisions in the Commons Registration Act 1965 and the cases are examined and

discussed in this section. Particular emphasis is placed upon the decisions in Central Electricity Generating Board v Clwyd County Council [1976] 1AER 251 and Box Parish Council v Lacey [1979] 1AER 113.

The final part examines the events which have taken place since 1965 and considers the recommendations contained in an Inter Departmental Working Party Report supplied by the Department of the Environment. There is also a discussion regarding a consultation document circulated with the Working Party Report and the replies to that document from a small number of interested bodies.

Finally, there are eight appendices which contain additional material supplementary to the text.

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F O R E W O R D

The scope of this work will be to discuss the following aspects of common land: its history, including the effects of the enclosure movement; its problems in the twentieth century and the attempts made to solve them, and the future which common land may have. At the time of writing¹ Parliament has enacted the Commons Registration Act 1965 as a first step towards the proper management and regulation of common land and further legislation is envisaged.

¹ May 1983

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ABBREVIATIONS

ACC	Association of County Councils
AER	All England Law Reports
Ch	Chancery
CL	Current Law
COSFPS	Commons Open Spaces and Footpaths Preservation Society
CPRE	Council for the Protection of Rural England
CPSJ	Journal of the Commons Open Spaces and Footpaths Preservation Society
CRA	Commons Registration Authority
JPEL	Journal of Planning and Environment Law
NFU	National Farmers Union
P&CR	Property and Compensation Report
QBD	Queens Bench Division
Royal Commission Report	Royal Commission on Common Land 1955-8 Cmd 462
SI	Statutory Instruments
SJ	Solicitors Journal
Working Party Report	Inter Departmental Working Party Report - Common Land Preparations for Comprehensive Legislation 1975/77
1965 Act	Commons Registration Act 1965

1 The Manorial System and Common Land

The precise origins of common land are difficult to trace but evidence of rights which were analogous to common rights may be found prior to the tenth century. Certainly, the rights are older than the manorial system but it was in medieval times that they were of particular significance as an essential feature of the economy.

After the Norman Conquest, the greater part of England was divided into manors in which agriculture was carried out under the open field system though with considerable local variations. Within a typical manor the lord of the manor was considered to own the land and he had free and customary tenants. The manorial lands consisted of demesne lands which the lord kept for his own use and cultivation, the open fields (usually three in number) cultivated by the lord's tenants and the waste land of the manor not needed for cultivation. The open fields were divided into strips each cultivated separately. After the harvest beasts would be allowed to graze on the open fields. Each year one of the fields would be left fallow and the beasts would graze there throughout that year. The waste land of the manor would be used by the lord of the manor, his free and unfree tenants and the landless cottagers for a variety of purposes including pasturing animals, collecting wood, digging turf or peat and taking sand or stone.¹ The relationships between the inhabitants of the manor and the exercise of the various rights and customs were regulated in the manorial courts held by the lord's steward.²

The open field system was most prevalent in the Midlands as well as Devonshire, Cheshire and areas of the north-east as far north as County Durham. The land in the fenlands and parts of Somerset was too marshy for arable farming. In large areas of the north of England,

the condition of the land and the lack of population precluded arable farming. Where the soil was rather poor one alternative system was known as the infield-outfield or run-rig system under which the infield was cultivated intensively until crop yields fell to an unacceptable level when a different area would be brought into cultivation. The outfield was used as common grazing. The infield-outfield system was used in the north-west and south-west England.'

Whichever system prevailed in any particular area, there was always an area of land whose natural produce could be taken by the local inhabitants as of right.

Between the fourteenth and the nineteenth centuries land usage in England changed dramatically for a number of reasons and as a result common land was liable to be inclosed, the rights over it being extinguished.

a) The Reasons for Inclosure

The first reason was the increasing population in England. More land was needed for the additional people to live on and it was necessary to cultivate more land to produce food for the increased numbers. Therefore, waste land was lost both because it was built upon and because it was brought into intensive cultivation. Land hunger became more acute in the eighteenth and early nineteenth centuries. It is particularly significant that the proportion of the total population living in towns was rising quickly during that period. By 1831 one person in two lived in a town whereas in 1790 only one person in five was a town dweller.' The commons which were near to the industrial towns, such as Oldham, were frequently inclosed and then built on by speculative builders.²

The second reason concerned changes in agricultural methods. The old systems such as the open field or infield-outfield were under attack as being inefficient and productivity could rise when land was inclosed. Specialisation became possible, such as the barley in Lincolnshire or fruit in Kent.³ Inclosure also facilitated the sowing of leys, also known as sown grasslands, which were used for a few years and then used for arable farming once more. Inclosure for permanent grazing took place on a larger scale in the Midland counties such as Leicestershire and Warwickshire, the grazing being required for sheep and cattle rearing. Meat prices rose and the woollen industry expanded in the late fifteenth and early sixteenth centuries. Cattle and sheep farming were becoming

more lucrative because they did not require a large workforce. Inclosure for these purposes created tension and caused accusations of unemployment and rural depopulation against the landowners who carried it out.'

A third reason why many commons were lost stemmed from a particular Elizabethan fashion, that of building ostentatious houses with large deer parks.²

b) The Manner of Inclosure

The manner in which inclosure took place changed gradually between the fourteenth and nineteenth centuries as the inclosure movement gathered momentum.

Inclosure consisted of the physical enclosure of the land, the extinguishment of common rights over the land and the distribution of the physically enclosed land. At common law the lord of the manor had the power to inclose the waste provided sufficient pasture was left for the pasturing of the freeholders beasts levant and couchant³ and this power was confirmed by the Statute of Merton in 1236. A development from inclosure by the lord of the manor prevalent in the seventeenth century was inclosure by agreement between the lord and the commoners. Decrees confirming the agreements could be obtained from the courts of Chancery or the Exchequer. After 1640 official opposition to enclosure was relaxed and recourse was made to private acts of Parliament to ratify enclosures. 576 acts relating to waste land alone were passed in the eighteenth century. However, in 1801 the inclosure movement gathered even more speed when the General Inclosure Act was passed making the process of inclosure easier and cheaper and confirming official approval of inclosure. From that date to 1844, 808 Acts affecting 939,043 acres were passed.⁴

c) The Disadvantages of Inclosure

Although inclosure brought tangible benefits by encouraging specialisation and increasing productivity, the inclosure movement brought radical changes to the rural economy and the continued disappearance of common land was not without its disadvantages.

The first individuals to suffer were those unable to establish that they were the owners of any common rights with the result that they were not entitled to any compensation. The complexity of the medieval law relating to the rights would make it even more difficult for an illiterate cottager to establish a prescriptive right although where a squatter could claim more than twenty years occupation he would generally receive compensation from the commissioners.' Recognition of the problem was shown in a statute² in 1782 which authorised up to ten acres of land to be inclosed by the guardians of the poor so that the land could be cultivated for the benefit of the poor in the parish. Later statutes made similar provisions to help the landless labourers but the problem was a serious one and even Arthur Young who had been a champion of inclosure eventually stated that he felt the poor had suffered from inclosure in nineteen cases out of twenty.³

The second individuals to suffer were those who although able to establish ownership of common rights, did not own sufficient rights to receive a viable acreage of land in compensation. The process of inclosure consisted of the consolidation of the strips and the distribution of portions of land to the former commoners in proportion to the value of his interest. In some cases the former commoner could not even afford to fence the plot which had been allocated to him and, therefore, was obliged to sell his land to the more affluent farmers.

The third sufferers were the members of the public at large. As towns increased in number and size, the existence of unfenced areas

for recreation and exercise had become more and more important. The public had no right to use the land: it belonged to the lord of the manor and only the commoners had rights over it but because physically the land was unenclosed the public enjoyed de facto access which could not be impeded in any practical way. The problem of open space for recreation was particularly acute near London.

The problems created by inclosure did not pass unnoticed and in 1836 the first step was taken to reverse the encouragement to inclose which had been given and commence a completely different function for the use of the remaining common land.

During the late nineteenth and early twentieth centuries, various events occurred which secured the future of common land. Commencing in 1836, a series of acts of Parliament was passed which made inclosure difficult or impossible, the most important of these acts being the Metropolitan Commons Act 1866, the Commons Act 1876 and the Commons Act 1899.

Land within a certain distance of London or other large towns could not be inclosed at all. Even where inclosure was permitted the health, comfort and convenience of the local inhabitants had to be taken into account and the Inclosure Commissioners could set aside an area for the purposes of exercise and recreation of the inhabitants of the neighbourhood. If such an area were not set aside the Commissioners were required to state their reasons. A provisional order approved by Parliament became an essential part of an inclosure award.

However, making the inclosure process more expensive, lengthier and more complicated would not prevent those who were determined to inclose, especially where substantial financial gains could be made and so in 1865 the Commons, Open Spaces and Footpaths Preservation Society (referred to hereafter as the Commons Preservation Society) was founded to oppose attempts to inclose and build upon the commons near to London where the value of building land was particularly high. The Commons Preservation Society has proceeded to extend its activities to the whole of England and it has enjoyed considerable success in ensuring that common land did not disappear completely in England. It is ironic that the preservation of English commons, which were primarily of agricultural importance, can be attributed, at least in part, to an organisation concerned for the well being of town dwellers.

Commons were preserved in a more peaceful way by authorities who purchased areas of land to ensure that they would be safe from inclosure. The Corporation of the City of London bought 6,000 acres in Epping Forest in 1878 and 492 acres at Burnham Beeches in Buckinghamshire in 1880.'

Finally in 1925 Parliament enacted two provisions which protected common land and confirmed its new function. By sections 193 and 194 of the Law of Property Act 1925 Parliament provided that the public should have a right of access to metropolitan and urban commons and to those whose owner had deposited a deed with the appropriate Minister and forbade the erection of any construction at all on common land without the consent of that Minister. The importance of the enactment is contained in the reference to a right of access for the public. The previous enactments were concerned with the welfare of the inhabitants in the neighbourhood of the common. The Law of Property Act 1925 referred to rights for the public at large. The remaining commons had been successfully saved from inclosure but the public and not solely the commoners were to be the beneficiaries.

Common land was originally an integral part of the manorial system but the agricultural and industrial revolutions produced a new economic structure in which common land had an additional function. Particularly in lowland areas, the land had become valuable by providing town dwellers with open spaces for recreation and exercise. However, in moorland areas where sheep farming was the main agricultural activity, common rights, particularly rights of pasture, retained their original economic importance. In addition, areas of land which were no longer of great agricultural value were providing havens for wild plants, animals and birds and becoming unofficial nature reserves. Therefore, by 1926 common land had at least three different functions but the legislation regulating the land had been enacted in piecemeal fashion with little attempt to consider the new functions of common land and the relationship between the commoners, the general public and the conservationists. As a result, the law hindered rather than encouraged the most beneficial use of the land and was difficult both to understand and to apply.

The common law had developed during a period when agriculture used completely different methods. The rule of levancy and couchancy² was particularly inappropriate in the twentieth century and that fact was acknowledged by the Royal Commission,

"Thus 'levancy and couchancy' even where it is a rule that is remembered has in fact lost much of its pertinence."³

It was difficult for a landowner, commoner or lawyer to be certain whether rights existed and, if so, who owned them and their extent.

Even the statutory law was difficult to understand because there were so many different acts relating to common land and the definitions used were not uniform.

So far as the application of the law was concerned the problems arose from the safeguards which had been enacted to protect the land. They were so comprehensive that they presented formidable barriers to anyone who wished to deal with the land in any way.

A valuable example is contained in the Commons Act 1876 which enabled a scheme to be prepared for the regulation of a common. However, the procedure to be followed before a scheme could be carried out was the same as the procedure for inclosure. Apart from the time and trouble involved, the assent of the lord of the manor and all the commoners was required and in view of the problems in ascertaining the identity of the individuals it is hardly surprising that the Act has been used infrequently and as a result commons have fallen into poor condition.

The extent of the problem was revealed after the Second World War when land which had been requisitioned by the Ministry of Agriculture Fisheries and Food was to be returned to its owners and commoners. The Ministry had spent a great deal of money in reclaiming the land and wished to obtain assurances that the commoners would continue to maintain the land properly rather than allowing it to revert to its previous condition. However, the commoners could not give assurances regarding management because of the difficulties in obtaining the necessary consents. Therefore, the Ministry used its powers under sections 85 and 92 of the Agriculture Act 1947 to compulsorily acquire the land and at least 3,000 acres of common land have been acquired in this way.'

The statutory law relating to public access was equally hard to apply. The law was clearly stated in section 193 of the Law of Property Act 1925 but it was extremely difficult for an individual to be sure whether or not there was a right of access to a particular piece of land because it was necessary for that person to know

- a) Whether the land fell wholly or partly within a Metropolitan area, borough, or urban district,
or
- b) Whether the owner had executed a deed giving a right of access, and, if so, whether it had been revoked,
or
- c) If no deed was in existence or if it had been revoked, whether the land was owned by the National Trust,
or, if not
- d) Whether a public right of access had been explicitly created by a private act.

However, Parliament did appreciate that there were difficulties facing common land and so a Royal Commission was appointed by Royal Warrant dated 1 December 1955 to review the situation and, if necessary, recommend changes in the law.

The Royal Commission was appointed

"to recommend what changes, if any, are desirable in the law relating to common land in order to promote the benefit of those holding manorial and common rights, the enjoyment of the public, or, where at present little or no use is made of such land, its use for some other desirable purpose." ¹

The Report, which was produced in 1958, contained detailed recommendations which, when implemented, would have lead to a completely different legal framework for common land. There were three main proposals which related to registration, management and access.

Turning to the question of registration, the Royal Commission intended that each county council would open registers where common land and town or village greens, their owners and all existing rights over the land would have to be registered. The registers would be regarded as provisional for twelve years and final after that period although subsequent changes would have to be recorded. Any dispute would be settled by specially appointed Commons Commissioners, with an appeal to the Lands Tribunal if necessary, and after the twelve year period anyone would be able to ascertain whether land was common and if so what rights existed over it simply by looking at the register. After the twelve year period the ownership register was to be transferred to the Land Registry.

The proposals relating to management were as detailed and were regarded by the Royal Commission as an integral part of their scheme for common land and town or village greens in the twentieth century.

"Although our recommendations are divided between the two chapters, we would emphasise that they should be considered as a whole." ²

The initiative for promoting a management scheme would rest with the landowner, the commoners or any local authority whose inhabitants made substantial use of the common. The proposals simplified the procedure the promoters had to follow to gain approval for the scheme

which would be submitted through the local planning authorities to the Minister of Agriculture Fisheries and Food. When approved, after a local inquiry if necessary, the scheme would be laid before Parliament in an order subject to negative resolution.' It is important to note that the members of the Royal Commission clearly envisaged that the proposals for schemes of management would be submitted whilst the registers remained open to registrations or objections:

"By the latter part of the twelve year period, a great many of the more serviceable commons should, we believe, have schemes of one kind or another in operation and would, therefore, have been inspected and recorded on maps." ²

The final major recommendation concerned the question of public access. The Royal Commission recommended that all common land should be available to the public for access as of right although there would be conditions attached to the exercise of the right to ensure that the commoners would not be inconvenienced unduly.³ The members of the Royal Commission obviously believed that the major function for common land in the future was to benefit the public:

"In a sense, the interest of the vanished commoners in keeping the land open would be bequeathed to the public by virtue of the latter's possession of a right of access."⁴

The major recommendations provided a sound framework within which the modern role of common land could have evolved. Although there are potential flaws in the proposals, the combination of the registration and management schemes might have been sufficient to prevent the existing state of uncertainty. However, the Commons Registration Act 1965, hereinafter called the 1965 Act, which resulted from the Royal Commission Report did not even attempt to bring all the recommendations into force and, therefore, the problems which were facing common land have been only partially solved whilst new problems have been created.

D THE COMMONS REGISTRATION ACT 1965

1 The Aims of the 1965 Act

The aims of the 1965 Act were to commence a remedy for the existing defects in the law relating to common land, to provide a sound basis upon which further legislation could be made, to enact part of the recommendations of the Royal Commission and to carry out these three aims without altering the nature or extent of subsisting rights.

The existing defects included difficulty in understanding the common law and in using the land without being involved in lengthy and extensive procedures laid down in protective legislation such as the Commons Act 1876. The 1965 Act assisted in simplifying the common law to a limited extent by ensuring that a final decision was made as to the existence and extent of common rights. After all the registrations have become final the register will provide details of the existence of the rights making a knowledge of the common law less important though not necessarily useless. The requirement for the quantification of all grazing rights will ensure that the doctrine of levancy and couchancy will become obsolete but not until all registrations are final.

The problems surrounding public access' were not affected by the 1965 Act in view of the saving of the Law of Property Act 1925, section 193.

It is clear from the wording of the 1965 Act and the comments made in the debates of the House of Commons² that the 1965 Act was merely an initial step in a process to promote wider and more profitable use of the land which became registered. Two of the sections in the 1965 Act contain the phrase "as Parliament may hereafter determine"³ and whilst the words are of no legislative force they do indicate a future intention. References may be found in Hansard to:

"the management scheme stage to which we look forward after five or six years, or some such period of time"⁴

The 1965 Act provides for the registration of the land, the rights over it and details of its ownership but makes few substantive changes in the law relating to it.

The 1965 Act endeavoured to provide a sound basis for future legislation by providing a degree of certainty. The public registers would have details of common land and town or village greens, the rights over that land and there may be details of ownership. There are limitations upon the extent of the certainty such as the provision in section 4(3)' that where the land is registered under the Land Registration Acts 1925 to 1936 (as they then were) no person shall be registered as the owner. However, there is no doubt that when all registrations are final there will be far greater certainty than existed before the 1965 Act was passed.

The recommendations of the Royal Commission were extensive and envisaged that the management aspect would not be separated from the registration aspect. The 1965 Act does not refer to the question of management at all and so it is clear that Parliament did not intend to adopt the entirety of the Royal Commission's recommendations. So far as the registration proposals are concerned, the Royal Commission proposed a far longer period for registrations and objections to be made and they proposed an appeal from a commons commissioner to the Lands Tribunal rather than the High Court. An interesting point concerns the question of quantification of rights. The Royal Commission recommended that there had to be quantification² but at least some of the members were not in agreement with the method contained in the 1965 Act.³

The substantive changes in the law relating to common land are few in number but have created a good deal of controversy. The problem has been aggravated by the refusal of those promoting the Commons Registration Bill to acknowledge that any substantive changes were being

made at all. Mr Frederick Willey stated

Section 15² required numbers to be specified in every single case. On some commons the rights had not been reduced to numbers and, in the case of a right in gross created by grant, did not need to be. The intention not to change the nature of the rights could not succeed.

The registration recommendations of the Royal Commission were adopted in a modified form whilst those relating to management schemes and access were left to be included in subsequent legislation and changes were made to the registration proposals including a substantial reduction in the period of time during which registrations and objections could be made. The legislation consisted of the Commons Registration Act 1965 which contained extensive powers to make regulations and the synopsis which follows includes the provisions made by those regulations.

The 1965 Act provides that the registration authorities are to be the county councils, county borough councils or the Greater London Council in which the land in question is situated. The authorities are to maintain two registers, one for common land and one for town or village greens, which will be available for public inspection. Each register is to have three sections, the first for land, the second for rights over that land and the third for the ownership of that land. The authorities were to accept applications for registration from any person or the authority could make registrations on its own initiative. Registrations had to be made within a certain period' and late applications could not be accepted. Where an application was made to register rights of common of pasture the number of animals to be grazed had to be specified.

The original registrations were provisional only and the authorities had to take prescribed steps to publicise the registrations in order to attract objections from the public. Once an objection was made the disputed claim came before a commons commissioner unless the objection was subsequently withdrawn or the registration cancelled. The 1965 Act provided for the appointment of Commons Commissioners from

whose decision a person aggrieved could appeal to the High Court.

Where no-one was registered as the owner of the land registered under the Act the question of ownership was to be referred to a commons commissioner. If the commons commissioner was not satisfied that any person owned the land and if the land was a town or village green the Commissioner had to direct the authority to register the appropriate local authority as the owner. Unclaimed common land was to be vested "as Parliament may hereafter determine".¹ No such determination has been made at the present time.²

Certain land, including the New Forest, was automatically exempt from the provisions of the Act and other lands could be exempted by order of the Minister.³

There are provisions to regulate the relationship between land and rights registered under the 1965 Act and land registered under the Land Registration Acts 1925 to 1971. Rights of common are overriding interests which did not require registration under the Land Registration Acts and the provisions in the 1965 Act are far from clear. However, rights which were registered under the Land Registration Acts did not have to be registered under the 1965 Act and, conversely, once registered under the 1965 Act could not subsequently be registered under the Land Registration Acts. The owner of land registered under the Land Registration Acts could not be registered under the 1965 Act. Land, once registered under the 1965 Act, becomes subject to the compulsory registration provisions of the Land Registration Acts.

There are provisions relating to amendment and rectification of the register. Minor amendments were made to the law of prescription to take account of periods during which the land was requisitioned or animals could not be grazed for reasons of animal health.

The provisions of the Law of Property Act 1925' relating to access to and the enclosure of common land were expressly saved. The 1965 Act contained an interpretation section which included a definition of a town or village green and a description, which was not exhaustive, of the type of rights to be regarded as common rights for the purposes of registration.

The 1965 Act has both short and long term effects which must be distinguished. The immediate effects are generally undesirable but may be acceptable when considered with the long term advantages.

The problem of delay with consequent uncertainty has been far greater than was originally anticipated.¹ In March 1978 26,400 disputed registrations remained to be heard and it was anticipated that these would take eight to ten years.² Uncertainties have been created for those having an interest in the registration if not in the land itself. For the landowners, it has proved difficult to dispose of land in respect of which there are provisional registrations and use of common land or town or village greens for some other purpose has been further impeded.

Mistaken registrations have created problems for those wishing to deal with the land and the ease with which a registration could be made has increased the likelihood of mistakes being made.

However, the permanent effects of the 1965 Act are more significant. A new method of creating common rights has been established because uncontested registrations automatically became final³ after the appropriate period without any further investigation. Rights which existed before the passing of the 1965 Act have been reduced or extinguished. The reductions have been brought about by the quantification provisions.⁴ The extinguishment has been the result of failures to register existing rights. It was in the interests of the landowner that as few rights as possible should be registered over his or her land because the value of the land increases as the number of rights over it is reduced. In the remoter parts of England the landowner would be likely to be in a position of power over the commoner, particularly where the commoner rented additional land from the landowner. It would be possible to exercise influence over the commoner to discourage him

from registering his rights. Rights have remained unregistered simply by omission or by a misunderstanding of the provisions of the 1965 Act. The consequences of a failure to register rights are far from clear and have been the subject of substantial litigation including the cases of Central Electricity Generating Board v Clwyd County Council¹ and Corpus Christi College v Gloucestershire County Council²; both cases will be considered in detail.³

A further long term effect of the registration provisions is that the nature of common land or town or village greens has been changed so that it no longer enjoys a capacity to adapt automatically to the changing needs of the local community. By requiring registration of these areas Parliament has declared that they have certain immutable characteristics. An examination of agricultural history reveals that as the needs of a farming community have changed so the land subject to common rights has changed. Although a similar process might be possible theoretically with the use of deeds of grant and surrender the practical consequences are that the identity of certain pieces of land as common land or town or village greens will have become fixed in the minds of those involved in the registration process and so spontaneous changes in land use will be less likely to occur. Eventually, the influence of the registration process will recede and the fluid nature of the land may return but, if so, the information in the registers will cease to be reliable.

The 1965 Act has helped to ensure that certain areas of open land will be unavailable for development because technically rights of common do subsist even though they are unexercised. It has also ensured that unenclosed land used by the public for air and exercise will become enclosed because ancient common rights have not been registered through lack of interest.

The regulations made under the 1965 Act' have made provision for searches of the registers to be made originally at a low cost. However, the cost was increased by over 300% in September 1980.² The service is extremely valuable to the busy practitioner and reduces the time spent in investigating titles to land whilst reducing the risk of error.

The investigations by the commons commissioners into every disputed claim has resulted in a clarification of the common law regulating common land or town or village greens. It is receiving closer attention than over the past one hundred years.

The effects both of failure to register rights and of failure to object to a registration of land have been the subject of litigation. It has become clear that a failure to register rights results in their being extinguished,³ but it would seem that the land cannot subsequently be removed from the registers simply on the basis that there are no subsisting rights.⁴ The effects of failure to object have been demonstrated to be less far reaching.⁵ It has been decided that a commons commissioner can hear an objection to a registration of land even where no formal objection was made.

Finally, the effect of the registration is to provide certainty so far as the identity of common land or town or village greens and rights over it is concerned. Unregistered land is neither common land nor a town or village green and unregistered rights cannot be exercised. The entries relating to land and rights are conclusive evidence of the matters registered although only at the date of registration. Eventually the previous problems of uncertainty will be reduced.

E THE FUTURE OF COMMON LAND

1 Parliamentary Activity

It is clear from the reports of Hansard that Parliament envisaged a second stage of legislation where provisions would be made for the establishment of management schemes to regulate the use of registered land. The further legislation would also provide for the vesting of registered common land without a registered owner.

The Department of the Environment has produced an Inter Departmental Working Party Report' (hereinafter called the Working Party Report) which states:-

"Second stage legislation on common land has always been contemplated as a follow-up to the fact-finding registration exercise under the Commons Registration Act 1965 ..."²

However the Working Party Report makes it clear that further legislation will not be enacted for some considerable time.

"The time for registrations elapsed in 1970 and Commons Commissioners are settling those which are disputed, a task which is likely to occupy them for some years to come. Nonetheless, the Department of the Environment concluded that a start should be made with preparations for the next stage."³

It would appear from the Working Party Report that the new legislation would contain provisions regarding public access, management schemes, the prevention of inclosure, the rectification of the register where mistakes have occurred, the vesting of unclaimed land and the merging of the registers relating to common land and town or village greens.

Comments upon the Working Party Report have been invited from various national bodies and societies including the Commons Open Spaces and Footpaths Preservation Society. Apart from the provisions concerning public access and management schemes, which were envisaged when the 1965 Act was drafted, the additional provisions have been necessitated, either in whole or in part, by the workings of the 1965 Act.

It is no longer possible to regard common land as a feature of the agricultural landscape adapting to the needs of the local community. It has remained unenclosed to enable it to be used by the commoners but its appearance has helped to create a belief that it belongs to the public and consequently that a general right of access exists. Parliament has granted limited rights to the public but impatience to formally confirm the existence of such a right is evidenced by three bills which have been introduced into Parliament although none has been enacted.

In the future, the emphasis for common land will be upon recreation and upon making the land available to the general public. The commoner who may have either lost his rights altogether or suffered a reduction in the extent of his rights during the registration process under the 1965 Act will diminish in importance and therefore the value of the land to the landowner will increase. The 1965 Act represents an attempt by Parliament to reduce to facts and figures, a method of farming which was not based solely upon precise measurement. Inevitably, commoners have suffered and common land has been lost. However, it is even more unfortunate that the vehicle used to register the land and rights is

"... not altogether easy to follow. It is not, perhaps, a model of clear and concise Parliamentary drafting."²

NOTES AND REFERENCES IN THE TEXT

Introduction

<u>Page Number</u>	<u>Ref No</u>	<u>Reference</u>
I	1	The Report of the Royal Commission on Common Land 1955-58 (referred to hereafter as the Royal commission Report) Appendix III Para 7
	2	Ibid Para 17
II	1	An Economic and Social History of Britain 1066-1939 Michael W Flinn 1961 Macmillan Educational Limited Pages 6-10
III	1	The Royal Commission Report Appendix II Para 54
	2	Ibid
	3	Ibid page 89
IV	1	Ibid pages 90-91
	2	The Royal Commission Report Appendix II Para 27
	3	The phrase 'levant and couchant' refers to the number of beasts which the freeholder could over winter on his own holding using only his own produce.
	4	The Royal Commission Report Appendix II Para 45
V	1	An Economic and Social History of Britain 1066-1939 Michael W Flinn p179
	2	22 George III c83
	3	The Royal Commission Report Appendix II para 52
IIX	1	Ibid para 54
IX	1	With the exception of the Law of Property Act 1925 section 193
	2	Ante page IV
	3	Royal Commission Report para 30
X	1	Ibid paras 116 and 117
XII	1	Ibid page 1
	2	Ibid para 262

Notes and References in the Text (Introduction continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
XIII	1	Royal Commission Report para 323
	2	Ibid para 290
	3	Ibid paras 312 and 321
	4	Ibid para 315
XIV	1	Ante page X
	2	Hansard Official Report Fifth Series Vol 717 Column 341
	3	Sections 1(3)(b) and 15
	4	Hansard Official Report Fifth Series Vol 717 Column 341
XV	1	The 1965 Act
	2	Royal Commission Report para 274
	3	Hansard Official Report Fifth Series Volume 717 Column 344
XVI	1	Ibid Column 349
	2	The 1965 Act
XVII	1	Commons Registration (Time Limits) Order 1966 SI 1966 No 1470
XIIX	1	Commons Registration Act 1965 Section 1(3)(b)
	2	September 1980
	3	The Minister of land and natural Resources at the time the 1965 Act was passed, now the Secretary of State for the Environment
XIX	1	Sections 193 and 194
XX	1	Ante page XV
	2	Hansard Official Report House of Commons Volume 946 para 324
	3	Section 7 of the 1965 Act
	4	Ante page V

Notes and References in the Text (Introduction continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
XXI	1	[1976] 1AER 251
	2	The Times 27 July 1982
	3	Post pages 155 to 163 and 211 to 213
XXII	1	Commons Registration (General) Regulations 1966 SI 1471 reg 32-34
	2	Commons Registration (General) (Amendment) Regulations 1980 SI 1980 1195
	3	Unless the rights were registered at H M Land Registry cf: Central Electricity Generating Board v Clwyd County Council [1976] 1AER 251
	4	Corpus Christi College v Gloucestershire County Council The Times 27 July 1982
	5	Re Sutton Common Wimborne [1982] 2AER 376
XXIII	1	Common Land Preparations for Comprehensive legislation 1975/77
	2	Ibid Introduction I
	3	Ibid II
XXIV	1	Access to Commons and Open Country Bill presented 29 November 1978 Access to Commons and Open Country Bill presented 27 February 1980 Access to Commons and Open Country Bill first reading 10 February 1982
	2	Per Oliver J in Re Turnworth Down [1977] 2AER 105

PART ONE

THE HISTORY OF COMMON LAND BEFORE 1926

INTRODUCTION

"We are encumbered by a mass of Anglo-Saxon laws and I wish to goodness that someone would send those laws packing, bag and baggage".¹

The law relating to common land relies upon words and concepts which are more appropriate to medieval society. It is essential to study the origins and subsequent development of common land in order to establish a background which makes the common law and subsequent statutes more comprehensible.

It is impossible to state precisely when common rights first came into existence. Common land is considered to be of immemorial antiquity and certainly older than the manorial system with which it is generally associated.² An initial qualification must be made; inevitably, there would be substantial geographical variation. The type of land and the presence of invaders would lead to considerable differences in the speed at which identifiable rights would emerge and in the form which they would take. In addition, the agricultural methods of the inhabitants of a particular area would influence the emergence of rights because a settled community will tend to develop a more complex property relationship amongst its members than a mobile group:-

"In those societies which practice shifting agriculture, moving on every few years as a newly cleared area becomes exhausted, people are unlikely to establish a permanent relationship with a particular tract of land; but where settled agriculture is practised, durable rights may come to be recognised as residing in particular individuals or groups."³

Writing in 1896 and 1897 F W Maitland⁴ provided a detailed analysis of the Domesday Book and made reference to the existence of rights over land which are mentioned in that book.



"In the hundred of Coleness in Suffolk there is a pasture which is common to all men of the hundred.' but as might be expected, we hear little of the mode in which pasture rights were allotted or regulated. Such rights were probably treated as appurtenances of the arable land:-

'The canons of Waltham claimed as much wood as belongs to one hide'²

If the rights of user are known no one cares about the bare ownership of pasture land or wood land."³

Maitland was not concerned, primarily, with the history of common rights but he gives his opinion that the land could not be regarded as owned by any individual because the question of ownership would be unimportant to the local inhabitants. He believed that in the seventh century there was a large mass of landowning ceorls and that many villages were peopled at that time and later by free landowning ceorls and their slaves.⁴ Therefore Maitland regards rights over land as being in existence before the ownership of the land had been settled. He dismisses the suggestion that the lords are the holders of the waste because the landholders are free to withdraw themselves and seek other lords. He does not accept that the land could be *res nullius*. It is his opinion that

"The fate of these lordless communities and of their waste was still trembling in the balance when King Harold fell."⁵

If the opinions of Maitland are accepted then rights of common in the modern sense could not be said to exist in the free communities which he mentions until the ownership of the waste was vested in someone other than the rightholders. The exposition of the origin of the manor given by Maitland has been subjected to modification⁶ although it has seldom been questioned as a whole.

With Maitland's opinion may be contrasted the theory that common rights were granted to compensate for property rights lost in some other

way.¹ The second theory would demand a competent grantor and a competent grantee and in view of the regional variations to be found and the waves of invasions suffered the theory of Maitland is preferred.

It would be inappropriate to dwell for too long upon the theories regarding the origins of common land. However, there are several pieces of evidence establishing that rights analogous to common rights existed before the Conquest. For example, although the earliest records of Dartmoor are from the early thirteenth century, they give an indication of the earlier history of the moor. The records show that it was the established custom for all the inhabitants of Devon to have common grazing over the moor with the exception of the inhabitants of the Boroughs of Totnes and Barnstaple.² The significance of the exclusion of these two boroughs is that they were founded in the middle of the tenth century and it is probable that they were excluded because the rights had come into existence before the boroughs were established.

The establishments of the royal forests provides further information concerning the emergence of common rights. When a royal forest was designated a detailed and onerous code of laws applied to it. So far as the New Forest is concerned it would seem that it became designated a royal forest in 1016 when Canute issued his Laws at Winchester.³ Royal forests were also established at Ashdown in Sussex and on Dartmoor in Devon. It is significant that both the Saxon and Norman kings reserved the rights of the commoners over the surface implying that the rights were already in existence.

There is more evidence available concerning the agricultural methods used in Kent.⁴ Andread's Weald was a large area of woodland which may have been common to the whole of Kent. There are eighth century charters which confirm that the woodland was used in common by numerous villages. It is conceivable that these practices date back to

the fifth century when settlements first commenced in Kent or possibly even earlier.¹

The laws of Ine (688-726) are often used as authority for the existence of an open field system of agriculture in Wessex in the seventh century.² The relevant portion of the text reads as follows:-

"If husbandmen have a common meadow or other share-land to enclose, and some have enclosed their share while others have not, and if cattle eat up their common crops and grass, then let those to whom the gap is due go and make amends to the others who have enclosed their share"³

However the passage is of little assistance in providing information upon the existence of common rights whether or not it provides evidence of the existence of an open field system.

The evidence referred to confirms that the concept of rights to take the produce of an area of land was familiar to the inhabitants of England prior to 1066. However, if the theory of Maitland is accepted, rights held in common with the owner of the soil cannot exist until the question of ownership has been decided. As the population of England increased, it created a greater demand for the land available and necessitated limitations upon the use of the land. The question of land ownership became more significant when competition for particular areas arose and so the rights of common came into existence and became more closely defined as the population increased. The first restrictions to appear were those concerning user of the land by the inhabitants of a certain area.

"In the hundred of Coleness in Suffolk, there is a pasture which is common to all men of the hundred"⁴

The rights then became restricted to the inhabitants of smaller areas such as a particular manor, borough or vill. The restrictions subsequently related to the class of inhabitant and, finally, a limit might be placed upon the number of animals which the commoner could use to exercise the rights. This final limitation is known as stinting and

it could take one of two forms. First, the quantification of the right could be assessed in accordance with the capacity of the commoner's holding to 'over winter' the animals using only its own produce. This rule is known as the rule of levancy and couchancy. However, by the thirteenth century, a second rule had evolved whereby only a fixed number of animals could be grazed. The second rule was not applied unless there was a possibility of over grazing or 'surcharging' the common. Common rights were originally undefined practices which became more closely circumscribed, the process continuing to modern times with section fifteen of the 1965 Act providing the most recent limitation by requiring that rights registered under that Act must be limited by a specific number.

The precise origins of common land are uncertain but analogous rights existed before 1066 and after the Norman Conquest the rights formed an integral part of the manorial system and become more closely defined.

I THE MANORIAL SYSTEM AND COMMON LAND

The manor was one unit of land ownership which might or might not correspond with one village and which was held by the lord of the manor, having been granted to him either directly or indirectly by the Crown. The manor was also an administrative unit and within each manor the lord held a court where disputes between his tenants and those of neighbouring manors could be settled. Within the manor, the system of cultivation would be closely regulated and customs developed concerning agricultural methods and land tenure. Whilst allowing for local variation, the common law, which was an amalgamation of the most prevalent features of customary law¹, regarded a manor as possessing certain essential features.

The lord of the manor was deemed to have been granted the manor, either mediately or immediately by the King and, in turn, the lord was deemed to have granted land within the manor to his free tenants who were also tenants in fee simple. The lord had unfree or customary tenants, who became known as copyholders, whose position was eventually protected by the King's courts but initially, the customary tenant, or villein, was in a very weak position being entitled to his holding at the will of the lord although the position did improve and he became known as a copyholder who was entitled according to the custom of the manor. Finally, there were usually landless cottagers who existed by taking the produce of the waste land according to custom.

The manorial lands were of three types, the demesne, the open fields and the waste. The demesne lands remained in the control of the lord, the open fields were farmed in strips by the free and customary tenants and the waste was uncultivated its produce being regarded as available for all the tenants and landless cottagers of the

manor and where the waste was contiguous with that of another manor the inhabitants of the adjacent manor might be considered entitled to the produce of the adjacent waste. The law was recognising a factual situation because it was inevitable that animals from each area of waste land would wander over the entire area, the wastes being unfenced.

The open fields and the waste are the most important categories of land when considering common rights. The open fields could be arable, meadow or fallow in any particular year. Beasts might be tethered upon the fallow field for the year and the cultivated fields would become available for grazing by the beasts of those holding strips in the open fields after the harvest. The produce of the waste was available to wider categories of individuals and the range of products was wider than that of the open fields extending to underwood, turf, peat, beechmast and acorns, sand, gravel, stone or fish as well as pasture.

The common law drew a distinction between lands which were used in common for part of the year and those available for the entire year. The former were referred to as commonable lands although this is not a term of art. The lands are often available for pasture from 12 August (Lammas Day) to 25 March (Lady Day) and if so may be referred to as Lammas land or half year land. It was stated in Grand Union Canal Company v. Ashby ¹ that common land does not include commonable land but the definitions employed by statute have almost invariably included commonable land² and so the distinction is of little significance.

Common rights were divided into four distinct categories³ known as appendant, appurtenant, pur cause de vicinage and in gross, the right being attached to land in the first three cases. Common appendant originates from the right of the freehold tenants to pasture cattle upon the manorial waste and it is limited to rights of pasture.

The right cannot be severed from the land and the rule of levancy and couchancy¹ is used for the purposes of quantification. Common appurtenant originates from an actual or presumed grant and is not limited to common of pasture. The right may be for a number certain and, if so, can be severed from the holding. Common pur cause de vicinage arises where the wastes of two manors are contiguous² and is restricted to common of pasture. The rights must be mutual and must not differ materially. A commoner claiming this right must be the owner of a right of common appendant or appurtenant in his own manor. Common in gross is a right unconnected with any holding although it usually arises where a right appurtenant has been severed. The right can be claimed by prescription but only if it is quantified.

The subject matter of the right could vary considerably and the older authorities even refer to rabbits, birds, tin and lead.³ However the more usual rights are known as rights of pasture, pannage, estovers, turbary, common in the soil and piscary. The right of pasture extended to any animal the land would support unless the right was appendant when it was usually restricted to horses, oxen, sheep and cows. Pannage is the right to let swine feed on beechmast or acorns although the word sometimes refers to a payment made for the annual grant of such a right. Estovers refers to a right to take timber or underwood from a wood or waste land. There are various categories including greater and lesser housebote, firebote, cartbote, ploughbote or wainbote, hedgebote, fencebote or haybote which authorise the taking of wood for repairs to houses or agricultural tools, fuel, repairs to gates or fences and the taking of furze, fern or heather for fodder or litter. The extent of the right is usually governed by the needs of the dominant tenement, thus precluding the sale of the produce. Turbary is the right to take peat or turves for fuel to be used only in the commoner's

house. Common in the soil is the right to take sand, gravel, stone, clay and sometimes coal from the waste sufficient for the commoner's consumption. Piscary is the right to take fish from a private stream or pond for use in the commoner's house.

The common law developed a system of regulation for the rights which had been exercised for a considerable time and local variations could be determined by custom. However, methods of agriculture were changing as the population of England increased and the manorial system became inadequate to cope with the inevitable demand for greater productivity.

II COMMON LAND AND INCLOSURE

Inclosure took place over a considerable length of time, at varying speeds, by several methods and for numerous reasons. The process whereby the vast majority of common land in England became inclosed cannot be explained simply.

A The Reasons for Inclosure

The most significant factors causing inclosure to take place were as follows:

- i) the rising population necessitating the use of more land for building and an increase in agricultural productivity,
- ii) the desire to specialise in particular crops,
- iii) the great expansion in the woollen manufacturing industry and
- iv) rising meat prices.

The increase in population took place in two distinct phases the first of which was from 1066 to 1348 when it gradually increased to perhaps just under four millions² resulting in more intensive use of the waste lands. Heaths and moors were brought into cultivation and common rights became more closely defined. New villages were established and those with names such as Somercotes² or Somerton indicate that the land was previously used for summer grazing only. On the upland commons, steps were taken to define boundaries as in 1279 when the tenants of Fountains Abbey on the Kilnsey Moors and those of Salley Abbey on the Arncliffe and Litton Moors in North Yorkshire agreed a boundary and erected markers.³ On lowland commons, however, the pressure was even greater and restrictions upon the numbers of animals which a commoner could graze known as stinting were introduced.

The manner of restriction varied in severity from the rule of levancy and couchancy to strict rules defining the precise numbers of animals for grazing upon commons with a large number of commoners. In 1256 at Bescaby a commoner was entitled to graze only two horses, four oxen and cows, thirty sheep, four pigs and five geese with followers or offspring for every yardland¹ of arable held in the open field.²

The inclosure of common land took place in some manors and was achieved by licence from the lord of the manor because he retained a limited right of inclosure. However, this power was capable of abuse and in 1235 the Statute of Merton³ restated the extent of the lord's right stating that sufficient common pasture had to be left for the free tenants of the manor. The inclosures were carried out both by the lords for themselves and by licence from the lords for their tenants.

Then, in 1348 the commencement of the Black Death eased the pressure on common land by reducing the population of England ultimately by almost half. Lords were obliged to seek tenants to cultivate the land and wages rose as a result. Villages and hamlets were abandoned and cultivated land reverted to waste.⁴ The manor court rolls of Wimbledon in 1480 provide details of a grant of lands

"which from ancient time were arable lands, and now and for many years the said lands are so grown and choked with brambles, thorns and furze that for many years the lords received no profits therefrom."⁵

The population did begin to increase again but it was not until the late sixteenth century that the population had risen to the level it had attained immediately before the Black Death.

From the late fifteenth century onwards, the pressure upon common land was renewed and although the rising population was a contributory factor, there were other important influences.

There was a desire for greater specialisation to make more profitable use of the land but so long as the open field method of farming continued, specialisation was impossible. Therefore where it was desired to concentrate upon a particular crop inclosure was inevitable. Kent and Essex were both counties in which open fields had virtually ceased to exist by 1500 because of their intensive cultivation of fruit in Kent and vegetables and hops in Essex.

Inclosure enabled agriculture to become more productive and it encouraged innovation. A trend developed in the sixteenth and seventeenth centuries of sowing leys, or temporary grassland, on land which usually supported crops. The ley enabled the overworked plough-land to rest and improve' and constituted a further variation in the cycle of crop rotation. Inclosures were often made to enable leys to be sown.

Further reasons for inclosure were rising meat prices and the expansion of the wool industry which made wool and meat production particularly attractive to the landowner. Therefore, land was inclosed to provide grazing for sheep and cattle. When compared with arable farming, pasture farming was not as labour intensive and so inclosure for grazing was associated with unemployment and rural depopulation creating hostility amongst former commoners. Inclosure of land for pasture took place mainly between 1475 and 1550 and was concentrated in the midland counties of Leicestershire, Warwickshire, Northamptonshire and Bedfordshire.²

One relatively minor reason for the inclosure of land in Elizabethan times was the ambition of lords of the manor who wished to enlarge their houses and establish deer parks around them. Predictably, inclosure for such selfish reasons was the source of unrest amongst commoners.

From the late sixteenth century until the mid nineteenth century the rising population became a more and more significant factor in the disappearance of common lands. Larger numbers of houses were needed, there were greater demands for food but, as towns increased in size, land was needed for recreation and, for that reason, common land did not disappear completely. Towns such as Liverpool and, more recently, Tunbridge Wells, grew up on common land. Birmingham doubled its population from 35,000 in 1760 to 70,000 in 1800 and the last of its heathland was inclosed in 1799.¹ By 1807 the commons of Oldham had been inclosed and built upon. Building land near London was particularly valuable and so the lords of the manors had a substantial incentive to inclose the land but they met with determined opposition² and there remains approximately 2,600 acres of common land within Greater London.³

A substantial amount of common land was lost because houses were built upon it but even more was lost as a result of changes in agricultural methods designed to increase productivity. Those who wished to inclose regarded common land as badly managed, the animals on the land as poor and diseased and the commoners as idlers. The open field system discouraged innovation and resulted in time wasting as the farmer moved from one strip to the next. It penalised the farmer who looked after his land if he had the misfortune to hold strips next to a lazy farmer who allowed weeds to grow. Because the cattle were mixed together it was harder to control diseases and impossible to experiment with cattle breeding. Often the crop rotation did not provide sufficient winter feed stuffs and so, each year, it was necessary to kill and salt a proportion of the cattle.⁴

Inclosure enabled farmers to experiment and specialise. For example, by growing root crops such as turnips a farmer could provide

winter feed for his cattle and eliminate the wasteful fallow year because the root crops allowed the soil to rest from supporting grain crops. Robert Walpole, together with other Norfolk farmers, developed the Norfolk four-course rotation of turnips, barley, clover and wheat which was made popular by Lord Townshend.³ Inclosure resulted in the increase of agricultural productivity benefiting landowners and the larger tenant farmer.

The reasons for inclosure were varied and their significance depended upon the circumstances of each particular area. However, the rising population and the agricultural revolution were of general importance. Just as there was more than one reason for inclosure so the methods of inclosure were varied.

B. The Manner of Inclosure

Reference has been made² to the power of the lord of the manor to inclose or approve any land of the waste so long as sufficient land was left for the freehold tenants to pasture their beasts levant and couchant. It was for the landowner to prove that there was sufficient land left for the free tenants and he could not approve against commoners with rights of turbary, common in the soil, estovers or pannage. The rule was affirmed by the Commons Act 1236 and extended by the Commons Act 1285, which is still in force, by enabling the lord to inclose against the tenants of a neighbouring manor who had rights of pasture over land within the manor.³ It is unclear whether the statutes were designed to facilitate inclosure by emphasising the lord's power or to discourage it by stressing that sufficient pasture must be left for the free tenants.⁴ In any event, the power existed and so farms were created as a result of approvement carried out by licence or charter from the lord.

A second possibility was inclosure by agreement between the lord and the commoners. The manor court provided a valuable forum in which weighty decisions about the farming of the manor could be made. In addition to the making and enforcement of by-laws upon every conceivable topic, the manor court took more far-reaching decisions upon the future of the land. In 1697 the inhabitants of Barrowby in Lincolnshire agreed to plough up one third of the common and put down an area of arable land to grass when the grass on the common had become unwholesome and the arable land impoverished by constant ploughing.¹ The decision provides evidence of the powers of the manor court and also indicates the fluctuating nature of common land.² Inclosures arrived at by agreement were often confirmed by decrees of the Chancery Court. However it is obvious from the reasons for inclosure³ that the agreement of all the commoners would not invariably be forthcoming, particularly where the landowner wished to take up sheep and cattle farming with its attendant threats of unemployment. The power to act by majority was needed to enable the wishes of those with very small acreages to be disregarded. In addition, the landowner wanted the power to redistribute the land so that the open field system disappeared and separate farms could be established.

The only method of achieving the radical changes desired was to obtain a private Act of Parliament. A majority of the landowners, by acreage, petitioned Parliament stating their desire to inclose the land and the signatures had to represent three-quarters of the land desired to be inclosed. The opponents of the proposed inclosure were entitled to submit a counter-petition but rarely did so. The act appointed three, five or seven commissioners whose task it was to survey the land, ascertain the ownership of land and rights and make an award. It was the award which set down the holdings which each

inhabitant was to receive in proportion to his previous holding of arable land and common rights. The changes made to the geography of the area inclosed were considerable and the commissioners had the power to make provision for new roads to give access to the farms which had been created.¹

Official opposition to inclosure diminished after 1640 and the number of private Acts in each decade gradually increased. Before 1727 there were 26 Acts, but by 1760 there had been 229. Some of the Acts, such as that for Higham-on-the-Hill in Leicestershire in 1801 where inclosure actually took place in 1632, merely ratified existing inclosures and so the number of Acts is not necessarily an accurate guide to the area of land actually inclosed in any particular year.² In 1801 the General Inclosure Act received the Royal Assent and, as a result, the procedure for inclosing land was simplified further. Certain clauses were standardised making the process cheaper. The Act provided evidence of the serious problems which had to be solved in balancing the interests of lord, rector and freeholder because attempts had been made to draft a Bill providing a process for inclosure without recourse to Parliament. However those attempts had failed and the Act was the greatest simplification which could be made if competing interests were to be protected adequately.³

Acts of 1834, 1836 and 1840⁴ facilitated the inclosure of open arable fields and meadows but it was the General Inclosure Act of 1845 which was the most comprehensive. It extended to a very wide range of land including commonable land, gated pastures where the landowners also owned the rights, land subject to rights of sole vesture,⁵ and lot meadows.⁶ The 1845 Act authorised inclosure of ancient arable and common meadows without parliamentary sanction so long as the land to be inclosed was not in the neighbourhood of an urban area. However,

within seven years, the power to inclose without parliamentary sanction was removed¹ except in an extremely limited number of cases which were governed by particular statutes.² Therefore, the most important provisions of the 1845 Act are those which lay down the procedure to be followed where land is to be inclosed with the sanction of Parliament.

The procedure was significantly different from that which prevailed when private acts were used because a statutory body, the Inclosure Commissioners, was set up with a duty to hold local inquiries. Assistant Commissioners held the inquiry into the local conditions and reported to the Inclosure Commissioners who considered the report having regard to

a) "the health, comfort and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed or any part thereof shall be situate"

and

b) "the advantages to the proprietors of the land to which such application shall relate"³

and if they were satisfied that the proposed inclosure was expedient, the terms and conditions had to be set down in a provisional order which was publicly notified in the parish. After publication, the provisional order was included in the general report of the Commissioners so long as they were satisfied that

i) persons whose interests were not less than two-thirds of the whole interest in the land

and

ii) if the land was waste land or otherwise owned by the lord of the manor, such lord consented to the provisional order.

The 1845 Act is evidence of an important change in emphasis, from a concern with strictly enforceable rights to an interest in the general well being of the local inhabitants. The value of common land for

non-agricultural purposes was formally acknowledged.

The Commons Act 1876 attempted to lay even more emphasis upon the importance of the interests of the local inhabitants whether commoners or not. The preamble introduces a new expression "the benefit of the neighbourhood" and states that the phrase in the 1845 Act concerning the health, comfort and convenience of the inhabitants¹ is included in the new expression. The 1876 Act introduced a new procedure and, as a matter of practice, afforded greater importance to the benefit of the neighbourhood. The substantive provisions did not specifically state the proposed inclosure had to be for the benefit of the neighbourhood but the provisions were interpreted in accordance with the terms of the preamble which stated that a provisional order

"is of no validity until and unless the Commissioners have in a report to be laid before Parliament certified that in their opinion the inclosure of such common, if made on the terms and conditions in their provisional order expressed, would be expedient, having regard to the benefit of the neighbourhood as well as to such private interests as aforesaid."

The procedure under the 1876 Act commenced with the publishing of notices by the applicants and the service of notices on the local authority.² The applicants had to furnish information to the Inclosure Commissioners bearing on the expediency of the application "considered in relation to the benefit of the neighbourhood as well as private interests".³ The content of the information relating to both these elements was prescribed⁴ and it is interesting to note the inclusion of the following words indicating the nature of the information which must be furnished

"as to the circumstances of any ground other than the common to which the application relates being available for the recreation of the neighbourhood; and in the case of a common being waste land of a manor, as to the site extent and suitability of the allotment, if any, proposed to be made for recreation grounds and field gardens, or for either of such purposes"⁵

Where a prima facie case was made out in favour of inclosure and where, having regard to the benefit of the neighbourhood as well as

private interests, it was expedient to proceed further, a local inquiry was held by an Assistant Commissioner who had to inspect the common, hold at least one public meeting and report back to the Inclosures Commissioners in writing.¹ Where the Inclosure Commissioners were satisfied "having regard to the benefit of the neighbourhood as well as to private interests"² that it was expedient to proceed further, it was their duty to draw up a provisional order with the inclusion of provisions for the benefit of the neighbourhood. The provisional order was deposited in the parish or parishes where the common was situated and the Inclosure Commissioners had to give notice of the deposit. The Commissioners had to satisfy themselves that persons representing at least two thirds in value of the interests in the common affected by the provisional order and, where appropriate, the lord of the manor, consented to the provisional order and, once satisfied, the Commissioners had to certify that it was expedient the provisional order should be confirmed by Parliament.³ The provisional order did not come into force until confirmed by Act of Parliament.⁴

The complexity of the procedure is obvious and yet the Commons Act 1876 is still in force and provides the machinery for modern inclosures. The same procedure must be followed where a scheme of management is to be applied to a common.⁵

It is clear that the manner in which inclosure could take place became more expensive, complicated and time-consuming as the centuries passed. A comparison of the figures which are available of the acreage of land inclosed provides interesting information although the figures are not entirely reliable.

So far as the waste is concerned the following details are

available:

" 1700 - 1760	56 Acts	74,518 acres
1761 - 1801	521 Acts	752,510 acres
1802 - 1844	808 Acts	939,043 acres
1845 and after	508 awards	334,906 acres " 1

During the same period four and one half million acres of land which was farmed under the open field system was inclosed under 2,911 acts and awards and ²some of that land would have been subject to common rights.

Although the figure for awards in the period from 1845 onwards is 508 it is important to note that the majority took place between 1845 and 1876, there being only 29 applications for inclosure since 1876 with the last in 1914.³

The manner of inclosure has changed considerably with substantial intervention by Parliament. Since 1876, inclosure has become a very complicated process because by that time the disadvantages of the loss of such a large amount of common land had become apparent.

C The Disadvantages of Inclosure

Just as the most important reasons for inclosure varied from time to time so there were different disadvantages for the persons affected.

Depending upon which interpretation of the Statute of Merton⁴ is adopted, it is arguable that inclosure could be used by the lord of the manor to his own advantage whilst depriving the free tenants of sufficient waste upon which to pasture their beasts.

At first sight, inclosure by private act of Parliament appeared to be more beneficial to the commoners because there was provision for a counter-petition to be presented.⁵ However, the practicalities of the relationship between the lord of the manor and the commoners would make opposition to a petition proposing inclosure virtually impossible.

"But the poorest cottager was always free to oppose a Parliamentary enclosure bill. All he had to do was learn to read, hire an expensive lawyer, spend a few weeks in London and be prepared to face the wrath of powerful men in the village"¹

Inclosure by private act and by award under the 1876 Act² was expensive, with legal fees and the surveyors' and commissioners' costs to be met and, in addition, there might be new roads to be built. The average cost per acre has been calculated at one pound twenty-five pence.³ When each individual holding had been established, the farmer would have further expense in erecting fencing and farm buildings and buying in stock and agricultural implements. For the farmers with a substantial acreage the costs would not be prohibitive but for the small farmer the expenses could prove too great forcing him to sell his holding to a larger farmer. Therefore, inclosure increased the number of landless labourers.

Some of the commoners were even less fortunate and did not receive any holding at all because they were unable to establish a right to use the common. Where a squatter could prove more than twenty years occupation his right was usually allowed but the compensation would be small when considered in relation to the value of being able to graze a cow or some sheep on the common⁴ or to use the implements and draught animals which had been provided by the entire community.

During the period from 1450 to 1600 the inclosure which took place was chiefly for pasture on which sheep and cows could be grazed. Complaints were made that the inclosures were causing unemployment and rural depopulation because the new methods of agriculture were less labour intensive. Acts of Parliament passed in 1489, 1533 and 1536 attempted to order the re-opening of recently inclosed land. Commissions of inquiry were appointed in 1517 and 1548 to investigate the problems but little effective action was taken because the enforcement of the

laws was the responsibility of the Justices of the Peace' who were often the principal offenders. Inclosure during the period from 1450 to 1600 has been attacked for causing poverty and unemployment amongst rural workers but there were other factors affecting their lives including serious and prolonged inflation. The disadvantage of inclosure for grazing land was a contribution towards unemployment at a time of accelerating economic development.

The disadvantages of inclosure to the agricultural community were serious for those with few rights and little land. Eventually the problems of these people were acknowledged. Both William Cobbett and Arthur Young became opponents of inclosure.

"the cottagers produced from their little bits, in food for themselves, and in things to be sold at market, more than any neighbouring farm of 200 acres ... I learnt to hate a system that could lead English gentlement to disregard matters like these"² (William Cobbett)

"I had rather that all the commons of England were sunk in the sea, than that the poor should in future be treated on inclosing as they have generally been hitherto!"³ (Arthur Young)

However, inclosure resulted in increased food production, cattle could be kept alive through the winter resulting in a decrease in the consumption of salted meat and an improvement in health as a result, the cattle produced more manure enabling cultivation to be more intensive and the new types of grasses led to an improvement in the quality of sheep's wool.⁴ The agricultural advantages to be gained from inclosure were so great that there was little chance of any opposition to the movement from influential quarters. In fact, even more sinister motives for encouraging inclosure can be found in the Board of Agriculture reports. By inclosing the commons and preventing the lower orders of society from attaining economic independence the

"subordination of the lower ranks of society ... would be thereby considerably secured."⁵

The progress of the Industrial Revolution resulted in a rapid increase in the number of towns and in their size. The population of Manchester was estimated at 30,000 in 1770, 95,000 in 1801 and 238,000 in 1831. Similar increases were taking place in other industrial areas such as the West Riding of Yorkshire and the Midlands. Inevitably common land was being taken for building and yet in the absence of any system of town planning, open spaces were urgently needed for recreation by the town dwellers. Inclosure provided land for houses and factories but condemned the town dweller to a life without fresh air or space in which to walk or play. William Cobbett was aware of the social consequences of inclosure of open land close to centres of population

"Wastes indeed! Give a dog an ill name. Was Horten Heath a waste? Was it a 'waste' when a hundred, perhaps, of healthy boys and girls were playing there of a Sunday, instead of creeping about covered with filth in the alleys of a town?"

Where building land was particularly valuable, common land was in even greater danger because the lord of the manor could spend a considerable amount of money in lawsuits and attempts to obtain private acts of Parliament yet still make a profit from the sale of building leases. The disadvantage of the loss of open spaces close to large centres of population cannot be assessed in financial terms but the loss of Wimbledon or Clapham Common, Doncaster Common or the Town Moor in Newcastle would be a serious blow to inhabitants of and visitors to those cities or towns.

The disadvantages of inclosure were apparent to both the commoner and the town dweller who wanted to enjoy the pleasures of the countryside. In view of the agricultural importance of common land and rights to the medieval economy it is ironic that the most effective protection of common land was the result of pressure from those who were concerned about the rights of the town dweller rather than the commoner.

III THE PROTECTION OF COMMON LAND

Common land has been saved from inclosure by various different bodies and numerous methods. The provisions of relevant Acts of Parliament are of obvious significance but the voluntary actions of landowners, pressure groups and local authorities are equally important.

In 1508 Ralph Eccleston and his son Henry granted part of Hackley Moss in Prescott, south-west Lancashire to the township for use as a common pasture. In return, Henry asked that those who used the ground should say a pater noster, ave and credo each Friday and Sunday when they went into the church or churchyard and should pray for the souls of his ancestors, himself and his heirs.¹

Statutory protection commenced in the late eighteenth century. Sometimes, even when there was recognition of the problem facing those with very small areas of land or no land at all inclosure continued but with land set aside for the poor of the Parish. By the statute of 1782 22 George III, c83 where the lord of the manor and the commoners consented, the guardians of the poor could inclose up to ten acres of common land near the poorhouse and farm it for the benefit of the poor in the parish. However the General Inclosure Act of 1801² provided a more satisfactory remedy which retained the advantageous elements of the open field system. Provision was made for a small allotment to be set aside in a ring fence to be stocked and farmed in common by those who would not have been able to afford to fence a small individual plot. A considerable numbers of commons which remain are those set aside under this provision.³

After 1801 the statutory protection for common land increased but the emphasis shifted from assisting the commoner with a very small

acreage to recognising the growing concern of the town dweller in maintaining accessible open spaces.

An Act of 1836¹ prohibited the inclosure of land close to London and other major towns and less specific provisions were contained in later nineteenth century enactments.

Reference has been made to the use of the concept "benefit of the neighbourhood" which appeared in the General Inclosure Act 1845² and was named in the Commons Act 1876.³ Under the 1845 Act a provisional order was necessary for land in an urban area to be inclosed and the health, comfort and consideration of the local inhabitants had to be taken into account. In addition, no town or village green could be inclosed and the Commissioners had the power to set aside a specified area of land for the purposes of exercise and recreation by the inhabitants of the neighbourhood and if they did not do so they had to give their reasons. By 1876 the importance of the benefit of the neighbourhood had increased and, as stated⁴, the Commons Act 1876 was interpreted in such a way that the provisional order could not be made unless it was for the benefit of the neighbourhood as well as the private interests.

The Metropolitan Commons Act 1866⁵ prohibited the inclosure of any land within the Metropolitan Police District on 10 August 1866 thereby stressing both the importance of maintaining open land near to London and the difficulties which were encountered because building land near the capital was particularly valuable.

The Law of Commons Amendment Act 1893 and the Commons Act 1899 afforded additional protection for common land although only in minor ways but the Law of Property Act 1925 contained two sections which detrimentally affected common land.

Sections 193 and 194¹ provided a limited right of access for the public and prohibited the erection of any building or fence or the construction of any other work which impeded or prevented public access without the consent of the Minister.² The Sections are important because they demonstrate the misconceptions about common land which have hampered its successful development in the twentieth century.

Section 193 provided the public with a right of access for air and exercise to the following categories of land:-

- i) Metropolitan Commons within the Metropolitan Commons Act 1866 to 1898
- ii) Manorial waste or common situated wholly or partly within a borough or urban district on 1 January 1926
- iii) Any land subject to rights of common on 1 January 1926 in respect of which the owner had deposited a deed.

Section 194 prohibited, without Ministerial consent, the erection of any building or fence or the construction of any other work which impeded or prevented public access on any land which was subject to common rights on 1 January 1926.

The legislature was concerned with the rights of those wishing to preserve areas of open land for recreation. However, in securing those rights Parliament enacted provisions which were damaging to the agricultural use of common land and, as time passed, became antiquated and difficult to understand, yet both provisions are expressly preserved by the Commons Registration Act 1965.³

Section 194⁴ has an unduly restrictive effect upon farmers because it makes consent essential before fencing to protect young trees, shelters for animals or roadside fencing can be erected. Even if Ministerial consent is applied for, there would be considerable delay and expense because the Minister must have regard to the same

considerations and, if necessary, hold the same inquiries as he is required to do under the Inclosure Acts 1845 to 1882.¹

Both Sections refer to land subject to rights of common on 1 January 1926, a date over 54 years ago, and so the question of whether either section applies to a particular area of land will involve a difficult enquiry into a past state of affairs. 127 deeds relating to 120,000 acres of land have been deposited under Section 193 but the information is not readily accessible to members of the general public. The question of whether either section applies to commonable land is open to doubt. Various views have been put forward² as to the application of these sections. The first is that the sections apply to commonable land during that part of each year when the rights are exercisable but not otherwise. This argument is unlikely to be correct because it would hardly be feasible for fences or other works to be erected and taken down so frequently. A second argument is that neither section applies to commonable land. However in view of the inclusion of manorial wastes in Section 193 and the broad definitions used in earlier statutes³ it seems unlikely, at least in the case of section 193, that commonable land would be excluded.

A third argument is that the sections apply to commonable land simply because this presumably would be the intention of the legislature when the Act⁴ was passed. However, in view of the fact that the Inclosure Act 1845 specifically included commonable land it is unlikely that a subsequent statute would omit reference to it whilst presuming its inclusion. A fourth and final argument is that the sections apply to commonable land only if the rights were actually being exercised over the particular commonable land in question on 1 January 1926. The effect of this interpretation would be to include virtually all commonable land because the relevant date falls between

harvest and the resowing of the land, or between Lammas and Lady Day. Although the argument may appear contrived it accords with the probable intentions of the legislature to extend protection to open areas of land and provide the public with a right of access.

Whichever interpretation is adopted, there are ambiguities in both sections indicating that the legislation was enacted with insufficient consideration of the practical situations to which it would apply. In particular, the provisions of section 194 relating to the erection of works reveal a lack of consideration towards those farming common land and trying to improve it by careful management.

The protection of common land was essential if it was not to be completely lost to the developer and the proponents of intensive cultivation. However, the legislative measures achieved their aims by preventing any development of it whether the new uses would encourage its continued existence or not. The interests of the town dweller were preferred to those of the commoner.

The protection which common land received from local authorities has been mentioned briefly.¹ The Corporation of the City of London purchased 6,000 acres of Epping Forest in 1878 and 492 acres at Burnham Beeches in Buckinghamshire in 1880.² Blackheath, which was the site for the meeting between the victorious Henry V and the Aldermen, Mayor and Sheriff of London in 1415 after the Battle of Agincourt, was placed under the Metropolitan Board of Works in 1871 and is secured for public use by the Greater London Council. The heath extends to 270.5 acres.³ The purchase of common land by local authorities was not confined to the area around London. Preston Moor was maintained as an open space although not for agricultural use and the land had been vested in the burgesses of the town in 1253 by a charter from Henry III. Other industrial towns, such as Oldham, lost their common land to the developers.⁴

The change in the Parliamentary attitude towards inclosure which occurred in the nineteenth century must be attributed to the efforts of a group of people who recognised the dangers of allowing inclosure to continue unchecked. In 1865 a Committee was set up at the instigation of Mr Doulton, the Member of Parliament for Lambeth, to inquire into the best means of preserving for the use of the public the Forests, Commons and Open Spaces in the neighbourhood of London.¹ The Report of the Committee stated that there was no open space within fifteen miles of London which could be reduced in area.² Whilst of the opinion that the rights of the commoners had not been abandoned, the Committee members felt that the commoners had transferred their rights to the public by acquiescing in the public use of the land for recreation and they recommended that Parliament should recognise the transfer and confirm it by legislation.³ The results of the Report were that the Lords of the Manor of the London Commons decided to take immediate steps either to commence or threaten inclosure and, in 1865, the Commons, Open Spaces and Footpaths Preservation Society (hereinafter referred to as the Commons Society) was founded to resist the actions of the manorial lords. The Commons Society was fortunate in having eminent members including lawyers such as Mr P H Lawrence and Mr Charles Pollock (later Baron Pollock) and Mr John Stuart Mill because in several cases the conflicts resulted in law suits which could not have been successfully undertaken by the uneducated or impoverished. Disputes arose involving numerous commons including Hampstead Heath, Berkhamstead Common, Wimbledon and Wandsworth Commons and Epping Forest. An outline of the dispute surrounding one of these commons will give an indication of the type of detailed and difficult work which the Commons Society undertook.

Berkhamstead Common⁴ remains one of the largest commons in southern England extending to 1,156 acres. In 1862 it was sold to the

Trustees of the late Lord Brownlow for £143,000 who wanted to use the land as an addition to Ashridge Park. Their first objective was to remove the commoners and inclose the Common. Small plots of land were physically inclosed and obstructions were made to the grass driveways which crossed the common. The most comprehensive scheme devised by the Trustees involved the making of a gift of 43 acres of land for the benefit of Berkhamstead if the commoners and inhabitants of the town agreed to release all their rights over the Common. The deed of gift was deposited in escrow for the period of six months to provide sufficient time for the releases to be completed. However, before the expiration of the period allowed an iron fence five feet high was erected by the land agent inclosing 434 acres of common and dividing the rest in two separate pieces. There were complaints made in letters to The Times but the solicitors acting for the trustees defended the inclosure. The commoners consulted the Commons Society who realised that eventually it might be necessary to commence proceedings to establish the illegal nature of the inclosure. However, a more practical remedy was employed in the first instance. One hundred and twenty navvies were sent by train to Tring shortly after midnight on 6 March 1866 to pull down the fences as quickly as possible. The work took a little over four hours and was completed before the land agent was aware of the removal of the fences.

Shortly afterwards, proceedings were brought against one of the commoners, Mr Augustus Smith who had financed the removal operation, and Mr Smith commenced a cross suit in the Court of Chancery claiming that his rights and those of his fellow commoners should be ascertained and that the Lord of the Manor should be restrained from interfering with or inclosing the common. No decision was given so far as the action for trespass was concerned because Lord Brownlow died before the

case could be heard. Mr Smith had no decision and he had to pay his own costs because there was no one against whom they could be recovered. However, the cross suit continued and necessitated an investigation into the history of the manor from as early a date as possible and records were found which dated back to 1300. In 1870 the Master of the Rolls, Lord Romilly, gave his verdict in favour of Mr Smith. The legal proceedings were lengthy and costly but the result secured the future of the common and provided a valuable precedent for future litigation. Berkhamstead was not the only common over which serious disputes arose and the work of the Commons Society spread to the whole of England.¹

It was as a result of the interest taken by Mr Fawcett, who was a member of the Society, in rural commons and the plight of landless labourers that a Select Committee was set up to consider the adequacy of the procedure under the Inclosure Act 1845. The Committee decided that where inclosure took place, the provisions made for the public and labouring people were inadequate and, after an abortive Bill in 1871, the situation was alleviated by the provisions of the Commons Act 1876.²

Although the measures which effectively prevented inclosure were passed by Parliament, it is clear from the details contained in *English Commons and Forests*³ that without the strenuous and dedicated involvement of the Commons Society, substantial areas of open land throughout the country would have been inclosed and built upon in the late nineteenth and early twentieth centuries.

It is interesting to note that whilst the Commons Society was anxious to support measures which protected common land, the members recognised the necessity for having provisions for regulation of the land which were sufficiently flexible:-

"On the other had, we failed altogether in Committee on the Bill³ to make the clauses with respect to the regulation of Commons more elastic and workable, either by reducing the required proportion of assents of Commoners, or by removing the veto of the Lord of the Manor"²

The nineteenth century saw a radical change in the attitude of many influential people towards inclosure. John Stuart Mill had been strongly in favour of inclosure on the grounds that it would lead to greater production. However after becoming acquainted with Mrs Grote who lived in the Manor of Burnham and hearing her account of the problems which commoners encountered Mr Mill reversed his opinion and became an ardent supporter of the Commons Society.³

As a result of the changes in opinion statutory provisions to prevent common land being inclosed were passed and ultimately a limited public right of access was given.

However, the provisions had been drafted without sufficient regard to the practical requirements of the commoners to enable them to farm the land efficiently and the public right of access was too limited, failing to recognise the use to which common land would be put most frequently in the future. The efforts of the Commons Society had ensured that substantial areas of common land would survive into the twentieth century but failed to provide a framework within which the land could fulfil the various functions assigned to it by the progress of the Agricultural and Industrial Revolutions.

NOTES AND REFERENCES IN THE TEXT

PART ONE

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
1	1	Per the late Earl Jowitt House of Lords Debate 23 February 1955 Official Report vol 191 No 24 Col 379
	2	The Royal Commission Report Appendix II Paras 1. - 17 and The Common Land of England and Wales L Dudley Stamp and W G Hoskins Collins Pages 6 - 13
	3	Order and Dispute Simon Roberts Penguin 1st Edition
	4	The Domesday Book and Beyond F W Maitland 1960 Page 101
2	1	Domesday Book ii 339b
	2	Domesday Book i 140b
	3	Domesday Book and Beyond Op Cit p181
	4	Domesday Book and Beyond p383
	5	Domesday Book and Beyond p412
	6	Essays in Agrarian History Vol 1 The Origins of the Manor in Britain T H Aston David & Charles 1968 p25
3	1	The Common Lands of England and Wales Op Cit p6
	2	The Common Lands of England and Wales Op Cit p 7 and Publications of the Dartmoor Preservation Association Plymouth 1890 1 pXXV
	3	The Common Lands of England and Wales Op Cit p8
	4	Cartulary and Survey of Bilsington Kent 4-5
4	1	The Royal Commission on Common Land Report 1955-58 Appendix II Para 3
	2	The Royal Commission on Common Land Report Appendix II Para 2, The Common Lands of England and Wales p9
	3	Agrarian History of England and Wales Ed Finberg Cambridge University Press vol 1 Part II p416

Notes and References in the Text (Part One continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
4	4	Domesday Book ii 339b Domesday Book and Beyond F W Maitland Fontana 1960 p181
6	1	Historical Foundations of the Common Law S F C Milson 1969 p2
7	1	(1861) 6 H & N 394
	2	See for example Commons Registration Act 1965 Section 22
	3	Law Relating to Common Land Chapter two paras 12 - 20
8	1	See ante page IX
	2	See ante page 7
	3	Law Relating to Common Land Chapter 2 Para 21 - 33
10	1	The Royal Commission Report Appendix II Para 18
	2	Royal Commission Report Appendix II Para 19
	3	The Common Land of England and Wales L Dudley Stamp & W G Hoskins p36
11	1	A yardland was between 25 and 40 acres. An Economic and Social History of England and Wales Op Cit p12
	2	Royal Commission Report Appendix II Para 21
	3	Renamed the Commons Act 1236
	4	The Royal Commission Report Appendix II Para 22
	5	The Royal commission Report Appendix II Para 22
12	1	An Economic and Social History of Britain 1066 - 1939 Op Cit p90
	2	An Economic and Social History of Britain 1066 - 1939 Op Cit p91
13	1	The Common Land of England and Wales Op Cit p62
	2	See post pages 24 to 32
	3	See post page 65

Notes and References in the Text (Part One continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
13	4	An Economic and Social History of Britain 1066-1939 Op Cit p170
14	1	Ibid p11
	2	See ante page 11
	3	Royal Commission Report Appendix III Para 25
	4	Ibid Appendix II Para 20 cf An Economic and Social History of Britain 1066-1939 Op Cit p23
15	1	Royal Commission Report Appendix II Para 42
	2	See post pages 183 to 185
	3	See ante pages 10-14 and particularly pages 12 and 13
16	1	An Economic and Social History of Britain 1066-1939 Op Cit p175
	2	The Royal Commission Report Appendix II Para 45
	3	Ibid Para 32
	4	4 and 5 William IV, c 30 6 and 7 William IV, c 115 3 and 4 Victoria, c 31
	5	A right of sole vesture excludes the owner of the soil from the produce of the soil
	6	Lot meadows are common lands where the owners drew lots in each year to decide which strips they are to hold
17	1	Inclosure Act 1852
	2	See the Acts referred to in the first schedule to the Commons Act 1899 such as the Literary and Scientific Institutions Act 1854 and the Royal Commission Report Appendix III Para 40
	3	Inclosure Act 1845
18	1	See ante page 17
	2	Commons Act 1876 section 10(1)
	3	Commons Act 1876 section 10(3)
	4	Ibid section 10(4)

Notes and References in the Test (Part One continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
18	5	Commons Act 1876 Section 10(3)
19	1	Ibid Section 11
	2	Ibid Section 12(1)
	3	Ibid Section 12(9)
	4	Ibid Section 12(10)
	5	Ibid Section 2
20	1	The Royal Commission Report appendix II Para 45
	2	Ibid
	3	Ibid Para 43
	4	See ante page 14
	5	See ante page 15
21	1	Reformation to Industrial Revolution Christopher Hill 1967 p233
	2	Commons Act 1876
	3	An Economic and Social History of England 1066-1939 Op Cit p177
	4	Ibid p179
22	1	Ibid p92
	2	The Royal Commission Report Appendix II Para 51
	3	Reformation to Industrial Revolution Op Cit p222
	4	Ibid p221
	5	Ibid p222
23	1	The Royal Commission Report Appendix II Para 51
24	1	Ibid Para 26
	2	Section 13
	3	Section 13 General Inclosure Act 1801

Notes and References in the Text (Part One continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
25	1	6 and 7 William IV c115
	2	8 and 9 Victoria c118
	3	39 and 40 Victoria c56
	4	Ibid
	5	29 and 30 Victoria c122
26	1	Law of Property Act 1925
	2	See Appendix I
	3	Section 21(1)
	4	Law of Property Act 1925
27	1	Royal Commission Report Appendix III Para 59
	2	The Law Relating to Common Land Op Cit
	3	Inclosure Act 1845 Metropolitan Commons Act 1866 (as amended)
	4	Law of Property Act 1925
28	1	See ante page 24
	2	Royal Commission Report Appendix II Para 55
	3	The Common Land of England and Wales Op Cit p65
	4	Ibid p64
29	1	For a detailed account of the movement to preserve the Commons of London and, ultimately, other parts of England, see English Commons and Forests, The Rt Hon G Shaw-Lefevre MP 1894 Cassell and Co Ltd
	2	Ibid p35
	3	Ibid p36 cf. The comments contained in the Royal Commission Report and quoted at page XIII above
	4	English Commons and Forests chapter V
31	1	Ibid chapter XV
	2	See ante page 25
	3	Op Cit p29

Notes and References in the Text (Part One continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
32	1	The Bill ultimately became the Commons Act 1876
	2	English Commons and Forests Op Cit p282
	3	Ibid p270-1

PART TWO

COMMON LAND FROM 1925 TO 1955

INTRODUCTION

By 1 January 1926 common land had become encased in a rigid framework of legislation which failed to encourage imaginative and productive development. During the period from 1925 to 1955 a growing sense of frustration emerged and, ultimately, the opportunity was taken to review both statutory and common law with the appointment of a Royal Commission which made its report in July 1958. As a result of their findings the Commons Registration Act 1965 was passed which carried out part of the recommendations which had been made.

Between 1925 and 1964 the statutory and common law relating to common land remained substantially unchanged and, therefore, gradually became even less able to cope with the growing demands of the commoner, the public, the developer or the conservationist. A comprehensive review of the law would have become necessary eventually but the Second World War during the period from 1939 to 1945 aggravated the situation because common land was requisitioned by the Minister of Agriculture and Fisheries and immense difficulties arose when the land was to be returned to the commoners.¹ There were problems regarding the identity of the landowner and the commoners whilst the possibility that the land would not be productively managed in the future caused grave concern to the Government.² It was Lord Winterton who was the initiator of a movement within Parliament to review the use made of common land and to consider whether it could not be used more productively. Although the Royal Commission was appointed in 1955, Lord Winterton had been urging the Government to take action for several preceding years. An interesting explanation for

his initial lack of success may be found in his letter to The Times:-

"I was told in private by members of successive Governments that the whole matter involved 'political dynamite' and that the Administration therefore preferred to leave things as they were." '

The problems surrounding common land have been mentioned² in outline but their seriousness and complexity merit a detailed consideration.

In order to demonstrate the unsatisfactory state of the law, it is proposed to consider its effect upon the various categories of persons who might be concerned with common land and then to examine the problems it created in respect of a particular area of common land in Upper Teesdale known as Cow Green.

I THE OWNER OF COMMON LAND

By 1926 a person who was the owner of an area of common land was subject to various different restrictions upon the use which could be made of the land. The common rights over the land might be of various types,¹ there could be a right of access for the public² over the land and no works could be carried out on the land³ without a good deal of time, trouble and expense. The degree of knowledge which the owner might have about the land could vary enormously. Where the Court Leet remained active, there might be a considerable amount of detailed information about the rights and duties of the interested parties together with certainty as to the owner's identity. However, at the other extreme, the owner might regard the land as valueless in view of the restrictions imposed upon his enjoyment and confirmation of the lack of interest displayed by some owners can be found in the hearings before the Commons Commissioners where large areas of land have remained unclaimed⁴ despite extensive publicity. It is apparent that the problem of land which was essentially without an owner was a real one.

Depending on the condition of the land, the owner might wish to improve it, particularly if the common were not overgrazed because then he would be entitled to graze his own beasts providing sufficient pasture was left for the commoners. Where the land was suitable for the rearing of grouse, the lord of the manor would have a further incentive for developing a suitable management scheme. As a general rule, the sporting rights over common land remain with the owner and a successful grouse moor can be a valuable source of revenue. However, in order to ensure that the grouse are healthy it is necessary for the heather to be burnt to encourage fresh young growth so there must be careful management. Burnt heather requires protection for a short period to ensure that it

is not overgrazed and, therefore, fencing becomes a necessity. The owner is faced with three significant problems. If he wants to secure a statutory management scheme he will become involved in a lengthy, expensive and complicated procedure, if he wishes to erect fencing he would have to seek Ministerial approval and if he wishes to proceed without taking either of these official steps he must be certain that he has the approval of every single commoner otherwise his actions could be prevented.

The owner would be faced with precisely the same problems if he wished to plant timber on the land because growing trees would need to be fenced to exclude the public and as a protection against animals and the risk of fire and the owner could be prevented from continuing his planting if insufficient land were left for the commoners.

The right to minerals is almost invariably vested in the owner of common land unless it is vested in the Crown. If an owner should wish to work the minerals he would be in a better position because section 194(4) provides that the section does not apply to any building fence or work erected in connection with the taking or working of minerals. However, it was the opinion of the Royal Commission² in their report that common land had suffered as a result of open cast mining and greater protection was needed to prevent the despoilation of valuable acres by quarrying activities.

Reference has been made to the necessity for having regard to the rights of the commoners. It would be possible for a situation to arise where none of the rights were exercised and the commoners might be regarded as having abandoned them. The lord of the manor might consider that he would not be bound by the obligations in respect of the commoners' rights and feel free to regard the land as ordinary freehold. However, the drafting of two sections³ of the Law of Property Act 1925 continued

to restrict him and those limitations still apply.¹ Both sections refer to land subject to rights of common on 1 January 1926 and because the sections are still in force the owner must obtain Ministerial consent for building works and allow public access if the sections applied in 1926 unless the rights have been extinguished in certain limited circumstances.²

The owner would be left with a sense of frustration at the continuing interference with his freedom and, because no register of rights existed in 1926, doubts and uncertainties as to whether the sections applied to a particular piece of land would increase.

In the area around London the vigorous litigation referred to in the previous chapter³ secured the future existence of common land by preventing the lords of the manor acting with complete disregard for the commoners' rights. Large areas of land were transferred to various bodies such as the National Trust or to a committee of conservators. Therefore the problems caused by lack of knowledge were reduced, particularly as far as ownership was concerned.

However, the problems confronting owners of common land in the remainder of England were significant and resulted in the deterioration of the condition of the land.

There was one important power over common land which the lord of the manor possessed and which might have reduced his feelings of frustration at the extensive restrictions placed upon his rights of ownership. Where a scheme for management or inclosure of a common was put forward by a person interested, the lord retained a right of veto⁴. He could not deal with the land as he wished but he could prevent anyone else from attempting to change the way in which it was cultivated. The Royal Commission Report⁵ makes reference to the power of veto and states

that it has been exercised only rarely. However, considering the question from a practical point of view, it is unlikely that a local authority, inhabitant or commoner would commence the institution of any scheme of regulation or inclosure without having carefully consulted the landowner because to undertake a scheme is an expensive and lengthy procedure. Therefore, the infrequent use of a veto is not necessarily indicative of its utility. The existence of the right could be sufficient to discourage even the commencement of a scheme.

The owner of common land had a number of severe limitations upon his rights of ownership which were capable of rendering the land worthless. He was confronted with problems in understanding the complicated statutory and common law and with identifying the rights holders and the extent of their rights. Even where the rights ceased to exist he might find that the land was still fettered with statutory restrictions.'

However the landowner had a valuable power of veto and was more likely than his commoners to be in a financial position to seek specialist help when problems arose. The results of taking legal action over the difficult questions of interpretation of the common law can be observed in the cases of White v Taylor (no 2)² and Tehidy Minerals Limited v Norman.³

Both cases involved disputes over the existence of common rights and demonstrate the length and expense of investigations into the factual circumstances which prevailed on a particular piece of common land. They also indicate the uncertain nature of the common law and its capacity to diverge from the expected and the predictable. The confusion of the common law is amply shown in the following quotation from Tehidy Minerals Limited v Norman:

"This combination of events seems to us to be exceedingly improbable, and we feel sympathy for the view expressed by Farwell J in A.G. v Simpson⁴ where that learned judge said

'It cannot be the duty of a judge to presume a grant of the non-existence of which he is convinced; nor can he be constrained to hold that such a grant is reasonably possible within the meaning of the authorities'

In view, however, of the decision in Angus & Co. v Dalton¹ we consider that it is not open to us to follow that line"²

The facts in the first case, White v Taylor (No 2)³ (referred to hereafter as White's case) are complicated. In 1920 there was an auction sale in thirty-eight lots of an estate in one ownership consisting of Martin Down and neighbouring farm lands (the "A" lands). There were six plaintiffs each of whom was the successor in title of a purchaser of one or more of the lots. Four of the plaintiffs also owned other land in the neighbourhood which was part of a different title and which had not been included in the auction sale (the "B" lands). The particulars at the auction stated that practically all the A lands carried sheep rights on the Down with the number against each lot and the Down was stated to be sold subject to the specified sheep rights and also to other sheep rights appertaining to land not included in the sale and to all other rights affecting it which were not vested in the vendor. The Down was conveyed to its purchaser on 21 October 1920 and the conveyance provided that it was conveyed subject to easements, quasi-easements and privileges. The defendants were successors in title of the original purchasers of the Down. The remaining lots were conveyed to their respective purchasers by various forms of conveyance some of which referred to rights of common of pasture for sheep and some of which did not. It was accepted that at the time of the conveyances of the lots where reference was made to sheep rights, no such rights could have been in existence because the A land had been in one ownership.

The sequence of events which culminated in the action in the Chancery Division of the High Court is not clear from the headnote or the judgment but there must have been a dispute as to the right of the

plaintiffs to pasture their sheep on the Down because the plaintiffs were, inter alia, seeking a declaration that they were respectively entitled to rights of common of pasture over the defendants' land. In addition, an injunction was sought to restrain the defendants from impeding or otherwise interfering with the exercise by the plaintiffs or any of them of their rights of pasture. The defendants had counter-claimed for damages for trespass in respect of a gate which had been erected by one of the plaintiffs in a gap in a hedge bordering the Down.

The judgment by Buckley J is lengthy and detailed providing evidence of the complicated questions of fact and law which had been argued by counsel for the plaintiffs and the defendants. The conclusion reached by Buckley J was that the existence of the rights attaching to the A land depended upon the form of conveyance used to transfer the land from the vendor to the various purchasers. Where the original conveyances referred to rights of common of pasture for sheep then the successors in title of the original purchasers were entitled to exercise rights on the Down because the conveyances were effective to grant sheep rights over the Down. Where the original conveyances did not contain a reference to such rights then the claim of the successors in title failed.

Buckley J was required to consider whether rights could have been created by prescription or under the doctrine of lost modern grant both in relation to the A land where there was no reference in the conveyance to rights of common of pasture and in relation to the B land. It was held that on the evidence, the user had not been of such a character degree and frequency as to indicate an assertion of a continuous right. Moreover a lost grant should not be presumed because of the discontinuous nature of the enjoyment of sheep rights. Buckley J clearly felt a strong dislike of the use of the fiction of the lost modern grant

"My credulity would, I think, be stretched beyond all reasonable

limits were I asked to infer that five separate grants of sheep rights were made by the defendants' predecessors in title between June 1920, when the Coote sale took place, and October 1959 when one of the defendants first bought Martin Down all of which have since been lost and of which nothing is known." ¹

Therefore the only claims to rights of grazing which succeeded were those based upon the grants contained in the conveyances of the auction lots in 1920.

The defendants' counter claim in respect of the gate in the hedge failed on the grounds that the fence, which adjoined a piece of waste land² should be presumed to belong to the owner of the close, that is, one of the plaintiffs, in the absence of any evidence to the contrary.

The White case provides an excellent example of the intricate nature of the question whether a particular right of common exists. The precise wording of the conveyances in 1920, the extent of the user of the Down by the plaintiffs' sheep and the devolution of title to the various pieces of land were all relevant to the action before Buckley J.

The subsequent case of Tehidy Minerals Limited v Norman³ presents certain similarities, in the degree of detail which had to be considered, and yet a disturbing variation in the decision that was reached upon the application of the doctrine of lost modern grant.

The facts of the case are that a dispute arose over rights of grazing on Tawna Down in Cornwall. The occupants of seven farms claimed rights over the down which adjoined the farms. Until October 1941 the farmers had been accustomed to graze their animals there although the evidence of user prior to 1941 differed because four of the farms and the Down had been in common ownership until January 1920. So far as the remaining three farms were concerned, the owners gave evidence of user by the occupants of the farms from the late nineteenth or early twentieth centuries. In October 1941 the Down was requisitioned by the Ministry of Agriculture and most of it was enclosed in a ring fence and ploughed up.

In 1954 the Ministry, by a written agreement, granted a licence to the Commoners' Association to use the enclosed area for grazing cattle and sheep belonging to bona fide common holders and the Association undertook, inter alia, to maintain the boundary fence in a stockproof condition and not to overstock. In accordance with the terms of the agreement the Association managed the grazing on the Down, accepting cattle and sheep on agistment on the Down only from farmers claiming to be entitled to common rights, subject to the payment of charges and on specified conditions. The Down was derequisitioned in December 1960 and subsequently the Association continued to manage the grazing on the Down under agistment agreements following a letter from the owners of the Down in which the owners agreed to the fence remaining subject to the payment of a fair and reasonable rental although the amount was never quantified. Two hundred and three pounds were paid to the owners in December 1964 in respect of the four years' use to that date which was a sum equivalent to the rate paid to the Ministry under the earlier agreement. In 1965, the owners purported to determine the Association's rights over the common and in 1966 a potential purchaser, with the consent of the owner, erected a wire fence on the down which the owners of the seven farms removed. As a result the owners of the Down brought proceedings against the farm owners for damages for trespass and for an injunction, thereby raising the question of whether any common rights existed.

The commoners were successful both at first instance and in the Court of Appeal but it is clear from the reported case that the dispute necessitated a detailed investigation into difficult questions of fact and law which was costly and time consuming. Buckley LJ commented upon the fact that a retrial would be 'a financial disaster'.¹

Their lordships had to consider the law of prescription and lost modern grant as well as the law relating to the abandonment of profits à prendre. During the course of the hearing, Buckley LJ came to the conclusion that part of his decision in the White Case¹ was incorrect so far as it related to the acquisition of profits under the doctrine of lost modern grant and so far as it was inconsistent with Angus & Co v Dalton². Buckley LJ had adopted an approach based on common sense in the White case³ in holding that there had been no grant and he would not use the doctrine of lost modern grant to support a fiction.

However, in Tehidy Minerals Limited v Norman⁴ Buckley LJ felt obliged to follow Angus & Co v Dalton⁵ even though the result would not necessarily accord with common sense.

The value of the case is that it demonstrates the problems confronting owners who were unsure whether rights existed or not. If Buckley LJ could find himself in difficulties over the application of the doctrine of lost modern grant to common rights it is unlikely that the common land owner or his legal advisers would be certain of its effects.

II THE COMMONER

The second category of individuals it is necessary to consider is that of the commoners. By 1926 areas of common land which remained were unlikely to be the subject of a large number of rights which were actually being exercised although there was significant local variation. In addition the potential problems regarding management which had been raised by the Commons Preservation Society¹ were proved to be real in the twentieth century. Equally serious difficulties arose as government assistance was made available to farmers thus increasing the commoner's problems and making the necessity for amending legislation more urgent. The grants were applicable to common land but inhibitions existed in view of the difficulties in identifying and tracing all the commoners². The essential feature of common land is that more than one person is entitled to its produce and, therefore, must be consulted if any changes to its nature are to be made. The commoners might have been able to make progress if they were certain about the identity of their fellow commoners and the extent or even the existence of their respective rights but the common law and statutory law was complicated and sometimes relied upon concepts which were no longer appropriate such as the rule of levancy and couchancy.³ Even where the law was applicable, the commoner might find himself involved in expensive and time consuming litigation over the question of whether his rights existed at all. The cases of White v Taylor (No 2)⁴ and Tehidy Minerals Limited v Norman⁵ which have been discussed⁶ are excellent examples of the doubts and uncertainties which plagued both landowner and commoner. Therefore the problem of uncertainty hindered the commoners if they wished to make any alterations to the way in which the common was used or if they wished to prevent surcharging of the common by a commoner they believed to be exceeding his rights. Stinting was a

detailed and complicated process and, where a stint had been imposed a number of years previously, revision might be necessary.¹

An additional obstacle hindering the commoners was the disintegration of the Manorial Court structure which had provided a forum in which difficulties regarding the common could be discussed and resolved. There are a few manorial courts which continue to function² but the majority have disappeared either on inclosure or when the Law of Property Act 1922 Part V abolished copyhold tenure.³ The manorial courts had provided a valuable means of securing a degree of co-operation amongst the commoners and resolving disputes with the assistance of local people whose knowledge of past usage of the common would make them well-qualified to adjudicate upon contested claims. However the system has broken down and the opinion of the members of the Royal Commission was that it could not be restored.⁴

The methods of agriculture associated with common land were developed in medieval England and so, as the country has become increasingly industrialised, greater pressure has been placed upon the commoners to abandon their antiquated systems. In particular, areas of common have become isolated by the building of houses and industrial premises, making grazing impractical and the substantial increase in the number of motor cars on the roads has placed the commoners beasts in danger where they graze on unfenced moorland.

The problem of the inaccessible common is well illustrated by the area of land at Harpenden in Hertfordshire which is about one third of a square mile and over which sheep rights were said to exist at the time of the investigation by the Royal Commission although no rights were being exercised. The common was surrounded on all sides by houses or gardens and so

"it is difficult to see how any flock could be brought to the grazing except by motor transport".

Ironically, the danger of the commoner being unable to gain access on foot to a particular common may have been increased by the measures designed to protect common land. The Royal Commission heard evidence that suggested some authorities had encouraged development on good agricultural land because of the problems which would be experienced where development was to be carried out on common land as a result of the parliamentary protection which was enacted in the nineteenth century.'

The dangers to grazing animals from motor traffic has become more serious as road traffic has increased. In 1904 13,800 cars, motor cycles and hackney vehicles were licensed by private owners whereas in 1957 the figure was 5,424,100. For goods and other similar vehicles the figure has risen over the same period from 4,000 to 1,576,800.² The only course of action which would protect the beasts is the fencing of substantial areas of land which would be expensive in itself and would require the consent of the Secretary of State for the Environment under Section 194 of the Law of Property Act 1925. In order to gain his consent the commoners would have to establish that the fencing would be for the benefit of the neighbourhood because the section³ requires that the considerations in the Commons Act 1876 must be taken into account. Agricultural considerations are not paramount. Despite the difficulties of expense and complicated procedures, commoners in some parts of England have undertaken fencing programmes.

"Thus, the Trustees of the Boxmoor at Hemel Hempstead have fenced most of it to contain the Cattle. At Newcastle upon Tyne an open wood fence runs round the Town Moor. It keeps the cattle in without keeping the public out."⁴

Although the commoners have suffered as a result of the progress of industrialisation they have been penalised by being deprived of the opportunity to participate in advances in agricultural methods, which may be divided into three categories: animal health, the control of pests and the awarding of grants.

In order to eradicate tuberculosis in cattle, it is necessary for a farmer to prevent his stock from having contact with any beasts which are not attested. Although the owner can replace his animals on the common when all the other beasts grazing there have been attested, it is apparent that the process of establishing an attested herd would be far more difficult for a commoner than for a farmer with his own land.' It is interesting to note that in the New Forest, where the Verderers have extensive statutory powers to regulate the management of the forest, it was possible to obtain the Minister's approval for the designation of the forest as an attested area before attestation became compulsory in Hampshire. The conclusion which can be drawn is that where management of the common is effective the disadvantages confronting the commoner can be substantially reduced.²

The Royal Commission Report makes reference³ to the problems of epidemics amongst animals on common land. Modern veterinary techniques enable disease to be controlled more quickly and effectively than in the past but the necessity for identifying and segregating stock remains. The commoners would be faced with even greater problems than farmers of inclosed land if infectious diseases amongst their animals were to break out.

Turning to the question of pests and weeds, the commoner would find problems in eradicating them because of the difficulties in organising a management scheme. Also, land which adjoined the common would be affected by the pests and weeds giving other landowners substantial cause for complaint and creating a bad impression of the standard of husbandry by the commoners. One of the reasons for proposing inclosure in the seventeenth and eighteenth centuries was the poor condition of the land:-

"Those who wished to maximise the food production of the country, as they thought, generally regarded the commons as badly managed, the animals that fed upon them as diseased, the people who lived by them as idlers or worse" ¹

Although Parliament was made to appreciate the necessity of slowing the rate of inclosure it failed to make satisfactory provision for the remedying of defects such as bad or inadequate management. The statutory provisions were cumbersome and failed to meet the commoners' requirements.

Finally the question of grant aid is particularly important when considering the problems facing commoners in the mid-twentieth century. Grants are available as subsidies for lime and fertiliser and towards ploughing up, drainage and water supply schemes but the money is only available to the "occupier" and so doubts exist as to whether commoners would be eligible to apply. However it is possible that commoners were eligible but did not apply because of the difficulties involved in tracing all the commoners, securing their agreement and obtaining their proportion of the cost.² In addition, schemes which involved substantial works being carried out to the land, such as the digging of drainage channels, could come within the scope of section 194 of the Law of Property Act 1925 necessitating ministerial consent. The Agricultural Act 1957 has made provision for more grants to be available to farmers by providing up to one third of the cost of improvements to fixed equipment including buildings, roads and permanent fencing³ but the provisions do not apply to works on common land leaving the commoner at a substantial disadvantage. However, there are provisions to help the commoner and these are contained in the Hill Farming and Livestock Rearing Acts and the Marginal Production Scheme. The problems with those schemes are the difficulties in identifying all the commoners, obtaining their agreement and also their share of the cost. Under the Hill Farming Act 1946⁴ only five schemes for the improvement of a common had been approved by the Minister by February 1958 providing an

indication of the unpopularity of the provisions.'

The physical condition of an area of common land may vary considerably depending upon its location, the attitude of its owner and commoners and its popularity with the public. However, even where attempts are made to manage the land efficiently the commoners are confronted by obstructive legislation and uncertainty without the machinery which might have enabled them to resolve disputes and secure co-operation.

"Lacking vitality locally, the whole system which legislation over the last century aimed at preserving has tended to ossify instead!"²

III THE PUBLIC

The preservation of common land can be attributed to the needs of an increasing population for areas of uninclosed land upon which air and exercise could be taken. The legislation of the mid and late nineteenth centuries started to provide protection for the interests of the public and subsequently the Law of Property Act 1925¹ gave the most general rights. The commoners have suffered because their system of farming has been superseded by modern techniques but the demands of the public are of more recent origin and so it might be anticipated that the legislation to assist the public would demonstrate an understanding of their needs. However, the statutory provisions for access are far from satisfactory and present the walker or rambler with a tangled mass of legislation which would not be readily understood even by the most intelligent. There is a general misconception amongst lay people that common land is so named because it is open to everyone provided they do not damage it. In fact, the question of whether a piece of land is available for general use turns upon the interpretation and application of a number of different statutes. Rights of access could be established in the following ways:-

i). Private Acts

The provisions of specific inclosure acts might include the setting aside of a certain area of land for exercise or recreation. The rambler would need to have a detailed knowledge of the history of the area before he could be certain of his rights and, in any event, it is probable that the rights would be restricted to the inhabitants of that area. There are private acts which are designed to regulate individual areas of land whilst keeping them open and uninclosed. Such acts often provide a right of public access and specific examples

include the Epping Forest Act 1878, the Malvern Hills Act 1884 and the New Forest Act 1877.

ii) Inclosure Act 1845

The requirements of the Inclosure Act 1845¹ made the provision of an area for exercise and recreation more likely but any rights which existed would still be restricted to local inhabitants and a substantial amount of research would be necessary to discover the existence and precise nature of the rights.

iii) Custom

A town or village green might be open to access for recreation by the inhabitants in the neighbourhood as a matter of custom but there could not be a similar custom for the benefit of the public generally.

iv) Commons Act 1876

Where a scheme to regulate a common was made under the Commons Act 1876, a specified area of the land would be set aside for the purposes of access for exercise and recreation.² Only 36 applications for regulation under this Act have been made, the final being in 1919³ and so the rambler is unlikely to be able to benefit from its provisions. Although there are no statutory provisions requiring access to be limited to local inhabitants it is possible that such a restriction would be imposed.

v) Commons Act 1899

Regulation under the Commons Act 1899 has proved more popular with 258 cases of regulation prior to 1958.⁴ The power to give a right of access is expressed in the same terms as those in the Commons Act 1876.⁵ However there are schemes under the 1899 Act where the access has been to the entire common.⁶

vi) Metropolitan Commons Act 1866

Commons within the metropolitan area could have schemes imposed upon them and provision for access by the public would be a usual feature' although there is no specific requirement in the Act itself. Schemes of this type are in existence, for example: Tooting Beck Common, Hayes Common and Hampstead Heath. The provisions for access to Tooting Beck Common refer to the public at large rather than the inhabitants of a particular area. The importance of the provisions regarding access contained in any scheme under the Metropolitan Commons Acts 1866 to 1898 has diminished since the introduction of a general right of access in the Law of Property Act 1925.

vii) The Law of Property Act 1925 Section 193

There are three categories of land over which the public were given rights of access from 1 January 1926

- a) Metropolitan Commons within the meaning of the Metropolitan Commons Act 1866 to 1898
- b) Manorial waste or common situated wholly or partly within a borough or urban district²
- c) Land subject to rights of common on 1 January 1926 and which has been brought within the terms of this section by a deed deposited by the owner of the land with the Minister.

There is an exception where the land is held for naval, military or air force purposes³. The rambler would not be faced with an impossible task so far as the identification of a Metropolitan Common is concerned. However land within what was formerly a borough or urban district may include rather unexpected areas. Even if only half an acre is within the necessary boundary then the provision will apply to the entire common which may extend to hundreds of acres. In addition, there is no definition of the word "common" in the Law of Property Act 1925 and so doubts exist

as to whether the section applies to various types of land, including Lammas or half-year land.' There is a reference to common land² and land subject to rights of common on 1 January 1926³ implying that there is a distinction between the two phrases. Without attempting to explore the numerous interpretations which could be placed upon these expressions, it is obvious that doubt and ambiguity will exist, especially amongst those unfamiliar with the subject.

The potential rambler might be involved in ascertaining whether a deed had been deposited with the Minister to bring the section into operation and it would be necessary to ensure the deed had not been revoked. There are provisions to govern the situation where the rights have ceased to exist and, once again, complicated questions upon the interpretation of the common law arise.

Access may be subject to limitations which could be imposed by the Minister⁴ or under byelaws or schemes regulating the land. Whilst the wide scope of section 193 is not in question there are difficulties and ambiguities in its interpretation.

viii) National Parks and Access to the Countryside Act 1949

A planning authority has the power to make access agreements or orders under Part V of the 1949 Act relating to open land which may or may not be common land. The power has not been used extensively with only 17 access agreements and no orders having been made prior to 1957.⁵

ix) Rural Commons and Commonable Land Owned by the National Trust

The National Trust Act 1907 Section 29 gives the public a right of access to rural commons and commonable land owned by the National Trust.

There are no accurate figures recording the total acreage of common to which the public has a general right of access. The Royal Commission Report⁶ states that 150,651 acres are either metropolitan commons or commons reported to be formerly wholly or partly within boroughs and urban

districts. In addition, deeds have been deposited and are unrevoked covering 118,500 acres approximately and the figure given by the working party report' is "about 120,000 acres" consisting of 143 commons. Until all the registrations under the Commons Registrations Act 1965 have become final it is impossible to provide a figure for the total acreage of common land but an estimated figure for England and Wales of 1,500,000 is generally accepted.² Therefore, there is a right of public access to approximately one fifth of the total acreage and it is for the rambler to decide whether a particular area of land falls within that one fifth or not.

A practical problem which may confront members of the public is that of illegal enclosure. The provisions of section 194³ are so unworkable that incidences of fences built in contravention of the statute do occur. The remedy provided is contained in sub-section(4) and is available on application to the county court within whose jurisdiction the land is situated. The council of any county or district concerned, the lord of the manor or any other person interested in the common has locus standi and the court has power to order the removal of the work and the restoration of the land to its original condition. Therefore, where a member of the public discovers any works which contravene section 194 he must pursue the matter in the appropriate county court, if the public has a right of access to the common, or, in other cases, press the local authority to take action. Unfortunately the councils have only a power and are not under a duty to take action and so the public may find themselves without a remedy where illegal enclosure has taken place.

The public received a good deal of assistance from the legislation enacted to protect common land. However, the provisions are difficult

to interpret and the remedies for failure to observe them inadequate.

IV THE CONSERVATIONIST

The legislation designed to protect common land made successful management more difficult. However, by preventing any substantial changes taking place in its use, the statutory provisions have ensured by accident that stable conditions have prevailed over areas of land where plants and birds of particular scientific interest have flourished. The Royal Commission requested the Nature Conservancy Council to study the preliminary list of commons available to the Royal Commission and provide details of the sites of special scientific interest.¹ Important areas included Hampstead Heath, Oxshott Heath, Port Meadow, Pixey, Oxhey and Yarnton Meadows in Oxfordshire.²

However, although some sites have become a haven for rare species because they have been neglected, others have become important for nature conservation because they have been continuously managed in a particular way.

"The Nature Conservancy state that the great agricultural and conservation value of the Oxfordshire meadows derives from their continuous grazing treatment over many centuries."³

The solution to the problem confronting those who wish to conserve nature could not be found by leaving common land in a wild, unmanaged condition. If endangered species are to survive than other pests and weeds may have to be destroyed in a carefully constructed management plan.

The existing legislation had prevented common land disappearing but had not given any locus standi to the conservationists which would enable them to intervene where a species was in danger of extinction. The provisions prohibiting the erection of fencing in the Law of Property Act 1925⁴ would hinder the conservationists because without the consent of the Minister no protection could be given to rare trees, shrubs or plants.

There is an expression which can be found in several regulation schemes relating to common land which is relevant to the question of

conservation. The conservators of the common or other responsible authority are often required to "do nothing that may otherwise vary or alter the natural features or aspects of the common." ' However, the witnesses who gave evidence to the Royal Commission found the expression impossible to interpret and, in any event, the requirement would be a general statement qualified by more specific duties upon the relevant authority. Therefore, the expression has little practical significance.

The problem confronting the conservationists was their lack of authority. They could only make suggestions to the landowners and the commoners unless they were fortunate enough to own the land themselves. They could not insist that a particular course of action be followed in order to protect a rare bird or plant but only advise.

The legislation surrounding common land presented different problems to the various groups of individuals who had contact with it. However a valuable illustration of the effects of the restrictions upon the use of the land can be found in the facts relating to Cow Green Reservoir in Teesdale, County Durham.

V COW GREEN RESERVOIR

Cow Green is situated in Upper Teesdale approximately one mile from the well-known waterfall "Caldron Snout". The area is particularly beautiful and impressive, a favourite with walkers, climbers and naturalists. In addition, because of the sugar limestone and acid peat soils communities of plants, unique in the United Kingdom are to be found there and may have been there since the period immediately after the last ice age.

In 1964 ICI Limited decided to build three of the largest ammonia plants in the world at Billingham and to expand production of hydrogen at their Wilton works. The new construction and expansion increased their water requirement by twenty-five million gallons per day (25 m.g.d.) Other industrial water users had been developing and altogether required a further 10 m.g.d. The problem facing the Tees Valley and Cleveland Water Board was enormous because the maximum entire output from Teesdale sources was only 65 m.g.d. The only feasible solution was for a river-regulating reservoir to be built in Upper Teesdale. There were several possible sites but geological surveys eliminated some of these whilst others did not have a sufficiently large catchment area. The Water Board was anxious to avoid confrontation with local farmers or naturalists and so talks were held with the Nature Conservancy Council in order to establish possible reactions to the various sites.

In the initial stages the Director General appeared to support the Cow Green site. However, following a botanical report based on a survey of the affected area, the Nature Conservancy Council had little choice but to oppose the scheme strongly.

It is at this point in the sequence of events that it was discovered approximately three hundred acres of the proposed site at Cow Green was

common land. ICI Limited and the Water Board had been aware that they would encounter strong opposition to the use of the Cow Green site but the discovery complicated the situation still further. There were other possible sites but they were more costly (particularly Upper Cow Green), had a lower yield or involved disturbing farmland and all the other alternatives had later completion dates.

In the ordinary course of events, the land would have been the subject of a compulsory purchase order under the Water Acts 1945 and 1948. However simply because the land was common land, first of all the Aquisition of Land (Authorisation Procedure) Act 1946 had to be followed. Therefore, special Parliamentary procedure applied unless a certificate was given by the Minister of Land and Natural Resources that an equivalent area of land would be given in exchange for the common land which was being lost. This is the procedure which the local council attempted to follow in Wilson and Others v Secretary of State for the Environment.¹ Secondly, Section 22 of the Commons Act 1899 applied and so the consent of the Minister was needed. Under the terms of the 1899 Act, the Minister had to hold the same inquiries as under the Commons Act 1876 in which regard had to be given to both "the benefit of the neighbourhood" and "private interests". Whether these phrases are interpreted precisely as laid down in the Act or whether a rather looser interpretation is adopted the net result is more time, trouble and expense.

So, the status of the land imposed the following additional conditions:

1. EITHER a certificate had to be obtained from the Minister of Land and Natural Resources
2. OR special Parliamentary procedure had to be followed.

AND IN EITHER CASE

3. The consent of the Minister under the terms of the 1876 Act had to be given.

Because of these complications, the Water Board was advised by the Minister to proceed by a private bill in Parliament and such a bill was

promoted because of the time factor involved. Under the 1876 Act, it is likely that advertisements in local newspapers and a local public inquiry would have been necessary and these procedures would have taken a considerable amount of time. The conclusion eventually reached however, would have been a reasoned one made by a Minister with expert evidence before him. The private bill had the advantage, for the promoters, of speed so long as it received a smooth passage through Parliament. The use of the private bill involved an element of risk because strong opposition could have resulted in the failure of the bill to receive the Royal Assent in the current session. Skilful arguments put forward in Parliament by an able orator might have been able to make a less than sound argument appear convincing where the opposition was put forward by one of more moderate ability. However, the Water Board decided to take the risk and on 27 November 1965 the Bill was laid.

The account of the Bill's subsequent passage through both Houses and ultimate success on 22 March 1967 when it received the Royal Assent is well recorded in Mr Gregory's book "The Price of Amenity". The point which this case demonstrates is that by the middle of the twentieth century, the accumulation of legislation affecting common land ensured that altering the usage of the land was almost impossible. Therefore an escape route (the private bill) was adopted. Although the technical procedures were avoided the eventual decision was subject to the vagaries of the Parliamentary procedure and, more significantly, by using the private bill, the promoter did not need to ensure that an equivalent area of land would be given in exchange for use as common land. No local inquiries were held nor consideration given either to the benefit of the neighbourhood or private interests, however defined. The protective legislation had defeated its own object by forcing those who wished to change the nature of the land to use unusual and unsatisfactory methods.

CONCLUSION

The problems confronting the various groups of people have been discussed and confirmation of the very real existence of uncertainty can be found in the case of Paine & Co v St Neots Gas Co ' which was taken to the Court of Appeal. The plaintiffs were manufacturers of malt extract and required a large supply of clean water for that purpose. Their premises and those of the defendants adjoined a common on which the plaintiffs had sunk a well. The water in the well became polluted by ammonia escaping from the defendants' works. The plaintiffs rested their right to the water on a "lease" of 1935 by five persons who were five of the commoners entitled to rights on the common. There had been a meeting of the commoners at which the request for the Lease had been agreed to and the original lease which was executed in 1932 had been drawn up by the treasurer of the meeting of the proprietors of common rights and he was a solicitor. In addition, the first proprietor referred to in the 1932 documents was also the lord of the manor and his son, by his agent, was present at the meeting when it was decided to grant the 1935 lease. However, he had not executed the 1935 document.

Scott L J considered the effect of the documents of 1932 and 1935 and he also referred to the Inclosure Acts of 1770 and 1774 which had created and defined the common rights. However, he felt constrained to find that the five commoners did not have the power to make the grant under the deed of 1935. They were purporting to deal with the freehold but had no authority to do so. Finlay and Luxmoore L J J were of the same opinion. Scott L J expressed sympathy for the plaintiffs who had been relying on a document drafted by a solicitor and to which a meeting of the commoners had consented. No objection had been expressed by the fee simple owner. However, because the plaintiffs could not prove title to the easement their claim in nuisance against the defendant failed.

NOTES AND REFERENCES IN THE TEXT

PART TWO

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
33	1	For a practical account of the problems see <u>Tehidy Minerals Ltd v Norman [1971] 2A ER 475</u> Considered post pages 38-44
	2	The Royal Commission Report Para 117
34	1	The Times 30 July 1955 p7
	2	See ante pages 31 to 32
35	1	See ante pages 7 to 9
	2	Law of Property Act 1925 section 193
	3	Ibid section 194
	4	Common Land Preparations for Comprehensive Legislation Report of an Inter-Departmental Working Party 1975-77 (hereinafter referred to as The Working Party Report) Para 5.5
36	1	Law of Property Act 1925 section 194
	2	Royal Commission Report Para 203
	3	Sections 193 and 194
37	1	Both sections have been expressly preserved by the Commons Registration Act 1965
	2	Law of Property Act 1925 sections 193(1)(d) and 194(3)
	3	See ante pages 29 - 31
	4	Commons Act 1876 Section 12(5)
	5	Royal Commission Report Para 214
38	1	See the Law of Property Act 1925 Section 193 and 194 and ante page 37
	2	[1968]1A ER 1015
	3	[1971]2A ER 475
	4	(1901)2 Ch 671 at page 698
39	1	(1877) 3QBD 85
	2	<u>Tehidy Minerals Ltd v Norman [1971] 2A ER 475</u> at page 491
	3	[1968]1A ER 1015

Notes and References in the Text (Part Two continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
41	1	[1968] 1A ER at page 1034D cf <u>Tehidy Minerals Ltd v Norman</u> [1971] 2A ER
	2	ie the Down
	3	[1971]2A ER 475
42	1	[1971]2A ER p484 b
43	1	[1968]1A ER 1015
	2	[1877]3QBD 85
	3	[1968]1A ER 1015
	4	[1971]2A ER 477
	5	[1877]3QBD 85
44	1	See ante pages 31 to 32
	2	The Royal Commission Report paras 161 and 162 and the Working Party Report para 2.26
	3	See ante page 10
	4	[1968] 1A ER 1015
	5	[1971] 2A ER 475
	6	See ante pages 38-43
45	1	See ante pages 10 to 11 for an explanation of stinting
	2	Such as the Court Leet of the Manor of Spaunton in North Yorkshire See Appendix II
	3	Royal Commission Report para 131
	4	Ibid para 135
	5	Ibid para 141
46	1	Ibid para 139
	2	Ibid p50 footnote 49
	3	Section 194(1) Law of Property Act 1925
	4	Royal Commission Report para 150
47	1	Ibid para 158

Notes and References in the Text (Part Two continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
47	2	Royal Commission Report para 158
	3	Ibid para 159
48	1	Ibid Appendix II para 48
	2	Working Party Report Chapter 2.26 and post page 222
	3	Ibid para 162
	4	Section 12
49	1	Royal Commission Report para 161
	2	Ibid para 163
50	1	Section 193
51	1	See ante page 25 and section 30
	2	Working Party Report Appendix D2 and section 7
	3	Royal commission Report Appendix III para 52
	4	Ibid para 53
	5	Section 1(2)
	6	Working Party Report Appendix D3 clause 5
52	1	Ibid Appendix D1
	2	By section 189(4) and Schedule 30 to the Local Government Act 1972 section 193 was amended to include manorial waste or common which is wholly or partially situated within an area which immediately before 1 April 1974 was a borough or urban district
	3	Law of Property Act 1925 section 193(6)
53	1	See ante pages 27 to 28
	2	Ibid
	3	For an example relating to Haworth Moor see the Working Party Report Appendix D5
	4	Post Appendix I
	5	Royal Commission Report para 94
	6	Ibid para 93

Notes and References in the Text (Part Two continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
54	1	Working Party Report para 1.1
	2	Ibid para 2.4 and Royal Commission Report para 61
	3	Law of Property Act 1925
56	1	Royal Commission Report para 74 and Appendix IV
	2	Ibid para 223
	3	Ibid para 223
	4	Section 194
57	1	Working Party Report Annex D3 para 3
58	1	The details regarding this sequence of events are taken from "The Price of Amenity" Gregory 1971 MacMillan Press Ltd Chapter 4
59	1	JPEL 1973 p153
60	1	See ante page 58
61	1	[1939] 3AER 812

PART THREE

THE RECOMMENDATIONS OF THE ROYAL COMMISSION

The Royal Commission Report presented to Parliament in July 1958 provided a clear account of the factual experiences of the members taken from their visits to commons and details of evidence taken from witnesses and correspondents. It is a valuable collection of information which is of great assistance to those wanting to learn more about the usage of common land in and around 1955.

The Report continues with recommendations for future legislation to remedy the defects in the legislation prevailing at the time of the investigation and to encourage future innovation. The proposals made establish a clear, logical system of registration and management with provision for extensive rights of access for the public. Although the Report makes it clear that the entirety of the suggestions made should be put into effect together, the registration, management and access proposals will be considered individually to facilitate an analysis of their content.

I REGISTRATION PROPOSALS

A THE REGISTER

Each county council or county borough would be designated a Commons Registration Authority (CRA) and would be required to open a register within one year from the appointed day. The CRA would invite claims from any person to register land claimed to be common land on the date of the passing of the act so long as it was situated within the authority's administrative area.¹ The registration might be made by a commoner, landowner, local resident, local authority, board of conservators or Trustees for the common, amenity society or the CRA itself.

The Commission recognised the danger that frivolous registrations might be made unless there were adequate safeguards and so it was proposed that there be a prescribed form for making the claim which would be countersigned by a responsible person and it would be a criminal offence to register a claim without just cause.²

At the same time as claims were invited for the registration of the status of the land, the CRA would encourage those with an interest in the land, whether as owners or commoners, to register their title to the land or rights over it. It is apparent that registrations would be relatively easy to make despite the recommended safeguards and so there was a recommendation for the publication of notices giving details of the claims made to enable objections to be registered. Local newspapers, police or parish notice boards and the entrances to local churches or chapels would provide information requesting those wishing to contest claims to make their formal objections.

The register would be open for a total period of twelve years, during which time it would be regarded as provisional. For the first eight years registrations could be made, whereas objections could be

made during those initial years or in the remaining four years. The additional years for objections would be necessary to ensure that it would be impossible for a registration to be made on the last available day in an attempt to prevent any objectors becoming aware of the claim in time to contest it. The total period of twelve years was deliberately chosen by the Royal Commission by analogy with the period laid down in the Limitation Act 1939.'

"As we are here concerned very largely with forms of real property it seems equitable that a similar rule should apply" ²

After the periods of eight and twelve years the register would be regarded as closed for claims and objections respectively except in unusual cases where possible claimants were under a legal disability or the victims of fraud. When the period of twelve years had expired uncontested claims would be regarded as final. Where objections had been registered, the matter would be referred to a Commons Commissioner³ to adjudicate upon the claim.

Although the Commission did not state precisely their recommendations upon whether the register should be kept up to date when all registrations had become final, there is a footnote which implies that the register should be maintained to reflect changes which occurred subsequently.

"Changes in a Register would be necessary if common rights were purchased or extinguished as the result of a scheme (...) or extinguished by a public authority on acquiring the land compulsorily ... Claimants should be warned on initial registration of the necessity of reporting any subsequent changes which might affect the record in the Commons Register."⁴

B THE REGISTRATION OF OWNERSHIP

The Commission regarded the H M Land Registry as the appropriate body to retain details of the owners of the land and recommended that when a registration of title to the land had become final then the details should be sent by the CRA to the appropriate Land Registry which would accept the documents as sufficient evidence of title.' Because common land is often in isolated locations and because changes of ownership are relatively infrequent, the procedure recommended by the Royal Commission might have been successful. However, when a normal application is made for the first registration of land at H M Land Registry a detailed investigation of the title is carried out. The documents which the Registry would receive from the CRA would be inconclusive by themselves and the absence of any objections to the registration, whilst adding weight to the authenticity of the claim, would hardly establish a good root of title. Therefore the recommendation regarding title to the land can be regarded as unusual and not entirely satisfactory.

C EXEMPTIONS FROM REGISTRATION

The Commission felt that certain areas of common land which were already managed adequately such as the New Forest could be exempted from the registration requirements on application to the Minister. The New Forest is regulated under the New Forest Act 1949 which requires the Clerk to the Verderers to keep a full record of rights and ownership in the "Statutory Atlas". The imposition of a new scheme of registration would involve additional expense without a great deal of benefit.

D AMENDMENT OF THE COMMON LAW

So far as the specific provisions regarding registrations of rights were concerned, the Commission were anxious to achieve simplicity and clarity. They recommended the abolition of common appendant and the registration of a particular quantification for the rights so that commercial exploitation would be avoided. Where rights of turbary or rights to take stove were involved, the right would be limited to the needs of a particular dwelling. However, rights of pasture presented a more difficult problem particularly where there was no form of stinting on a common.

"For other commons, without any form of stinting, no method of predetermining rights is satisfactory" ¹

Having made such a broad statement, the Commission proceeded to dismiss the rule of levancy and couchancy, the method of valuing the farm as a pastoral unit and the measurement of rights according to user in previous years. However no suggestion was made as to which test was to be recommended and the solution suggested was that each commoner should decide for himself upon the quantity to register. In the event of conflict, the final decision would have to be made according to the common law which would result in the application of the rule of levancy and couchancy but, despite their reservations regarding the antiquated nature of the rule, it was the opinion of the Commission that no "provision which we could suggest for the prior definition of rights would prevent this happening occasionally."²

The Commission foresaw that there would be conflict and yet declined to provide any guidance whatsoever for the commoners or their advisers.

E MAPS

An important recommendation to assist the public in exercising their right of access concerned the question of maps. It was recommended that the CRA put details of all final registrations on maps, one copy of which would be sent to the Ordnance Survey Department¹ so that subsequent maps of each area would give details of common land. Therefore, the information would be readily available to the rambler in an easily digestible form.²

F THE RESOLUTION OF DISPUTES

The Commission appreciated that disputes would arise, where a provisional registration was made followed by an objection, which would require resolution and so there were recommendations regarding machinery for deciding upon the validity of individual claims. The Report placed emphasis upon the capacity of the individuals concerned to resolve problems amicably and indicated that the CRA could assist by fulfilling a mediatory role. It was envisaged that few cases would require legal proceedings

"But, though few, they would need to be determined by a procedure which was both speedy and inexpensive." ¹

When the importance of the existence of the rights to the commoner is compared with the value of land free from rights to the landowner then the confidence of the Royal Commission that there would not be many disputes appears to stem from optimism rather than fact.²

The system proposed by the Commission consisted of a group of legally qualified persons known as Commons Commissioners to whom disputes would be referred by the CRA. The Report makes reference to the suitability of county court judges for the task³ Assessors would be made available to assist the Commissioner where appropriate, the assessor being a qualified person such as a valuer, surveyor or land agent. The use of an "official" expert could help to keep the cost of the proceedings to a minimum and it is clear from the Royal Commission Report that the question of expense was given serious thought.

"For the same reason of limiting cost it would be desirable for the Commons Commissioner to hear cases in public as near as possible to the land in dispute." ⁴

A right of appeal to the Lands Tribunal was recommended, because of its reputation for speed and moderate cost and its experience in

dealing with questions regarding real property. The Commission were attempting to achieve a simple, quick, inexpensive method of resolving disputes which, in their opinion, would be small in number.

G UNCLAIMED LAND

The Commission realised that there would be areas of land which would not be claimed by anyone. Both small pieces of roadside waste and large areas of common land might be left without an owner after the expiration of the period of eight years during which registrations of ownership could be made. The Commission recommended that the unclaimed land should vest in the Crown in accordance with accepted practice and the question of which department should act for the Crown was given careful consideration. The Minister of Agriculture, Fisheries and Food and the Minister of Housing and Local Government were rejected on the grounds that both of the Ministers were too closely identified with the use of land for particular purposes. The suspicion of bias, whether justified or not, would exist. In addition, the Commission wished to select an authority with which those holding other interests would feel they could negotiate on equal terms. Therefore, one of the major departments of state would not be entirely suitable. However, the body taking responsibility for unclaimed land would need to have a detailed working knowledge of the law and administration of real property. Therefore, the custodian recommended by the Royal Commission was the Public Trustee' and he would be given additional functions regarding the receipt of compensation payable by a public authority in connection with an unclaimed common or where the ownership was in dispute. The work undertaken by the Public Trustee would not provide a significant amount of revenue particularly in the initial period and so a fund known as the Common Land Fund was recommended to be granted by Parliament as a capital sum.

H CONCLUSION

When considered as a whole, the registration provisions put forward by the Royal Commission constitute a unified procedure which would result in a complete register of details regarding rights and status, a welcome addition to the ownership register at H M Land Registry, an effective and speedy procedure for determining disputes, a solution to the problem of unclaimed land and a time scale for the entire process which accorded with the usual provisions regarding the limitation of actions. The only significant problem which was apparent from the Report was the quantification of rights of pasture' and the Commission was unable to find a solution leaving the decision to each Commons Commissioner. The recommendations regarding management are equally comprehensive.

II MANAGEMENT PROPOSALS

The Royal Commission envisaged that the provisions regarding management would come into force at the same time as those relating to registration and the success of the former would be dependant upon that of the latter.

" ... the commoners and owners of the soil, meeting to talk over their claims to rights before registering them, would very likely go on to talk about the various things that needed doing to the land to put it into good shape." '

Hence negotiations prior to registration could serve an additional function by providing the opportunity for discussion about the condition of the land. The existence of a simple procedure, should the recommendation be taken up, to put a management scheme into effect would encourage the interested parties to put their ideas into practice. None of the suggestions made by the Royal Commission regarding management were enacted although proposals are being considered for legislation on this topic in future.² An Inter-Departmental Working Party has been set up in 1975 consisting of representatives from various Government Departments with an interest in common land with a view to commencing preparations for second stage legislation to deal with the questions of public access and management.

A PROPOSING A SCHEME

The Commission gave the power to promote schemes to the holders of private rights and to any local authority whose inhabitants made substantial use of the common. The proposals could be intended to relate to the management or improvement of either the whole or a part of the land and it would be possible, and preferable, for the various interested persons to collaborate and work in conjunction with each other so that the scheme could be submitted by all those with an interest in the land whether as an owner, commoner or local authority. The proposals would be sent to the planning authority who after giving the statutory notices would send it together with any objections received to the Minister of Agriculture, Fisheries and Food. The Minister would consider the scheme and objections after holding a local inquiry if necessary, and, upon his approval, the scheme would be laid before Parliament in an order subject to negative resolution. The initiative for proposing a scheme would remain with those people having an interest in the land, either as owners and commoners or as a local authority whose inhabitants used the land.

The Commission considered that for the first two years after the Register was opened by the CRA the right of a local authority to make proposals should be limited to

"such schemes as were designed primarily for the management and improvement of the land for the enjoyment of the public or, if it were a highway authority, in the interest of public safety".

These restrictions would be lifted after the period of two years had elapsed, giving local authorities wide powers over common land because a scheme proposed by an authority would not have needed to relate to an area located within its administrative boundaries.

Authorities would be able to act in co-operation where appropriate and

could seek additional powers to limit or acquire rights compulsorily should the commoners fail to co-operate. The suggestions made by the Commission regarding provisions which might be included in any scheme included the laying out of children's playgrounds, the construction of car parks, public shelters, sports pavilions, public lavatories and other desirable buildings considering the use made by the public of the land.'

Where the proposals by a local authority interfered with the rights of commoners or the landowner, the Commission recommended that the rightholders (including the landowner) be given a choice of selling their rights to the authority voluntarily, having their rights suspended on payment of compensation, having a part of the common reserved for the exercise of the rights with an appropriate compensation payment or having the rights acquired by the local authority and extinguished on payment of compensation.

None of the recommendations regarding management schemes have been put into effect and so it is impossible to state the practical consequences of the implementation of the Commission's suggestions. However, it is clear that the local authorities would have had extremely wide powers which could have resulted in the loss of a substantial number of common rights. The large expanses of common land in the North and South West of England are regularly used by town dwellers from the Midlands and South East of England and the Commission's proposals would have enabled local authorities at considerable distances from remote areas to acquire land and extinguish rights compulsorily. Although there is reference to the payment of compensation, the method for calculating the value of the rights is not satisfactory:

"Compensation should be as agreed between the parties or as determined by a Commons Commissioner on the basis of the value of the

rights at the date of this Report" ' .

There is a proviso for the Minister to award an increase where land values generally had increased substantially but the proviso only applied to the acquisition of the title to the soil and not to the acquisition of rights over the soil.

Reference is made to the promotion of a scheme by the commoners themselves but the possibility of intervention by a local authority would exist² and could exercise a restraining influence upon farmers wishing to improve their land.

B GUIDING PRINCIPLES

In order to ensure that any schemes proposed would not adversely affect those with an interest in or having access to the land, the Commission formulated six principles which they recommended should apply to every scheme no matter who proposed it.

The first required any person promoting a scheme to provide adequate details of any proposed works or improvements which might adversely affect the rights of others so that the precise extent and likely effect of those works could be comprehended. Where it was proposed to erect any type of fence, its location, nature and the length of time for which it would be erected would have to be accurately stated. The authorities would be required to satisfy themselves that the interference was the minimum necessary for the scheme to function properly.

The second, as a necessary addition to the first, declared that any work which was carried out and adversely affected the rights of others should be illegal unless it had been included in an approved scheme.

The third principle was regarded as particularly important by the Commission and required that every effort should be made to publicise proposals for a scheme to ensure, as far as possible, that every person affected would have an opportunity to object. On receiving or making proposals, the CRA would be required to notify every person with a registered interest in the land, every local authority in whose area the land was situated, local representatives of the Minister of Agriculture, Fisheries and Food, the Forestry Commission and the public generally by giving notice in accordance with the regulations proposed by the Minister. The Commission wished to provide another opportunity for the local authorities to exercise

power over the commoner by recommending that where a scheme was received for a common within its administrative area, the authority should be able to suggest for inclusion in the scheme stiles, footpaths, gates and cattle grids to facilitate public access. Although the promoters of the scheme would have the chance to object to any suggestions, the decisions would rest with the Minister and it is not difficult to see that even the possibility of an authority making any proposals regarding public access would be sufficient to dissuade a group of commoners from initiating a scheme.

The fourth principle concerned the variation or extinguishment of rights over the land. Whenever a proposed scheme affected rights over the land and it was feasible to offer the rightholders a choice as to whether their rights should be restricted to part of the common or temporarily suspended or purchased or acquired then that choice should be offered. Although the existence of an element of choice is preferable to the imposition of a single course of action, the principle simply serves to emphasise the considerable acquisition powers which the Commission intended to give the local authorities.

Similarly the fifth guideline stated that rights should be suspended or acquired only on the payment of compensation.

The final principle declared that the promoters ought to be able to carry out the same improvements as if the land were freehold.

The guidelines laid down by the Commission stress the desire to encourage local authorities to take an active interest in common land used by their inhabitants whether it was within their administrative area or not. Although emphasis is placed upon extensive advertising to inform those affected by the proposals, those who object could find their rights extinguished in return for compensation which would not

be adequate.

The Commission also recommended that the owner of the land should not have the right to exercise a power of veto over any scheme. The effect would be to substantially reduce the powers of the owner over his own land and whilst it is possible to understand the frustrations experienced by those wishing to promote schemes who are blocked by the owner, it would be a drastic step to remove the power of veto. '

C THE FUNCTIONS OF THE COMMONS REGISTRATION AUTHORITY

The Royal Commission's recommendations which have been set out would result in substantial powers being vested in the CRA. Their responsibilities would extend to the provision and management of the registers and receipt of the proposals for management schemes together with the implementation of the procedure for statutory advertisements, receipt of objections and transmission of the proposals to the Minister. However, the Commission envisaged still wider powers being vested in the CRA where their administrative area included neglected commons.

First, after the registers had been open for the initial period of two years, the CRA would be able to make proposals on its own initiative for a scheme of management or improvement even where such a scheme did not necessarily facilitate public enjoyment or safety.

Secondly the Commission recommended that a duty should be placed on each CRA to examine all the common land in its area at the end of the registration period and every ten years thereafter. Where a scheme had failed, the CRA would give advice and encouragement to the promoters to make new proposals. Where the promoters refused to do so the CRA would be able to submit suggestions of its own if the land were threatened with serious deterioration.

In fact, the powers of the CRAs have been limited to the establishment of the registers and any new legislation regarding management is unlikely to give particularly extensive powers to the county councils.' However, it is clear that the members of the Commission were prepared to encourage substantial interference in the use and management of common land and, had all the recommendations been put into effect, the powers of the local authorities if fully utilised could have resulted in the acquisition and extinguishment of substantial quantities of rights.

D MINISTERIAL RESPONSIBILITY

The Commission envisaged that the management proposals would be submitted to the Minister of Agriculture, Fisheries and Food who would consult the Minister of Housing and Local Government where public enjoyment and access was in question. The advice of the Nature Conservancy Council and the Council for the Preservation of Rural England would be sought upon problems of public access, archaeology, ornithology, ancient monuments, camping and other related matters. The Minister would be under an obligation to hold a local inquiry where there appeared to him to be a substantial conflict of interests. The decision of whether to consent to the proposals or not would rest with the Minister who would have the power to modify any proposals in the public interest.

E OPERATING A SCHEME

Once a scheme had been formally approved the question of how it should be put into effect becomes paramount. Where the proposer was a local authority, the Commission considered that the authority would be responsible for the scheme's management. The inclusion of a representative from the remaining rightholders was suggested where a substantial use of the common was made by them. Where the owner of the soil proposed a scheme, the Commission stated that the management should be his responsibility and he should inform the local authorities concerned and the commoners of any particular actions he was about to take which affected their interests. However, the Commission foresaw that problems could arise where the commoners were the promoters and therefore recommended that the details submitted to the CRA should include provision for a Committee of Management and that the Minister should prepare and issue model rules for such a Committee.

It is obvious that the question of who should have a place on a Committee of Management is central to the success of any scheme. Whilst the Commission gives considerable detail upon the voting rights which ought to be exercised by each commoner where the scheme was proposed by them it does not give much attention to the manner in which a committee established by a local authority should act. Without clear requirements regarding representation of rightholders upon any governing body or rules concerning the safeguarding of those rights there is the possibility that the interests of the public would be preferred to those of the commoner and landowner.

F POSSIBLE OBJECTIVES FOR A SCHEME

Common land varies considerably in geographical location, agricultural purpose, state of cultivation and requirements. The Commission recognised the numerous possibilities which could be explored in the use of the land in the future and having made reference to the establishment of schemes for public enjoyment, grazing, reclamation and as woodland, stated that the categories were not comprehensive each common required individual attention. The caution of the Commission has been endorsed by a study since undertaken by the Nuffield Foundation of the practical problems of over 500 commons. The results, published in 1967, classified common land into 21 different types with individual management codes.'

G RATIONALISING THE EXISTING LEGISLATION

The legislation of earlier centuries had served to protect common land but, in doing so, had created various different categories of land with separate legislative control. The Commission sought to simplify the existing arrangements by recommending the repeal of the Metropolitan Commons Acts 1866 to 1898, the Inclosure Acts relating to inclosures and Sections 193 and 194 of the Law of Property Act 1925. The repeals would be without prejudice to any schemes made under any of those Acts.

So far as the question of grants is concerned, the Commission recommended that the existing legislation be amended so that agricultural improvements on common land would be eligible for Government grants at the same rate as improvements carried out on other agricultural land. Assistance should be provided for fencing works and consideration given to the amendment of the Agriculture (Improvement of Roads) Act 1955 so that the word "improvement" could be extended to cover fencing of eligible roads over a common to enable the Minister of Agriculture to contribute towards the cost of fencing some unclassified or unadopted roads in livestock rearing areas in hill and upland counties.

The Commission considered that town or village greens serve the same function as Metropolitan or other commons in densely populated areas and, therefore, recommended that the proposals regarding registration should apply.

It is apparent from the definition of a green suggested by the Commission that a green could be owned by a private individual.' However the recommendations do not refer to the maintenance of the green except where it is vested in the local authority. In the latter event, the recommendation is that the land should be maintained by the authority as if it had been acquired under the Open Spaces Act 1906. Presumably, the Commission envisaged that where the green was not owned by a local authority the owner would be given specific rights and duties to enable the land to be managed whilst protecting the rights of the public.

Where recreational or fuel allotments set aside under inclosure awards have become used as village greens then the Commission recommended that they should be registered as such. The recommendations regarding allotments used for their original purpose are confused making it unclear whether the registration provisions would be mandatory or not. The allotments are the responsibility of the Ministry of Education or the Charity Commission and so their views would have to be considered should the original purposes become incapable of fulfillment. The only clear recommendation is that the Charities (Fuel Allotments) Act 1939 be repealed, thus removing the power of the Charity Commissioners to approve schemes for the sale or letting of fuel allotments for other purposes.

I FENCING

The problem of fencing common land has troubled commoners and the public for a considerable time. The number of sheep killed by motorists is sufficient to cause concern and yet the fencing of extensive moorland tracts would be expensive and reduce the amenity value of the areas in question. The Commission were satisfied that the interests of the commoners and the safety of the public were paramount and recommended that a highway authority should have the power to promote a scheme for the fencing of a roadside common where it was satisfied that the fencing was in the public interest because it would reduce the risk of accidents involving stray animals. The authority would be able to propose the scheme as soon as the register was opened and would not have to wait for the initial period of two years to elapse. There are recommendations regarding fencing where a scheme was proposed by the commoners rather than the highway authority under which the authority would be given the opportunity to make alternative proposals subject to its defraying any additional expense should the Minister accept the authority's options.

III PUBLIC ACCESS

The recommendations regarding public access are quite clear stating that all common land should be open to the public as of right subject to general conditions for the prevention of damage to or misuse of the land. The restrictions on access to open country in the Second Schedule to the National Parks and Access to the Countryside Act 1949 would apply and the proposers of any management scheme could request the district or borough council within whose area the land was situated to make bye-laws for the prevention of nuisances and the preservation of order.

The confidence of the Commission in the publicity which would surround the registration of common land can be observed in their statement that

"If our recommendations are accepted, anyone who has any doubts whether a stretch of land is common or not will need only to refer to the Commons Register" '

However, even though a member of the public might be unaware of the existence of a register, the inclusion of markings signifying common land on Ordnance Survey Maps² would ensure that the public were made sufficiently aware of their access rights.

The proposals regarding public access have not been implemented despite considerable pressure upon the Government to introduce legislation providing a general right.³ However, it is likely that access to all common land will be established eventually although subject to general limitations similar to those suggested by the Royal Commission.⁴

CONCLUSION

Because only a small part of the Royal Commission's recommendations were put into effect, they are no longer of great significance. However, it is possible to observe potential problems in the legislation which the Commission envisaged some of which appeared after the passing of the Commons Registration Act 1965.

The problem regarding quantification of pasture rights has been discussed¹ and the recommendation of the Commission accepted. The potential hazards were discussed in the House of Commons² but the clause remained and has resulted in decisions before the Commons Commissioners which have caused severe hardship.³

The ease with which registrations could be made in accordance with the recommendations adopted by Parliament has produced litigation⁴ where attempts have been made to vacate the register quickly.

The reservations which have been expressed upon⁵ the extensive powers which the Commission wished to vest in the CRA are no longer necessary because the recommendations were not taken up and the Working Party Report clearly indicates that such powers would not be appropriate for a county council under modern conditions.⁶

A final reservation upon the effect of the Royal Commission's recommendations concerns the effect of repealing Section 194 of the Law of Property Act 1925. Once the section had been removed, the carrying out of works on common land without the Minister's consent would no longer be forbidden. Therefore, where a fence was erected or a trench dug, the rambler or local authority would be completely powerless unless there was a scheme regulating the use of the common in existence. The terms of the Commission Report implied that the members felt schemes

would be proposed for the majority of commons and so the problem would not arise. However, there could be no guarantee that schemes would be prepared and, therefore, the possibility arises that encroachments would increase. Where work was carried out on common land, the owner or commoner would have a remedy in trespass or they could propose a management scheme which would provide effective powers to prevent the work but the procedure would be lengthy and the danger of interference by the local authority would arise. Any local authority whose inhabitants made substantial use of the common would be empowered to promote a scheme and, eventually, stop the work if they could be persuaded to take action. However, the local inhabitant or rambler would be powerless.

In conclusion, the Royal Commission recommendations were comprehensive and envisaged substantial interference by local authorities. It is possible that large quantities of common rights could have been lost by compulsory acquisition for inadequate compensation but public access would have been secured.

NOTES AND REFERENCES IN THE TEXT

PART THREE

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
63	1	Royal Commission Report para 263
	2	Ibid para 264
64	1	Ibid para 279
	2	Ibid
	3	See post pages 69-71
	4	Royal Commission Report p91 footnote 11
65	1	Ibid para 285
67	1	Ibid para 274
	2	Ibid para 277
68	1	Ibid para 287
	2	The recommendation was not adopted and a reply to a Parliamentary question in 1970 indicated no firm proposals had been made. Official Report 5th Series Parliamentary Debates Commons 1969-70 vol 794 p363
69	1	Royal Commission Report para 293
	2	See post Appendix III and pages 137 to 142 for the number of disputes
	3	Royal Commission Report para 294
	4	Ibid para 297
71	1	Ibid para 303
72	1	Ante page 67
73	1	Royal Commission Report para 331
	2	Inter Departmental Working Party Report 1975/77 Chapter 2
74	1	Royal Commission Report para 327
75	1	Ibid
76	1	Ibid p108 footnote 11
	2	Post pages 77 to 78

Notes and References in the Text (Part Three continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
79	1	The Working Party Report contains comments that such a drastic step would not be entirely satisfactory Chapter 2.20
80	1	Working Party Report 2.16 and 2.17
83	1	Published by Leonard Hill Authors: Dr D R Denman, the late Prof R A Roberts and Mr Hubert Smith
85	1	Royal Commission Report para 403
87	1	Ibid para 320
	2	Ante page 68
	3	Ante pages 12 to 15
	4	Working Party Report Annex A1
88	1	Ante page 67
	2	Official Report Fifth Series Parliamentary Debates Commons 1964-65 Vol 711 p460, 482, and Vol 717 p341 and 344
	3	Post pages 183 to 186
	4	Post pages 145 to 148
	5	Ante page 80
	6	Working Party Report 2.16 and 2.17

PART FOUR

THE COMMONS REGISTRATION ACT 1965

INTRODUCTION

The Commons Registration Act 1965 received the Royal Assent on 5 August 1965 but was brought into force on different dates for different purposes.' It was intended to carry out the first part of the Royal Commission's recommendations: those which related to registration, albeit in an amended form. Further legislation is anticipated to provide for public access and the making of management schemes. The purpose of the 1965 Act was to provide for the registration of all common land and town or village greens, together with rights over the land, in England and Wales. The county or county borough councils and, in London, the Greater London Council, were designated as the registration authorities and were given a duty to establish two registers, the first for common land and the second for town or village greens. Each register is divided into three sections for land, rights and ownership. After the registers were opened, applications were invited from the general public for the registration of land, rights or claims to ownership. The applications which were received were provisionally registered and advertised for the purposes of attracting objections. Whenever an objection or conflicting registration occurred or wherever land was left without a registered owner, the matter was referred by the registration authority to a commons commissioner to enable a hearing to take place. The commissioner has the power to confirm a registration with or without modification or refuse to confirm it. He also has the power to register any person as

an owner of unclaimed land where he is satisfied that that person is the owner. The periods of time within which registrations and objections could be made has expired but there are references to commissioners which have yet to be heard. Where no objection was made, the original registration became final at the end of a specified period. The sanctions for non registration are contained in section 1 of the 1965 Act. No land capable of being registered under the Act will be deemed to be common land or a town or village green unless it is so registered and no rights of common are exercisable unless they are registered either under the 1965 Act or under the Land Registration Acts 1925 to 1971.

Before the provisions of the Act are considered in detail its aims will be explored.

I THE AIMS OF THE 1965 ACT

The principle aim of the 1965 Act was to increase the amount of information available regarding common land, common rights and town or village greens in England and Wales with the intent that further legislation would be enacted regarding its management and access to it. The information would be acquired by the establishment of registers for the land and the method used to set up the registers would be based upon the recommendations of the Royal Commission. The Act was not intended to alter the rights in any way.' At first sight, the provisions of the 1965 Act do establish a system of registration which would reduce the crippling uncertainty about the status of considerable areas of land.² However, there are important limitations which will be considered, upon the value of the information which the registers will supply and the provisions of section 15 which relate to quantification undoubtedly change the nature of certain varieties of rights. Therefore the extent to which the 1965 Act achieves the apparent aims of Parliament is open to question.

A THE INCREASE IN AVAILABLE INFORMATION

The Act established two registers, and each is divided into three sections. The registers are open to inspection by the public and the registration authority must supply information by post about entries in the registers on payment of the appropriate fee.' The existence of registers in which searches can be made means that far more information is readily available than before the Act was passed. However, it is the content and nature of the entries which determines the value of the statutory provisions.

It will be assumed that all registrations under the 1965 Act have become final but no further legislation has been enacted.

Each of the two registers would have a land section with a plan of each area of land which had been registered, known as a register unit, and a written description of its location. The date of the application for registration, the name of the applicant and the date of the entry in the register would appear. In addition there might be additional information about local Acts, schemes or conditions affecting the land¹ or about private rights and interests such as easements, profits a prendre other than rights of common, franchises and rights of the lord of the manor.² The absence of any additional information would not be conclusive evidence that there were no public or private rights affecting the land because the registration authority is only under a duty to make an entry where they receive an application in the correct form and there are no provisions affecting the validity of the other rights where no application is made. In addition, the registration authority may refuse to register private rights where the entry would lead to confusion or inconvenience³ or would be unlikely to add substantially to the information available from an inspection of the land. Therefore, the only details in the land section of any significant value would be the map and description of the land. Any additional notes or the lack of them would be of assistance but inconclusive.

Turning to the ownership section, one discovers a more complicated set of statutory provisions. There are four possible situations: the land may have an owner registered at the commons registration authority or registered at H M Land Registry or at both, or, in the case of common land the land may be without an owner. Where the owner is registered

under the 1965 Act only the ownership section would give details of the date of the application and subsequent entry in the register, the name and address of the owner and a description of the land owned. Where the land is registered at H M Land Registry, the ownership section should contain a note to that effect and the name and address of the owner should not appear. It is possible to imagine a situation where there was an entry both under the 1965 Act and at H M Land Registry ie where the initial application form was incorrectly completed and the procedure under the Ministry of Land and Natural Resources Circular 4/66 Para 9 was not followed or during the period between the subsequent registration of land at H M Land Registry and the notification of registration to the authority.² Therefore, it would be necessary to search the Public Index map to obtain conclusive information about the registration of the land at H M Land Registry. Where the land is common land, as opposed to a town or village green, it is possible that no owner might appear on the register. The reason can be found in Section 1(3)(b)³ which provides that where the land is without a registered owner either under the Act or at H M Land Registry it shall be vested

"as Parliament may hereafter determine."

No subsequent legislation has been enacted and so the ownership register may have no details about the title to the land.

Turning to the rights section, one finds that the register is likely to contain a substantial amount of detail which will be of great assistance in considering the future uses for the land but there are some qualifications to the certainty of the information. The rights section may be blank or it may have specific details of rights. If it is blank there are four possibilities which must be considered:

- a) the land may be a town or village green
- b) the land may be waste land of a manor

- c) there may be rights registered at H M Land Registry
- d) There may be no exercisable rights.

In the first three situations, the registration of the land is valid and can remain. In the fourth situation, it is arguable that the land may be liable to be de-registered' but at the present time it is unlikely that such an application would be successful.²

Where there are details of rights the register will give the date of the application and subsequent entry in the register, the name and address of the commoner, the nature and extent of the right and the description of the land over which the right is exercised. It is important to remember that even where the rights register is blank the rights will still be enforceable if they are registered at H M Land Registry and so it would be necessary to obtain office copy entries from H M Land Registry to have full details of the rights.

Finally, section 21(1) expressly preserves sections 193 and 194 of the Law of Property Act 1925 which relate to access and restrictions on enclosure and so even where there is no entry in either of the registers the application of the 1925 Act must be considered.

In conclusion the register would contain a description of the land, possibly with additional information; it might give details of the owner and it might make reference to rights of common. The person making the search would be able to obtain a good deal of useful information but further inquiries would be necessary.

ii The Nature of the Entries

The value of the information obtained must depend upon its nature, in other words, whether statute provides that the entries are conclusive or merely evidential. There are two sections in the Act which are relevant, sections 1 and 10.

By virtue of section 1, no land is deemed to be common land or a town or village green unless it is registered with the commons registration authority and no rights are exercisable over any such land unless they are registered either under the 1965 Act or at H M Land Registry. Therefore, if the search reveals that the land is not registered, the person making inquiry knows that the land has lost its peculiar status, although the provisions of the Law of Property Act 1925 could still be relevant. However, if the land is registered the searcher has to make further enquiries because registration of the rights at H M Land Registry would be sufficient to protect the rights.

Section 10 provides that registration under the 1965 Act of land or rights "shall be conclusive evidence of the matters registered as at the date of registration". Therefore, the section imposes significant limitations upon the value of the information contained in the registers. The omission of the ownership section from the terms of section 10 indicates that the contents of that register concerning ownership are merely evidential. An interesting comment was made on this point in the House of Commons by Mr Arthur Skeffington¹ when he stated that it was felt inappropriate to make the ownership register conclusive because the investigation of title would not have been sufficiently thorough.² If Mr Skeffington's justification is accepted, then the same comment could be made about the ownership of rights which are interests in real property. However, Parliament chose to distinguish between land and rights on one

side and ownership on the other.

A second limitation concerns the question of the future validity of the entries. According to section 10 the entries are conclusive only "as at the date of registration". Therefore, any person making a search will be given information which was conclusive at some time between 1967 and 1970 but may no longer be correct. The importance of this limitation, which was probably not envisaged by the Royal Commission, may be gauged from the comments contained in the Inter-Departmental Working Party Report 1975/77:

"The Working Party considers that a basic weakness of this system' in its present form is that the registrations do not show conclusively land which is common land at any current date"²

The Working Party advises that the final registration of land or rights of common should be evidence of the matters registered at any current date.³ The word "conclusive" is not mentioned in their recommendation but if the word were not included in any amending legislation little improvement would be made to section 10. The consequences of the limitation as to time contained in section 10 in its original form are exacerbated by the absence of any obligation on a present or future owner or commoner to record changes as a prerequisite for transfers to be effective. Therefore it is more likely that the entries in the registers will become progressively less accurate.

The primary aim of Parliament that more information about common land should be readily available has been achieved but the extent of the information is not as wide as it might have been and, as the years pass, the value of it will reduce as its accuracy diminishes.

B THE DESIRE TO RECORD EXISTING RIGHTS

It was an expressed aim of Parliament to record the common rights as they actually existed without bringing about any changes in the nature or extent of the rights.' Unfortunately, the provisions of the Act were such that changes were inevitable not only in the nature or extent of the rights but in their existence. There are three ways in which variations have occurred by rights being altered, newly created or extinguished and each will be considered in turn.

i The Alteration of the Right

It is section 15 which requires that every rights of grazing shall be exercisable in relation to a specific number of animals.¹ Before the Act was brought into force there were two types of rights which did not necessarily have precise numbers attached to them, the first were rights on unstinted commons which would be attached to a dominant tenement and the second were rights in gross. Sometimes rights in gross were exercisable in relation to a specific number but the rights could be perfectly valid in the absence of any quantification.

So far as the unstinted common is concerned, the common law would regard either the rule of levancy and couchancy or that of ploughing and campestering as the yardstick for ascertaining the extent of the rights should such a determination be necessary.² Reference has been made to the inappropriate nature of the rules in modern farming conditions and it is not difficult to accept that the practice on unstinted commons in the twentieth century would be to permit large flocks so long as the common was not surcharged. Therefore, the application of section 15 to unstinted commons could foreseeably produce a drastic reduction in the number of animals allowed to graze with a possible loss of livelihood to the commoners concerned. Parliament would be able to console itself with the knowledge that the commoners had only been prevented from unlawfully exercising rights but the reality of the situation would be that the provisions of the Act had seriously interfered with the grazing pattern on the common as it existed before the 1965 Act.

So far as rights in gross are concerned, a right can be validly created without reference to number. It is the view of one writer³ that where there is no quantification, local custom would be applied to establish a limit but the process of finding an appropriate number

would be long and complicated and the carrying capacity would vary as the condition of the common changed. One of the major advantages of common land was its ability to adapt to the needs of the local community and the custom could change over the centuries as the breeds of sheep and numbers of commoners changed.

The effect of section 15 will be to apply an obsolete common law rule to unstinted commons and to deprive rights in gross of their flexible nature.

The provisions of section 15(3) contain a reference to future legislation which indicates the underlying motives of Parliament and would give the commoners genuine cause for concern. It states that when the registration has become final, grazing rights can only be exercised in relation to numbers not exceeding the number registered

"or such other number or numbers as Parliament may hereafter determine".'

The reference to prospective legislation does not commit Parliament to enacting a further statute but it is evidence of their intention to do so. Therefore, whether or not the quantification provision presently in force has lead to changes in existing rights, Parliament has expressed the intention of changing the rights in the future.



The 1965 Act was not intended to alter the existing rights over common land, merely to record the valid ones. However, the procedure which was to be followed by which rights were registered and could become final was such that an entirely new method of creating rights was provided by the 1965 Act.

Where a right was registered under section 4(i) of the Act it would be provisional and open to objection. The application would have to be in the prescribed form and accompanied by a statutory declaration but no documents of title had to be produced to support the claim. Then, under the provisions of section 7(i), where no objections were received by the registration authority or, alternatively, if all objections made were withdrawn the registration became final without any further investigation into its validity.

The combination of the ease with which initial registrations could be made and the lack of investigation into title where no objection was maintained resulted in a new method for rights to be created. A graphic description of the effects of the 1965 Act is to be found in the words of Walton J in Re Sutton Common (Wimborne):

"It was never, I am persuaded, the intention of Parliament to facilitate the establishment of entirely bogus claims in this way, Parliament having doubtless counted on the fact of landowners' self interest being sufficient to ensure that all such claims were in due time objected to, but it is notorious that, whatever the intentions of Parliament, the matter has not worked out that way."

The consequences of non-registration were such that perfectly valid rights could become unenforceable.

"... no rights of common shall be exerciseable unless they are registered either under this Act or under the Land Registration Acts 1925 and 1936."

Therefore, Parliament placed a considerable onus on the commoner if he were not to lose his rights. Extensive publicity was given to the legislation and the importance of registration made clear. However, the fact remains that non-registration did result in the rights becoming unenforceable and, therefore, enabled valid rights to become worthless. An additional problem for the commoners arose from the administration of the registers. Each register had three sections and it was quite possible for land to be registered as common land but for no rights to be registered over that land. In such a situation, the rights would become unenforceable and the land might be de-registered.² However, commoners who had not taken legal advice could misunderstand the situation and might feel that the registration of the land as common land would be sufficient to protect their rights. The provisions of the Act are quite clear about the necessity for registering individual rights but Parliament was making complicated legislation which placed a heavy onus on people who would not necessarily have a lawyer to consult and so the provisions would have to be explained very simply to ensure rights were not lost by misunderstanding.³

The 1965 Act was not intended to change rights in any way. However, the provisions of section 15 were capable of making substantial alterations to grazing patterns on common land and the registration provisions enabled new rights to be created or valid rights rendered unenforceable. The Parliamentary aims were partially achieved but the

Act produced unforeseen results and unfortunate consequences as well as providing valuable certainty. It is now proposed to consider the provisions of the Act in detail.

II THE PROVISIONS OF THE 1965 ACT AND SUBORDINATE STATUTORY INSTRUMENTS

The sections of the Act are, necessarily, detailed and more precise than the recommendations of the Royal Commission; however, where it is possible to relate the statutory provisions to a specific paragraph in the Commission Report, comparisons will be made.

a The Registration Authorities

Section 2(1) stated that the appropriate registration authority would be either the Greater London Council, where the land was situated within Greater London, or in all other cases, the county or county borough council where the land was situated.¹ Registration authorities could provide, by agreement, which would be the appropriate authority where any area of land was situated within the area of more than one authority. The effect of local government re-organisation has been to repeal the words "or county borough" and to remove the words "county borough" and "or the council of a borough included in a rural district" in section 22(1) which provides the definition of a local authority.²

The registration authorities were each required to establish and maintain two registers to be open for public inspection: one for common land and the second for town or village greens.³ The form of the registers is prescribed by regulations made under the Act.⁴ The registration authorities were under a duty to publicise the existence of the registers, to invite registrations and to explain the consequences of a failure to register.⁵ Where applications in the prescribed form were received, the authority was under a duty to make an appropriate entry on the register. For example, where a claim to common rights was made, the authority was required to enter the land in the land section and the rights section.⁶ Where two applications were received which did not conflict, the second was simply noted in the register. Where the second did conflict, it was regarded as an objection to the first registration. The registrations were provisional when originally made.

The authority had the power to make registrations of land of its own volition.⁷ Once a registration had been received or made, the authority had a duty to publicise it with a view to attracting any objections

to it.' In addition, the authority had the power to make objections to registrations of land which did not have a registered owner. If objections were received, they were noted on the register and publicised both to the general public and by notice to the person who made the original registration.

The registration authority could cancel or modify the registration to which the objection² was made if it had made the registration itself or if it was so requested by the initial applicant.

The periods of time within which registrations and objections could be made were laid down by regulation³ and strictly applied⁴. At the end of the prescribed period the authority was under a duty to refer certain matters to the commons commissioners. These were the cases where objections had been received and not withdrawn, those where there was a conflicting registration⁵ and those where no person was registered as the owner of the land.⁶ The authority was obliged to make a note on the register when a registration had become final at the end of the prescribed period⁷ and to delete the ownership registrations where it had received notification from the Chief Land Registrar that the land had been registered under the Land Registration Acts 1925 to 1971.⁸

So far as the hearing of disputed claims is concerned, the registration authority was entitled to be heard where the dispute concerned either the entry in the land register or the question of ownership of unclaimed land.⁹ When a decision had been made by a commissioner, a copy was sent to the registration authority¹⁰ who had a duty to enter on the register the details and to cancel the registration if it had become void."

Regulations have been made requiring the authorities to supply, by post, information relating to the entries in their registers.¹¹

The choice of the county or county borough councils as the

the registration authority was made by the Royal Commission and accepted by Parliament. The detailed provisions regarding the administration carried out by the authority were not discussed by the Commission and, in particular, the inclusion of a search facility in the 1965 Act was a welcome aid to the busy solicitor which was not suggested by the Commission. However, the most notable feature of the powers vested in the authorities is their passive and bureaucratic nature completely different from the dynamic role envisaged by the Commission.

b The Registration and the Objection

The procedure for making registrations and objections is laid down by the Commons Registration (General) Regulations 1966¹ and the Commons Commissioners Regulations 1971². Applications had to be made on the prescribed forms but provided they complied with the Act the registration authority had to make the registration³. A statutory declaration was required to support an application for the registration of land, rights or ownership and so the provisions of section 5 of the Perjury Act 1911 applied. This section provides that any person who knowingly and wilfully makes a false statement in a material particular in a statutory declaration is guilty of an offence. An objection did not need to be supported by a statutory declaration.

Any person could make an application for the registration of land but the right to make applications to register rights or ownership was restricted to the owner of the rights or land, as the case may be, the Church Commissioners, where the rights or land belonged to an ecclesiastical benefice of the Church of England which was vacant, or where the application related to rights which were comprised in a tenancy of land, the landlord, the tenant, or both of them jointly⁴. There was no limitation placed upon the identity of those who could make objections although the registration authority was given the power to object where there was land which is without a registered owner⁵.

The regulations regarding the periods of time when applications and objections could be received are detailed and important because they have been strictly applied. There were two registration periods: the first being from 2 January 1967 to 30 June 1968⁶ and the second being from

The time within which the application could be made was to be not less than three years from the commencement of the Act' and the Minister was to specify the final date by order. The Commons Registration (Time Limits) Order 1966² specified 2 January 1970 as the last day for the making of registrations. The publication of details of the initial registrations by the CRA was intended to attract objections, where appropriate, and the time limits for those objections depended upon the date of the initial registration. If it was made before 1 July 1968, the objection had to reach the registration authority between 1 October 1968 and 30 September 1970 and where the registration was made after 1 July 1968, the objection would have to be received between 1 May 1970 and 30 April 1972.

It is clear that the periods for registrations and objections are substantially shorter than those recommended by the Royal Commission which had been chosen by analogy with the periods laid down in the Limitation Act 1939. When the Commons Registration Bill was debated in the House of Commons reference was made to the reduction in the time scale by the Minister of Land and Natural Resources, Mr Frederick Willey

"The Royal Commission recommended twelve years - eight years of claims and four years for registration of objections - but this has been reconsidered and discussed with all concerned. There was general agreement that twelve years is too long and would provide unnecessary delay."³

The desire to avoid delay is understandable and welcome but where the consequences of failure to register or to object are so serious it is essential that adequate periods of time be allowed. In any event, there has been delay in resolving disputed registrations which has been caused by the failure to appoint Commons Commissioners at an early stage and the inadequate number of Commissioners who were

eventually appointed.' If the Government was serious in its concern about slowness, the remedy was in its own hands. To provide periods for registration which were unusual and contrary to the Royal Commission's recommendations increased the possibility of valid rights being inadvertantly lost and entirely new rights being created. In particular, the absence of any simple procedure for rectifying errors in the registration process has created serious problems.²

There were detailed provisions in the Act and its subordinate legislation concerning the effect of consecutive registrations over the same piece of land and objections to those registrations. For example: Paragraph 7 of the Commons Commissioner's Regulations 1971³ states that where there is a conflict between two registrations each shall be treated as an objection to the other and each of the objections shall be deemed to have been made at the date of the later of the two registrations. Therefore, if one piece of land is registered as common land and as a town or village green, each registration is regarded as an objection to the other and the matter must be referred to a Commons Commissioner even though the registrations may have been made by the same applicant. The form for making objections contained notes to explain the complexities of various combinations of registrations together with useful examples but, even so, the layman could experience problems in completing his application particularly where the existence or scope of rights over an area of common land was in dispute. One particular problem, which has arisen concerns the registration of the land and of rights over it. Although it is clear from the Act that the registration of the status of the land does not automatically result in rights over the land being noted on the register, the layman might easily be under the misapprehension that his rights would be protected so long as the land was registered.⁴ The onus on the government

to ensure that every person affected by the legislation was aware of its effects was a heavy one in view of the serious consequences of failing to either register or object.

Once a registration becomes final certain important consequences follow. By section 10, the registration of land as common land or as a town or village green or of any rights over such land is conclusive of the matters registered as at the date of registration. The provision that the evidence is conclusive is of great assistance to legal practitioners or those with an interest in the land who wish to embark on a scheme affecting the land. However, the section is limited by reference to "the date of registration." There is no provision requiring the register to be kept up to date. Although the Royal Commission recommendation was not entirely clear there was an indication that the register should reflect subsequent changes affecting entries. Its value is substantially reduced where the information is conclusive only on a particular date which will fall between 2 January 1967 and 2 January 1970.

The Act contains provisions² for the register to be amended in particular circumstances but there is no requirement for changes to be notified to the registration authority. Where the ownership of the land changes hands by way of sale section 123 of the Land Registration Act 1925 would apply³ making first registration of the title compulsory even though the land was not situated in an area of compulsory registration. Therefore, in that particular situation, the limitations of section 10 would lose their significance. However, where the land was gifted or the title transferred on death it would not be necessary to register with H M Land Registry.

The provisions regarding registrations and objections contain controversial elements particularly in relation to the time available

for applications, the complexity of the subordinate legislation and the limited value of the information to be obtained from the registers in future years. However, the most controversial provision regarding registration relates to the quantification of grazing rights.

Section 15 states that where a right of grazing was not limited by number, then for the purposes of the Act it could only be exercised in relation to a definite quantity of animals which had to be specified in each application. However, section 15(3) contains an unusual provision indicating that the number in the register may be subject to alteration. When the registration has become final, the rights can be exerciseable by animals limited to the specified number or

"such other number or numbers as Parliament may hereafter determine".

The unsatisfactory nature of the Royal Commission's recommendation on this point has been discussed.' However, Parliament chose to follow the suggestion whilst extending it to allow the number to be varied in an unspecified manner at an undetermined time. The debates in the House of Commons at the time of the Commons Registration Bill's passage indicate that the Opposition was very concerned about the consequences of this provision. The objections put forward were three in number. First, in the event of dispute, the number would be determined by a Commons Commissioner who would be a lawyer and not an agriculturalist. Secondly, some of the commons were suffering from under-grazing and limiting the numbers could aggravate the problem. Thirdly, the principle of levancy and couchancy has very little relevance in modern day farming conditions and, in any event, when dealing with rights in gross, the Commissioner could refer to no dominant holding in relation to which the number could be assessed. In particular, the view was expressed that stinting is a very long and complicated process

which could only be carried out as a function of management. Mr J E B Hill stated

"I would say that the subsequent survey into the management problems that are likely to arise which has been carried out by the Nuffield Foundation and Cambridge University and which includes several members of the Royal Commission has confirmed my view. They are quite certain in their view that defining numbers at the stage of registration is not merely going to be difficult but is going to give rise to serious trouble."

The response of the Government was to state that it was their wish to make the record of the rights as accurate as possible. Mr Garfield, for the Opposition, pointed out that some rights were unlimited and so to ascribe a number to them was not recording them accurately but changing their nature. The response of Mr Wilby was that

"Rights are definite if we establish them "²

which failed to meet the criticism made at all. When Mr Michael Jopling³ asked how the rights would be determined agriculturally, Mr Willey⁴ declined to reply on the grounds that they would be settled according to the law. It is unfortunate when unforeseen effects of legislation produce inconvenience and difficulties for individuals but when the problems are foreseen and yet the legislation is not amended to avoid them, it is inexcusable.

c The Effect of Non-Registration

The effect of registration has been considered¹ and mention has been made of the existence of the serious consequences of failure to register.² The relevant provisions regarding non-registration of land or rights contained in section 1(2). Where land or rights were not registered by 2 January 1970, the land ceased to be common land or a town or village green and the rights were no longer exercisable unless they were registered under the Land Registration Acts 1925 and 1936.³ Therefore, the consequence of failure to register is that the land will no longer have its peculiar status and the rights will be lost. The use of the phrase "no rights of common shall be exercisable" as opposed to an expression extinguishing the rights is unusual and could lead to problems in the future where the view could be taken that the rights still exist for the purposes of commoners taking part in management schemes.⁴

The effect of failure to register ownership has equally far-reaching effects. When the registration of the status of the land had become final the question of ownership was referred to a Commons Commissioner unless the land was registered under the Land Registration Acts 1925 and 1936, who had to investigate⁵ the matter and could direct the registration authority to register an individual where the Commissioner was satisfied of his ownership. Where the Commissioner was not satisfied, the subsequent course of events depended upon whether the land was town or village green or common land. In the former case, the land was vested in either the borough, urban or rural district council or, in more limited cases, the parish council.⁶ Since the reorganisation of local government, the appropriate councils have become the council of a London borough if the land is within the borough and, otherwise, the council of the district in which the land is

situated. There is provision for the land to be vested in a parish or community council where the land is in a parish or community for which a council exists but, where the land is regulated under the Commons Act 1899, it can only be vested in a parish or community council if the powers of management under Part 1 of the Commons Act 1899 are being exercised by the parish or community council.' Where common land was without an owner, the provisions of section 1(3)(b) applied which states that it shall

"be vested as Parliament may hereafter determine."

No subsequent legislation has made provision for unclaimed land and so the land is without a registered owner. Until the land has become vested then the local authority in whose administrative area the land is situated can take steps to protect it and take proceedings to do so if necessary.²

The Royal Commission envisaged that the land would be vested in the Public Trustee and so there would not have been an interim period during which the land would require temporary protection. The advantage of the method contained in the Act is that Parliament will have the opportunity to see how much land is without an owner, where it is situated and how much administration and management it is likely to require. However, the length of time which is likely to elapse before the land has an owner will be considerable and, in the interim, no management or improvement to the land can be made.

d Exempted Land

Section 11 deals with the question of land exempted from registration and the wording of sub-section (1) is not entirely clear. It states, *inter alia*, that the foregoing provisions of the Act do not apply to the New Forest or Epping Forest and are not to be taken to apply to the Forest of Dean. The reason for the distinction between the former forests and the latter is not explained. In the Royal Commission Report¹ a reference is made to the Forest of Dean to indicate that the Commission did not give much attention to it because a committee under the chairmanship of Sir Thomas Creed was conducting a separate inquiry. However, the Act contains no other reference to the Forest and so it must be assumed that the effect of section 11 will be to exempt each of the three forests mentioned without any practical distinction and the difference in wording could be attributed to the fact that the Forest may not be a true common.²

There is also provision in section 11(1) for the Minister to exempt by order any land in respect of which an application is made before a prescribed date.³ However, no order could be made unless the land was regulated by a scheme under the Commons Act 1899 or the Metropolitan Commons Act 1866 to 1898 or under a local Act or under an Act confirming a provisional order made under the Commons Act 1876 and, in each case, no rights of common had been exercised over the land for thirty years and the owner of the land was known. The application had to be publicised together with the Minister's decision.⁴ The Royal Commission had envisaged that well regulated areas of land such as the New Forest would be exempted from the registration provisions⁵ and also land which was properly regulated under a statutory management scheme.⁶

The use of the word "foregoing" in section 11(1) presents

additional problems of interpretation. It is reasonable to assume that if the foregoing provisions of the Act do not apply then the following sections do apply or the word is devoid of meaning.

Section 12 relates to the registration of common land at H M Land Registry and it was a Royal Commission that even exempted land should have its ownership registered at the Land Registry.' Therefore, it is logical that section 12 should apply to the exempted land. However that section states

"The following provisions shall have effect with respect to the registration under the Land Registration Acts 1925 and 1936² of any land after the ownership of the land has been registered under this Act³"

Upon the wording of section 12 it is clear that it does not apply to exempted land because exempted land can never be registered under the 1965 Act. The remaining thirteen sections of the Act either have similar expressions or their provisions are clearly inappropriate with the possible exception of section 16 which relates to the disregard of certain interruptions in prescriptive claims to rights of common.

In any event, the reason for the use of the word "foregoing" in section 11(1) is unclear and could lead to unnecessary disputes.

The appointment of the commissioners was made by the Lord Chancellor from barristers or solicitors of not less than seven years standing and the number to be appointed was left to his discretion.¹ One of those appointed was to be the Chief Commons Commissioner. It was also the duty of the Lord Chancellor to draw up and revise a panel of assessors to assist the Commissioners in cases requiring specialist knowledge.

Where a matter was referred to a Commissioner, it was his duty to inquire into it and either confirm the registration with or without modification or refuse to confirm it. The registration became final if it was confirmed and void if it was refused although where an appeal against the decision was brought, the final outcome would not be known until the disposal of the appeal.²

An appeal on a point of law from the decision of a Commissioner was to the High Court by way of case stated. From there, there was a right of appeal to the Court of Appeal with the approval of either court.³

There are significant differences between the provisions regarding the settlement of disputes in the Act and the Royal Commission's recommendations. The use of a county court judge to act as a commissioner was declined in favour of solicitors or barristers who might be less inclined to adopt formal procedures for the hearings but could not be expected to have the judge's experience in making decisions. Although there is a right of appeal in the Act it is to the High Court and not the body recommended by the Royal Commission, the Lands Tribunal.⁴ The latter was suggested for its speed, moderate cost and experience in dealing with matters affecting real property. Although the experience of a High Court judge would be wide, the High

Court is not noted for either its ability to give early hearing dates or the inexpensive nature of the costs which could be incurred .

f The Relationship between the Commons Registration Act 1965
and the Land Registration Acts 1925 to 1971

The present system of the compulsory registration of title to land in England was established in 1925 and is gradually being extended to include the whole country. The areas where registration of the title on sale has been made compulsory are usually those which have a higher density of population such as London, Newcastle and Cleveland. Therefore, many of the locations in which common land is found are not subject to compulsory registration because they are in remote moorland areas. It is both sensible and in the interests of clarity that any system of registration for common land should acknowledge the existence of H M Land Registry and, where possible, add to the information contained there because it is accurately recorded and relatively accessible.

It will be recalled¹ that the Royal Commission recommended that the entire ownership register be transferred to H M Land Registry as soon as possible after all disputes had been settled. However, the 1965 Act provides, by section 12, that land registered under the 1965 Act is to be compulsorily registrable on sale² at H M Land Registry. Therefore, it is clear that although Parliament did intend the ownership of all common land to be registered at H M Land Registry the method chosen was not as quick as that selected by the Royal Commission. The method in the 1965 Act has one distinct advantage which relates to the investigation of title which will be carried out on an application for registration. The Royal Commission proposed a system whereby applications for registration under the 1965 Act were to be made on a specified form and the application would be countersigned by a responsible person. In addition, it was intended by the Royal Commission that

anyone making a registration without just cause would be guilty of a criminal offence.' Therefore, any registration which became final without challenge would not have been subjected to any close scrutiny. If the proposal concerning the transfer of registrations to H M Land Registry had been implemented, the result would have been that those areas of registered land would not have been through the detailed process of investigation carried out on an application for first registration at H M Land Registry. Under the system which has in fact been adopted, the usual investigation of title will be made at H M Land Registry when an application for first registration is made.

The registration of the ownership of common land is also provided for by Section 1(3) of the 1965 Act which indicates that the machinery for the vesting of unclaimed land does not apply to land which is registered at H M Land Registry and section 4(3) contains a complementary direction that no person is to be registered under the 1965 Act as the owner of land if the land is already registered at H M Land Registry. The reason for the omission of the name of the owner is the complete privacy of the register of title at H M Land Registry.²

Section 12 specifies that where the Chief Land Registrar notifies the commons registration authority that the title to land has been registered at H M Land Registry then the registration of ownership shall be deleted by the commons registration authority from the register. The necessity for the removal of the owner's name arises from the secrecy element in the Land Registration Acts 1925 to 1971.³

The interaction of the two systems of registration is clear as far as the registration of title is concerned. However, the same cannot be said for the remaining provisions of the 1965 Act.

A table has been drawn up in order to assist in the comprehension of the provisions in the 1965 Act relating to H M Land Registry. The

table sets out the various different sets of circumstances which could arise and the results which would be produced.

Before looking at the table, it is necessary to consider the following words in section 1(1) of the 1965 Act.

"... no rights of common over land which is capable of being registered under this Act shall be registered under the Land Registration Acts 1925 and 1936" '

The effect of this sub-section depends upon the meaning of the words "shall be registered". Profits a prendre cannot be registered at H M Land Registry in their own right. However, they will usually be noted on the register of the land which is adversely affected by them.² In addition, if the dominant tenement is registered, the rights can be entered as appurtenant to it in the property register.³ Section 1(1) of the 1965 Act does not state whether it is the dominant or servient title upon which the rights cannot be registered. Ruoff and Roper appear to be of the opinion that the rights can be entered against the servient title but not against the dominant title

"Rights which exist in gross may, of course, be entered as burdens on the register of the servient title. Obviously they cannot be registered as appurtenant to a registered title, and, in any event, rights of common over land which is capable of being registered under the Commons Registration Act of 1965 may not be entered on the register of title"⁴

If that analysis is correct, then when an application for the first registration of common land was made, the common rights, if any would be noted as adverse upon the title. It is unfortunate that the wording of section 1(1)⁵ is so unclear.

Prior to 2 January 1967

Registration Requirements

The Effect of Future Transactions

1.	Dominant Land Registered - Servient Land Unregistered - Rights shown on dominant register as appurtenant	Land must be registered at CRA Rights need not be registered	Servient land compulsorily registrable on sale. Rights can be noted against servient register. Ownership registration at CRA will be cancelled.
2.	Dominant Land Registered - Servient Land Unregistered - Rights not shown on dominant register as appurtenant	Land and rights must be registered at CRA	AS ABOVE and rights cannot be added to the dominant register.
3.	Dominant Land Unregistered - Servient Land Registered - Rights shown as a burden against the servient title	Land and rights must be registered at CRA. Ownership cannot be registered at CRA	Not applicable
4.	Dominant Land Unregistered - Servient Land Registered - rights not appearing on the register	Land and rights must be registered at CRA. Ownership cannot be registered at CRA	Not applicable
5.	Dominant and Servient Lands Registered - rights shown on dominant register as appurtenant and appear as a burden against the servient title	Land must be registered at CRA Rights need not be registered Ownership cannot be registered at CRA	Not applicable
6.	Dominant and Servient Lands Registered - rights not appearing on the register	Land and rights must be registered	Not applicable

One important point to note relates to common land which was registered at H M Land Registry prior to the commencement of the 1965 Act. Common rights are over-riding interests' and normally the registered proprietor would take subject to them whether they were noted on the register or not. The effect of the 1965 Act has been to change the nature of common rights as over-riding interests because whether the rights are exercisable or not depends upon section 1(2)²

"no rights of common shall be exercisable over any such land unless they are registered either under this Act or under the Land Registration Acts 1925 to 1971."

If Ruoff and Roper's analysis of the words "registered ... under ... the Land Registration Acts 1925 to 1971" is adopted then the question to be answered when considering the existence of common rights over registered land is "are the rights registered at the CRA or do they appear as appurtenant to the dominant title?"

The provisions in the 1965 Act which refer to the Land Registration Acts 1925 to 1971 vary from the simple and sensible to the obscure. As a practical matter, it is quite possible that the compulsory registration provisions of section 12 may be overlooked because common land is likely to be situated in an area where registration of title on sale has not become compulsory. It remains to be seen whether the potential problems contained in section 1(2)(b) of the Act will become real.

g The Amendment and Rectification Provisions

Section 13 and section 14 contain the statutory details relating to the amendment and rectification of the registers and the powers are closely circumscribed. The former section provides for amendment of the register where land either ceases to be or becomes common land or a town or village green. It also authorises amendment where registered rights are apportioned, extinguished, released, varied or transferred in certain prescribed circumstances. The section gives the power for amendment but it does not make any alteration of the register compulsory. Circumstances have been specified' in which the entries relating to rights can be amended where rights are transferred but the provision only relates to the transfer of a right in gross.

Section 13 makes no provision for alterations to the register where a mistake was made in the initial registration. It refers to land which ceases to be common or a town or village green but not to land which never held such a status. Equally, there is no provision for rights which never existed being removed from the register. Subsequent events have established that the wording of section 13 is of the utmost importance.²

Section 14 provides for rectification of the register but its application is limited either to objectors induced by fraud to withdraw or refrain from making objections or the situation where section 13 has been used to amend the register but that alteration was made in error. Therefore, it is of no assistance where the initial registration was wrong. In view of the simplicity with which applications could be made, it is surprising that the amendment and rectification provisions were not more widely drawn. The application had to be made on a prescribed form and be supported by a statutory declaration by the

applicant of his belief in the truth of the facts on the application form. However, no fee was payable and so long as the application complied with the 1965 Act, it was provisionally registered without further investigation.

h Amendments to the Law Relating to Prescription

The 1965 Act contains important details which affect the application of the law of prescription when considering the question of common land. Reference has been made' to the appropriation of common land during war time and so it is understandable that the 1965 Act protects the interests of the commoner whose rights could not be exercised during war time. Section 16(1) provides, inter alia, that for the purposes of the Prescription Act 1832, periods during which the land was requisitioned and over which the rights could not be exercised, shall be left out of account in deciding whether there was an interruption in the enjoyment of the right and in computing the periods of thirty and sixty years mentioned in section 1 of the 1832 Act. There is an explanation of the meaning of "requisitioned" which refers to powers conferred by regulations made under the Emergency Powers (Defence) Act 1939 and by Part VI of the Requisitioned Land and War Works Act 1945.

Where the right of common is a right to graze animals, periods during which the right could not be or was not exercised for reasons of animal health are also left out of account for the purposes of the Prescription Act 1832.² The exclusion is sensible because it takes into account the particular problems which the commoner faces when contagious diseases break out on common land.³

Section 22(1) contains definitions of common land, rights of common and of a town or village green.

Common land is land subject to rights of common, as defined the Act, whether the rights are exercisable at all times or during only limited periods and waste land of a manor not subject to rights of common. Town or village greens and any land forming part of a highway is expressly excluded. The provision is considerably wider than that suggested by the Royal Commission¹ and, in particular, the reference to waste land of a manor has given rise to litigation.²

The common law definition of common rights is substantially extended by the Act and the terms used indicate that the examples given are not intended to be exhaustive.

"Rights of common includes³ cattlegates or beastgates (by whatever name known) and rights of sole or several vesture or herbage or of sole or several pasture, but does not include rights held for a term of years or from year to year."⁴

The common law definition may be expressed as the right to take the produce of the land of another in common with the owner of the soil. Cattlegates or beastgates⁵ are different because although the soil remains vested in the lord of the manor, the "commoners" are entitled to rights of pasture to the exclusion of the landowner. In some cases the "commoners" are also the tenants in common of the land itself and have the exclusive right to take the produce of the soil, sole vesture, or to graze animals on the soil; sole pasture, each to the extent of his own gate or stint.

The definition of a town or village green is in three parts, the first relates to land allotted by or under any Act for the exercise or recreation of the inhabitants of any locality, the second to land where a customary right to indulge in local sports and pastimes has been acquired and the third to land upon which the inhabitants have indulged

in sports and pastimes as of right for not less than twenty years.'

The words used are analogous to those recommended by the Royal Commission.²

The definition has been the subject of litigation and produced two cases which provide an interesting contrast and reveal the way in which the working of the 1965 Act can achieve very surprising results. The first case is New Windsor Corporation v Mellor and Others³ and the second is Re the Rye High Wycombe Buckinghamshire⁴

In the first case the respondent made application for the registration of an area of land in the centre of the borough of New Windsor in the register of town or village greens on the grounds that the inhabitants of the borough had acquired by custom a right to indulge in lawful sports and pastimes on it. The plaintiff objected to the registration and the matter was referred to the Chief Commons Commissioner. When the respondent made the application, the land had for some time been used partly as a school sports ground and partly as a car park. In the development plan of the borough, the land was listed as the site for a multi-storey car park. Therefore, it is reasonable to assume that the plaintiffs did not anticipate that the land was a town or village green subject to any customary rights. However, the Commissioner confirmed the registration of the land as a town or village green and the plaintiff's appeals against the decision to the High Court and the Court of Appeal were dismissed.

In order to reach their conclusions, the Commissioner, Foster J in the High Court and Lord Denning MR, Browne LJ and Brightman J in the Court of Appeal had to consider leases of the land in 1651, 1704, 1749, 1819 and 1822, the effect of the Inclosure Act 1813, an inclosure award of 1819 and a newspaper extract from 1875. The investigation involved difficult questions of fact and law and its eventual result was contrary to the expectations of the borough. The inhabitants had

not used the ground since 1875 for exercise and recreation and so it is not difficult to understand why the appellants were so anxious to contest the case. Although the intention of the 1965 Act was to preserve existing legal rights, the practical consequence in New Windsor was to make a substantial alteration to the use of the land, to provoke considerable litigation and to prevent future usage of the land for any other purpose.

It is interesting to contrast that case with Re The Rye High Wycombe Buckinghamshire ("the Rye Case") which has been mentioned.²

A local protection society registered an area of land known as the Rye High Wycombe as a town or village green. The land belonged to the local authority who lodged an objection to the registration. The history of the land was that in 1878 a charity scheme had been approved which enabled the land, which then belonged to an almshouse charity, to be used for the purpose of a recreation ground for the almspeople subject to any rights of local inhabitants over the land. In 1923 the governors of the charity conveyed the land to the local authority and in 1927 a local private Act was passed which provided that as from 1 January 1928 the land should be deemed to be a public park or pleasure ground or land acquired by the local authority for the purpose of cricket, football or other games and recreations as the local authority from time to time determined and would be retained by the local authority for all time for those purposes. The commons commissioner, Charles Arthur Settle QC, held that the land was not a town or village green on the ground, inter alia, that the land had not been "allotted" by the local private Act for the exercise or recreation of local inhabitants. The protection society appealed to the High Court Chancery Division but Brightman J dismissed the appeal and in doing so referred to the comment by Lord Denning MR in the New Windsor Case³ in which he

said that the first limb of the definition of a town or village green

"concerns chiefly land which was set aside under the inclosure Acts".

Brightman J considered that the reference in section 22(1) to "any Acts" was in fact a reference to the Inclosure Acts and he went on to state that on its true construction the local Act had not allotted the land since the land had been included in the Act for the quite different purpose of defining the purposes to which the local authority was entitled to put the land and the powers it was entitled to exercise over it.

It is difficult to understand why the 1965 Act did not refer specifically to the Inclosure Acts if such was the intention of Parliament and it is ironic that the words of Lord Denning MR were used to support a decision which would appear to contrast with his desire to seek out the spirit of the Act rather than rigidly observe its every word.'

One problem which has arisen in relation to the second and third limbs of the definition relates to requirement of user by the inhabitants of any locality. It has proved extremely difficult to establish exclusively local enjoyment of the land.

Finally, in relation to the third limb of the definition of a town or village green, it is curious to note that the requirement of user for twenty years does not create any right previously known to statute or the common law. Prior to the passing of the 1965 Act, no statutory or judicial definition existed. The essential characteristic was that the inhabitants of a town, village or parish must have acquired the right of playing lawful games on the green by immemorial custom.² In order to establish a customary right, user from time immemorial must be proved. Therefore, the third limb of the definition

creates a new category of town or village green.'

The provisions of the 1965 Act were intended to embody only the initial stages of the Royal Commission's recommendations and yet at least one of the suggestions taken up in the Act' would only be practicable, in the opinion of at least some members of the Royal Commission, when enacted as part of a management programme.

Some sections of the Act have defects of draughtsmanship which are immediately apparent whilst others appear to contain provisions which could lead to interpretation problems. Consideration will be given to the effects of the Act both desirable and adverse.

III THE EFFECTS OF THE 1965 ACT

The Act has had many effects some of which are only temporary whilst others will continue for the foreseeable future. In order to make any evaluation of the Act it is necessary to distinguish between short and long term consequences because an undesirable effect which will only last a short while may be justifiable when viewed in the light of more permanent effects.

a Short Term Effects

One of the purposes of introducing a system of registration was to give more certainty to those with an interest in the land or those who wished to deal with it in some way. However, the legislation has created doubts and problems for several reasons, including delays in the Act's implementation and problems over its interpretation.

i Difficulties caused by delay

During the Parliamentary debates about the Commons Registration Bill, there were comments which implied that the Government was anxious to have the registrations completed so that the management schemes could be implemented quickly.' The reduction in the periods of time for registrations and objections from those recommended by the Royal Commission is evidence of the desire to move as quickly as the dictates of justice would allow. However, subsequent events show that the initial wish to proceed speedily has been dissipated and, in 1983, there are a considerable number of references to Commons Commissioners still to take place. An analysis of the periods of time which have elapsed will show the extent of the delays.

The Commons Registration Act 1965 received the Royal Assent on 5 August 1965 and section 25(2) provided that it would come into force on days to be appointed. Various statutory instruments were made under the Act but it was the Commons Registration (Time Limits) Order 1966² which provided that registrations by individuals had to be made between 2 January 1967 and 2 January 1970 although registration authorities could make registrations of their own volition until 31 July 1970.³ Objections had to be made by 30 April 1972 at the latest, although where the registration was made before 1 July 1968 the objection had to be received by the registration authority by 30 September 1970. Therefore, there was a period of almost seven years between the Act receiving the Royal Assent and the last objection being received. However, the registration process was by no means complete because conflicting registrations had to be adjudicated upon by the Commons Commissioners.

The sections in the Act⁴ providing for the appointment of Commissioners and for appeals from their decisions were brought into

force on 1 January 1970 which was nine months before the end of the first period for registrations and objections giving sufficient time for the necessary appointments to take place before hearings could commence.

However, the case of Thorne RDC v Bunting' provided clear evidence that there was delay in the appointments which caused problems for landowners. The defendant owned a house in the rural district of Thorne in Yorkshire and registered extensive common rights over various properties in the district. The plaintiffs owned one of the properties over which rights were registered which consisted of a road and they sought a declaration in the High Court that the defendant was not entitled to the rights which he had registered. The reason for the plaintiffs' commencement of the action was that the registrations had discouraged prospective developers from developing land in the rural district. The question before the court was whether the plaintiffs had any locus standi apart from the area they owned. The plaintiffs contended that they were financially concerned because the rateable values of the properties would be affected by the existence of common rights, they had an interest because of their planning functions and, in any event, the 1965 Act did not impose any restrictions on persons who could lodge an objection to a registration. The plaintiffs brought the action for a declaration because no Commissioners had been appointed and so there was no other machinery by which the dispute could be resolved.

Megarry J held that the plaintiffs had no locus standi except in respect of the road which they owned. It was apparent from the judgement that immediately before the hearing, the defendant had asked the County Council to cancel the registrations in respect of approximately half the land which meant that nearly all the land with

prospects of development was no longer affected. It was also clear that the question of whether there were any rights still in existence would be difficult to determine because it involved an agreement between Charles I and Cornelius Vermuyden in 1626, a contract of 1628, and a decree and award of the Court of Exchequer in 1630, an Inclosure Act of 1811 and an Inclosure award of 1825 as well as questions of immemorial user. The rural district coincided with the old manor of Hatfield and the defendant had claimed rights of piscary, venary and anceptary and a variety of profits in the soil including a profit of pasture for one hundred cattle.

Megarry J was of the opinion that the court retained its jurisdiction during the interim period when no Commissioners had been appointed. He also made reference to Booker v James¹, before Pennycuik J, and Trafford v Ashby² before himself, which were both heard before section 17 of the 1965 Act had come into force and, in each case, it was held that the court did retain jurisdiction. In any event, Megarry J made it clear that the sooner the appointments took place the better.

"The bulk of the Act³ came into force at the beginning of 1967, and the provisions as to the Commons Commissioners and appeals to the High Court on 1 January 1970. Unfortunately, even though a year and three-quarters has elapsed since these provisions came into force, no Commons Commissioners have yet been appointed and the Act is accordingly still not in full operation."⁴

Even the appointments did not solve all the problems. In the case of Cooke v Amey Gravel Co Ltd⁵ Megarry J was called upon to consider the provisions of the Act once again. The case was heard on 25 July 1972. The defendant company was engaged in working gravel and owned an area of land over which the plaintiff had registered a right to graze cattle and horses under the 1965 Act. The defendant company objected to the registration which was, therefore, provisional at the date of the hearing. Because there was a danger that the defendant

company would remove the top soil from the land, the plaintiff had obtained an injunction to prevent the defendant company's operations and protect the alleged rights. An interlocutory injunction had been obtained on 18 January 1972 with the defendant's consent or acquiescence and the present proceedings were taken by the plaintiff to seek the continuation of the injunction. At the hearing, the plaintiff did not file any evidence in support of her claim but relied solely on the provisional registration and the statutory declaration lodged in the process of registration which was not before the court.

It was held that the injunction would not be granted. From the judgement it appears that the submission had been made that the court ought not to proceed with the action but should leave the matter to the Commons Commissioners. However, Megarry J did not find it necessary to consider whether the court might lack the necessary jurisdiction. He was anxious to give clarity and certainty to the defendant company and implied that not all of the rights provisionally registered were well-founded.

"Some claims are specific claims supported by strong evidence, and at the other extremity there are claims which, speaking temperately, can at best be described as wild-cat claims."

Indeed, in rejecting the contentions put forward by Counsel for the plaintiff as to the interpretation of section 10², Megarry J provided further support for the proposition that registration was not a particularly demanding procedure. Counsel's contention was that the words "except where the registration is provisional only" in section 10 carried by implication or were at least consistent with the view that a provisional registration, though not conclusive evidence, was at least prima facie evidence of the matters registered. Megarry J, however, was of the opinion that a provisional registration was not any evidence of the existence of the rights at all. He referred to the ease of registration

"The only qualification for achieving registration appears to be that the claim put forward should comply with the prescribed formalities and, I suppose, not be so obviously hopeless or improper that it would be wrong to register it." ¹

One of the purposes of the 1965 Act was to reduce uncertainty. However, the defendant company was experiencing that very problem as a result of its provisions

"I also bear in mind that the defendant company does not allege that there is any great urgency for working this land, and says simply that it wishes to know what the position is so that it can make its plans for future workings." ²

Megarry J appreciated that once the defendant company had been allowed to remove the gravel it would destroy part of the area of the common for grazing purposes. However, there was insufficient material to justify the granting of an injunction.

The case provides evidence of the delay caused by the workings of the Act, a problem which was not solved simply by the appointment of Commons Commissioners because the number appointed was too small to handle the large number of references. The length of time which is being taken in resolving disputes has been the subject of Parliamentary questions. On 29 October 1976, in a written answer, the Secretary of State for Wales stated that there were 2,544 unresolved objections in Powys and 22,876 in England. He went on to explain that the Commissioners office had redistributed the Commissioner's workload as as to increase resources for dealing with Welsh cases and efforts were being made to recruit additional Commissioners.³ More details were revealed in the House of Commons on 8 July 1977, approximately eight months later, when the Secretary of State for the Environment gave the figures, county by county, for the number of objections received, how many of those had been heard by a Commons Commissioner and how many remained to be heard.⁴ The details are set out in Appendix III and show that the number of disputes to be resolved in England was 21,755 and in

Wales, 4,863. The number for Powys was 2,391. By 16 March 1978, the speed of resolution of disputes was no better. The Secretary of State, in a reply to a written answer', stated that there were 26,400 disputed registrations and 4,800 claims to ownership to be heard and, with the existing complement of Commons Commissioners, the process was expected to take eight to ten years. There was a repetition of the fact that efforts were being made to recruit more Commissioners than the three full-time and one part-time officials then conducting hearings. However, no additional appointments had been made by 1 January 1981.

The implementation of the 1965 Act has caused problems which can be observed in the cases referred to particularly where registrations of little substance have been made. The Parliamentary answers give details of the extent of the problem which has been exacerbated by the reluctance of the Lord Chancellor to appoint additional Commissioners.

However, there is a further case which demonstrates particularly clearly, pecuniary loss caused by the delay in implementing the provisions of the Act: it is the case of Wilkes and Others v Gee ² which was taken to the Court of Appeal. The defendant had applied to the commons registration authority for the registration of certain land including land belonging to the plaintiffs as common land. The plaintiffs registered their objections and so, at the time of the hearings in the High Court and the Court of Appeal, the registrations were provisional. At the time of the application for registration the plaintiffs were negotiating for the sale of the land to the local authority who wished to build a much-needed school on it. The negotiations could not be completed until the question of the status of the land had been determined. Commons Commissioners had been appointed to hear objections but the registration, having been made after 30 June 1968, was a second period registration and had not become

referable by statutory instrument to a Commons Commissioner. In an effort to have the registration removed, the plaintiff brought proceedings against the defendant in the High Court and moved for an order that the defendant should concur in or procure the removal of the registration. The motion was dismissed in both the High Court and the Court of Appeal on the grounds that assuming the court retained a residual jurisdiction, it would only be exercised in the most exceptional cases and only where it could clearly be shown that the person making the initial registration had been acting *mala fide*.

The land owned by the plaintiffs had been used for the siting of a factory which manufactured pottery and was enclosed by fences and hedges. Evidence had been filed on behalf of the plaintiffs that for the last fifty years there had been no claim in respect of rights of common, pasture way or sporting rights over the land which had been in full free and undisturbed possession of the plaintiffs. The defendant, who spent a good deal of time in London, had a house not far away from the land and, although he had not claimed any rights over the land, he and other people had registered it as common land. There is reference in the reports to the "tenuous" nature of the defendants' evidence in support of his assertion that the land was common land. The plaintiffs' argument was that the defendants' evidence was so insubstantial that the conduct of the defendant in refusing to withdraw his application was *mala fide*.

However, both Plowman J and Russell L J felt unable to accept such a submission. At first instance, it was clear that any residual jurisdiction which might exist would not be used

" ... it seems to me that it would be quite wrong to treat this court, as it were, as an overflow court for the Commons Commissioner" ' The plaintiffs attempted to establish that there was an element of urgency in view of the negotiations with Dorset County Council for

the sale of the site but the urgency was not such as to convince either Plowman J or the Court of Appeal that any residual jurisdiction should be exercised in their favour.

The way in which the provisions of the 1965 Act have been brought into effect has caused uncertainty and the cases show that the problem has been sufficiently serious for proceedings to be commenced in the High Court. However, there can be no doubt that each of the cases would have been resolved eventually, when the hearing before the Commons Commissioner took place. Therefore, the problem was essentially of a temporary nature rather than a permanent one.

ii Difficulties caused by the drafting of the rectification and amendment provisions

Reference has been made¹ to the narrow scope of sections 13 and 14 of the Act despite the fact that applications for registration were relatively easy to make. The case of G & K Ladenbau (UK) Ltd v Crawley & De Reya² (a firm) provides an excellent example of the problems which have arisen in amending the register where the details on the register were wrong as the result of a mistake. The plaintiffs instructed the defendant solicitors to act for them in their purchase of a plot of land which they hoped to develop. The plaintiffs had obtained planning permission for the erection of two industrial buildings on the land. The defendants raised numerous enquiries before contract including an enquiry as to the existence of any common rights over the land. The vendors' solicitors replied that there were none to the vendors knowledge. The sale was completed and the plaintiffs immediately negotiated the sale of the land to a third party whose solicitor made a commons registration search. He discovered that part of the land had been registered under the Commons Registration Act 1965. The conveyance was delayed causing the plaintiffs financial loss. The plaintiffs sought damages from the defendant for negligence and breach of contract. It was held by Mocatta J that the defendants were liable to the plaintiffs for their breach of professional duty in failing to make a search. The significant point is that the registration was a mistake and was eventually removed whereupon the conveyance to the purchasers was completed. The damage which the plaintiffs had suffered was financial loss caused by the fluctuations in the property market whilst a means was found of securing the removal of the mistaken claim from the register. If the procedure had been simple the delay and consequent damage might have been minimal. The mistake consisted of incorrect colouring of a plan. The only two

objections to the registration had been withdrawn and so it had automatically become final. The local authority originally argued that the fact the registration was a mistake did not bring the case within the amendment provisions which refer to land which "ceases to be" ' common land rather than land which never was common in the first place. The case report states that a solution was eventually found after consultation with the person who made the initial registration and Mr Ryan of counsel but the report does not give the nature of the solution and the writer's personal enquiries have failed to reveal the scheme which resulted in the clearance of the register. At least the case demonstrates that the Act did not provide an efficient solution.

The inadequacy of the rectification and amendment provisions has been acknowledged in the Inter-Departmental Working Party Report² which confirms that the 1965 Act does not make provision for land to be removed from the registers even where the original applicant is prepared to concede that his application was a mistake. The Report also states that the Department of the Environment has been advised that any regulation made under the Act purporting to provide for the removal of the land in such circumstances would be ultra vires. Therefore, the question of legislation to amend the Act is being considered and will be explored in greater detail.³

It is disturbing that there is a reference in the case of Wilkes v Gee,⁴ which has already been considered, to an error in the area of land registered on the part of the registration authority. The land accidentally included was not relevant to the dispute before the Court of Appeal but the reference to it is clear

" ... the defendant says that by some error on the part of the registration authority the provisional registration covers a part of the larger of the plaintiff's two areas which was not included, or intended to be included, in the defendant's application"⁵

The consequences of mistaken registrations are serious and, where the registration authority is at fault, machinery should be readily available to ensure that those with an interest in the land do not suffer unnecessarily.

The problem caused by the drafting of the rectification and amendment provisions has been regarded as a short term effect for two reasons. First, in the case of G & K Ladenbau (UK) Limited v Crawley & De Reya (a firm)¹, which has been considered, a solution was eventually discovered, and therefore the problem is not insoluble. Secondly, amending legislation is being actively considered. However, for the time being, no obvious and readily available solution exists.

The short term effects of the Act are not beneficial and have resulted in expense, inconvenience and uncertainty. However, it is the long-term effects which are of the greatest significance and the Act cannot be evaluated solely upon results which are not permanent. Russell L J gave a lucid account of the ultimate value to be derived from the Act despite some temporary inconvenience in the case of Wilkes v Gee²

"That [the inability to negotiate the sale to Dorset County Council] is simply the result of legislation - legislation which, looking at the other side of the coin, while it might be thought to be hampering to the plaintiffs in their design to sell their land for the time being, on the other hand when the procedures are gone through that are envisaged by the Act, if the plaintiffs are right, will mean that their situation will be far more certain than it would ever have been without this particular legislation ..."

b Long Term Effects

The permanent consequences of the Act are, predictably, greater both in number and in complexity than those of a temporary nature and so they are to be divided into effects which were intended by Parliament and those which were unforeseen. The classification will assist in producing an evaluation of the Act.

i Intended Effects

a) Certainty

There can be no doubt that Parliament will succeed in its desire to introduce an element of certainty into an area of the law which has been plagued by uncertainty. There will be limitations upon its extent and it will not be achieved until all registrations are final but the register will give information which could only have been obtained with lengthy investigation before the Act and with little confidence in the accuracy of the information eventually obtained.

The certainty will extend to the identity of the commoners and the extent of their rights and to the status of the land as common land or as a town or village green. In view of the quantification provisions contained in section 15, the amount of information which will be available about the extent of the rights will be greater than would have been possible before the Act because the effect of that section has been to impose a stint on commons which did not have specified limits.

The advent of certainty has been particularly valuable on some commons where disputes had arisen about the use of the land for some other purpose and the question of whether the rights had been abandoned was in issue. A right can be lost after a period of non-user but the real test is the presumed intention of the claimant. There is a reference to a period of non-user for twenty years giving rise to a presumption of abandonment' in The Law Relating to Common Land but the view expressed in the Commons Open Spaces and Footpaths Preservation Society Journal² is that there is no standard period of non-user and that the period of twenty years is merely a "yardstick". The second view is preferred because in agricultural terms twenty years is not so

significant a length of time as it would be for a private householder. Farming policies evolve slowly and take time to be established.

The case of Re Yately Common Hampshire Arnold v Dodd and Others¹ provides an excellent example of the value to be derived from the certainty given by the Act and also gives an interesting account of the motives behind some of the registrations. An area of land had been subject to rights of common from time immemorial until 1942 when the land was requisitioned and became Blackbushe Airport. At the end of 1960 it was derequisitioned and became a civil airport which it had remained although it changed hands in 1973. By virtue of the regulations restricting access to the land, the rightholders had been unable to exercise their rights of common since 1942. Registrations had been made of rights over the land and the owner of the land had objected on various grounds including a claim that the rights had been lost by non-user. It was held by Foster J that the rights could not have been abandoned by non-user because the claimants had been prevented, by law, from exercising their rights and, therefore, could not have intended to give them up. There had been evidence before the Commons Commissioner that there had been continued disputes concerning the existence of the airport and the disputes clearly indicated that the claimants had had no intention of abandoning their rights. Foster J felt that it was necessary to make it entirely clear that he had no ulterior motive in reaching his decision

"In considering whether the legal rights have or have not been abandoned, it is in my judgement immaterial whether it is of importance to maintain the present user (as an airfield) as being in the public interest to have a civil airport there, and it is equally immaterial for what motives the commoners seek to maintain their rights; they may wish to stop development or to stop noise or to prevent the land in any way being used other than as an open space. If there is a legal right, there is a legal right, and if there is not, there is not."²

The Act has provided a benefit to the commoners by ensuring that a decision is made as to the existence of the rights which would

enable any future negotiations to take place on a clear understanding that the commoners have not abandoned their rights. An additional bonus is that the procedure laid down by the Act ensured that the matter came before the court. Had there been no Commons Registration Act the commoners would have been unlikely to commence litigation to determine the dispute and so the problems and arguments would have continued.

An important feature of the Act is the facility for making a search of the registers: information which has been collected is readily available. The prescribed forms can be sent by post with the appropriate fee to the registration authority and the result is quickly returned. The fee was increased from 74p to £3.00 in 1980¹ but the procedure is simple and the cost still low for the benefit provided. In the case of G & K Ladenbau (UK) Limited v Crawley and De Reya (a firm)² Mocatta J explained the value of the search procedure:

"In fact it will not have escaped attention that in the case of Mr Franklin³ no warning bell (his own expression) rang at all; in the case of the two experts called on his behalf it would have. Had it rung for Mr Franklin he would not have indulged in a nice balancing operation as would Mr Purton,⁴ but would have secured certainty for his client by a very small expenditure."⁵

There are important limits to the extent of the certainty, in particular the reference to "as at the date of registration" and the omission of the ownership of the land from section 10 but the doubts and uncertainties which existed before the Act have been substantially reduced.

b) "Ownerless" land

English real property law does not acknowledge that land can be without an owner. However, the practical circumstances which existed before 1965 upon many commons and village greens were such that no one would declare themselves to be the owner of the land which, consequently, was neglected and allowed to fall into an unacceptable state. The Act required owners to declare their interest in the land or take the risk of losing it. Therefore, each owner of land which became registered had to make a decision upon whether to accept the responsibilities of ownership or give up the land. Where land was not claimed and the Commons Commissioner was unable to find an owner it was vested in the appropriate body, if it was a town or village green or, in other cases, it will be vested in accordance with the terms of future legislation.'

There are town or village greens which have remained unclaimed and these have been vested² in the Parish Council, or, in the absence of a Parish Council, the District Council. Where the green was within the Greater London Council administrative area, it was vested in the Council of the appropriate London borough. Therefore, the land will have an owner concerned for its condition and, in view of the fact that the land will be newly acquired, likely to be willing to consider implementing a scheme to ensure that the land is properly managed. The new owner would be assisted by the provisions of section 8(4) which provided that sections 10 and 15 of the Open Spaces Act 1906 apply which give the local authority concerned the power to manage and make byelaws concerning the land.

The effects of the Act on unclaimed common land, as opposed to greens, are not as satisfactory but remain a large improvement upon the state of affairs before the Act. The land is to be vested "as

Parliament may hereafter determine" ' which results in the present state of uncertainty continuing. However, in the interim period before provisions for the vesting of the land come into force, section 9 gives any local authority in whose area the land is situated, the power to take steps to protect the land against unlawful interference and to institute proceedings for any offence committed in relation to the land. Therefore, even where land does not have a registered owner, it does have a measure of protection. The local authorities are given a power but are not placed under a duty and so it is conceivable that an authority might fail to take action to safeguard the land. However, the existence of the section indicates Parliament's intentions towards unclaimed land and provides powers which can only serve to protect the future of common land until it has been vested in the person or organisation selected by Parliament.

It is stated in the Working Party Report that of the 16,250 registrations of land, 10,250 were not matched by a claim to ownership. Presumably the figure of 16,250 must refer to the number of pieces of land registered. It is stated that some owners may have failed to make a formal claim to ownership in the belief that such a claim might prejudice their objection to the registration of the land itself.²

c) Increasing awareness

An important effect of the Act, which is not capable of being precisely measured, is the creation of a greater interest and awareness amongst the public in areas of common or green which may be close to their houses. The legislation of the nineteenth and early twentieth centuries had ensured that areas of open land would not be inclosed but it did not provide practical means for managing the land. The public were aware that commons and greens existed but often considered that these areas were open for access as of right to the general public and where the land had become untidy or even inaccessible through lack of management, the public did not have the knowledge or the powers to commence the implementation of any schemes to improve the situation.

The 1965 Act has resulted in a good deal of publicity for the land at the time when registrations and objections could be made and the necessity for registrations to be made had resulted in a detailed consideration being given to land which was often in a neglected condition. Until the provisions enabling management schemes to be made are enacted it is impossible to gauge how much interest has been aroused and what result any interest may have in the improvement in the condition of the land. It is unfortunate that at least fifteen years are likely to elapse between the extensive publicity at the time of registrations and the implementation of new provisions enabling schemes to be made because, inevitably, a certain amount of impetus will have been lost. However, the subject of commons and greens has received a good deal of attention which is likely to result in more thought being given to its future management.

The Act has resulted in a large number of references to Commons Commissioners ' and, from those references, a limited number of appeals to the High Court and, less frequently, the Court of Appeal. The cases have tended to turn upon the application of the provisions to a particular set of facts and, therefore, are not of general significance. However, there are several areas in which the litigation has produced problems and created difficulties for those wishing to apply the law in the future.

a) The Effects of Failure to Register

The case of Central Electricity Generating Board v Clwyd County Council ' has aroused a considerable amount of interest and concern about its possible effects upon substantial areas of common land. The plaintiffs owned an area of unenclosed land upon which they wanted to build a power station. The land had been manorial but it had been taken out of the manor by various conveyances. It was alleged that the land was subject to rights of common but none had been registered by 2 January 1970 when the time for individuals to make applications expired. The local authority had the power to register the land as commonland until 31 July 1970 and did so on 17 July 1970. The plaintiffs objected to the registration and so the matter was referred to a commons commissioner, the hearing taking place in December 1973. The commissioner confirmed the registration of the land as common land. He took the view that the question of whether the land was subject to rights of common should be considered as at the date of the registration of the land ie 17 July 1970. He regarded as irrelevant the fact that no rights of common had been registered at that date and that no commoner could make an application because the statutory period had expired over six months previously. The commissioner proceeded to hear the evidence and decided that there was sufficient evidence to establish that the land was subject to rights of common on 17 July 1970. The Electricity Board appealed to the High Court.

Goff J, reversed the commissioner's decision and allowed the appeal, the respondents were not represented and did not appear. In his judgement, Goff J explained that the desire of the applicants to use the land as a power station had aroused considerable local opposition

and he continued

"and in consequence, a local farmer, Mr John Winston Thomas, the owner of Pentre Farm, wished to register rights of common over the appellants' land in the Saltings; but the statutory date at which the right for anyone to apply to register rights of common expired was 2 January 1970. Unhappily for him, Mr Thomas failed to make any application until 14 May 1970." ¹

The implication is that Mr Thomas' sole motive in attempting to register rights was the frustration of the applicants' plans and not the protection of any rights. However, the commons commissioner decided that rights were being exercised on 17 July 1970. Therefore, it is logical to assume that Mr Thomas wanted to register his rights in order to ensure that he could continue to exercise them. When referring to the registration of the land by the respondents, Goff J stated possible alternatives for their motives

"Whether to assist Mr Thomas, or for their own purposes in defeating the appellants' plans, or for other reasons ... " ²

The dates upon which various statutory provisions became effective are particularly important. After 2 January 1970 no applications could be made by individuals to register either land, rights or ownership. From 2 January 1970 to 31 July 1970 the registration authority could register the land but not any rights over the land. From 31 July 1970 no rights of common could be exercised unless they were registered either under the 1965 Act or the Land Registration Acts 1925 and 1936.³ Therefore, when the registration authority registered the land on 17 July 1970 the rights were exercisable though they would inevitably cease to be in fourteen days time.

Counsel for the applicants had to establish that the effect of section 1(2)(b) which referred to rights ceasing to be exercisable, was to extinguish the rights so that the land would no longer be subject to rights of common. He referred to section 21(1) which provided that

sections 193 and 194 of the Law of Property Act 1925 were to continue to apply to land over which rights were exercised before the provisions of the 1965 Act took effect. Goff J accepted that the rights of common referred to in section 1(2)(b) were extinguished rather than simply becoming incapable of being exercised.

"In my judgement it is plain that in the 1965 Act the legislature was using the expression 'cease to be exercisable' as synonymous with 'extinguished' " "

The next point for Goff J to consider was whether he should look at the date on which the land was registered or the date of the hearing before the commons commissioner to decide whether the land was subject to rights of common in accordance with section 22(1). It is apparent from the judgement that, initially, the judge had decided that the later date was the appropriate one but a letter from the Department of the Environment had been drawn to his attention which stated that the former date should be used and so Goff J restored the matter for further hearing. He declined to follow the suggestion in the letter to adopt the earlier date for a number of reasons.

First of all, he considered that if the land were registered but no rights were registered over it, an application could be made under section 13 to have the land removed from the register² and, therefore, to confirm the registration would be futile.

"To confirm registration because at that time it might have been right, when you know at the hearing that it is wrong, leaving the objector to apply to amend the register seems to me to be a wrong course to pursue." ³

Secondly, the letter referred to sections 6(3) and 12(b) stating that if the date of the hearing was the correct time to consider the existence of the rights then there would have been provisions in the Act analogous to sections 6(3) and 12(b) to deal with land which ceased to be common land through the failure to register rights. Both

the sections contain directions to the registration authority to cancel registrations where certain specified events have occurred. Goff J found that there was nothing in this particular argument because the two situations referred to in the sections were not analogous to that of land over which no rights have been registered.

Thirdly, the letter referred to section 5(7) which provides that an objection to the registration of the land is automatically an objection to the registration of any rights over the land. The letter stated that the Act did not contain a converse provision, ie that an objection to rights was an objection to land.' Presumably, therefore, the argument put forward by the Department of the Environment was that a registration of land can stand even though there may be no rights registered over it and even where it is not waste land of a manor. Goff J gave no weight to this argument because he considered that an objection to a right did not necessarily involve an attack on the status of the land which might be affected by other rights or might be manorial waste.

The arguments put forward in the letter from the Department of the Environment are worthy of consideration but not conclusive. Goff J's decision was pragmatic and was not in contradiction of the law and facts before him. However, it is the existence of the letter which is interesting because it provides a clear indication of the Government's intentions so far as the interpretation of the Act is concerned. A copy of the letter is reproduced at Appendix V. No statutory provision had been made for the situation which arose in this case and, when the matter came before the High Court, the intentions of the Government were considered but rejected.

Goff J went on to consider whether the commissioner could find that the land was subject to rights of common on 17 July 1970 if his

initial decision upon the appropriate date for considering the existence of the rights was wrong. The commissioner's decision was criticised for being too general. The commissioner decided that rights of grazing did exist but he did not quantify them, state whether they were appendant or appurtenant or show who claimed them. His decision was also criticised for finding that there were any rights at all because Goff J considered that, taking all the circumstances into consideration the so-called rights could have been nothing more than indulgences on the part of the landowner. An area of adjoining land had been enclosed and no objections had been raised. Some of the owners of adjacent farms took licences in order to use the Saltings for grazing and no-one had registered any rights or appeared at the hearing to assert any against the applicants.

Goff J was confident that the correct date to look at for the existence of rights was the hearing date but he was equally certain that there was insufficient evidence for the commissioner to find that rights existed on 17 July 1970.

The case has produced concern amongst those who wish to preserve areas of common land and amongst those who understood that the directions contained in the letter from the Department of the Environment would be followed. The effect of the case may be that applications under section 13 can successfully be made for the removal of land from the register where there were valid rights in existence before the Act but they have not been registered. However, this assumption may be incorrect in the light of the decision in Corpus Christi College v Gloucestershire County Council.¹ If this view is correct then it would be ironic if it were possible to remove land from the register which had had valid rights because it has ceased to be common land but

impossible or difficult to remove land which was mistakenly registered and never was common land.'

Concern has been expressed for the practical implications of the decision in the GECB case² and it is possible that amending legislation will be introduced³ although it would have to be retrospective in its effect. The case has been considered by Richard Vane⁴ and in his opinion the owner of land over which no rights have been registered but whose land is registered cannot apply for de-registration because the land never was common land. Goff J considered the question of the existence of the rights and decided, in the alternative, that there were no rights on 17 July 1970 and so the land was not common land. However, the main tenet of his judgement was that the appropriate date was the hearing date to decide whether rights had existed and so the case could be used to support an application for de-registration where valid rights existed until 31 July 1970. On the facts of the CEGB case Richard Vane's opinion is correct but his view would not apply where there had been valid rights in existence. The difficult question of applicaitons for de-registration will be considered in Part Five.

It is interesting to look at the comments made by Templeman J upon the question of land without registered rights in the case of Smith and Another v East Sussex County Council⁵ where the county council had provisionally registered a plantation as common land under the Act. The land was misdescribed in the statutory notices and so the owner did not realise his land had been registered until two years after the expiration of the period for objections. The owner challenged the finality of the registration and obtained a declaration that the registration had not become final because no-one reading the notices would have connected them with the land. In giving judgement Templeman J made the following statements:-

"By section 10 of the Act of 1965 final registration of any land as common land is conclusive evidence of the matters registered. If therefore the registration of the plantation as common land became final, the plantation is now irrevocably and indisputably common land though it may never have been or may have ceased to be common land prior to the Act." ¹

The CEGB case has caused considerable argument and some practical problems and the decision may be the subject of legislation in the future. The existence of the letter from the Department of the Environment indicates the Government's intentions and provides an explanation for the use of the phrase "no rights of common shall be exercisable" in section 1(2)(b) rather than a word such as "extinguished". It is clear from the judgement that the Department of the Environment were of the opinion that the registration of the land as common land could remain even when no rights were registered over it and no successful application under section 13 could be made for rectification. When considering the contents of the letter Goff J states

"It appears to be suggested that it was right for the commissioner to look only at the date of registration, because if he confirmed the registration it could stand, notwithstanding the failure to register any rights of common, and could not be amended under section 13 of the 1965 Act because that could only be applied if there was some change of circumstance or something outside the failure to register the rights of common." ²

Goff J was satisfied that the two were synonymous but, by analogy, section 40 of the Law of Property Act 1925 provides an excellent example of a contract which is valid but not enforceable unless certain conditions are met and, in that section, there is an important distinction between validity and enforceability. It would have been possible for Goff J to recognise a similar distinction between the rights being unexercisable rather than extinguished, and, had he done so, less violence would have been done to the wording of section 1(2)(b).

The Working Party Report makes reference to one specific common known as Ibberton Long Down (177 acres) in Dorset where the commissioner

was obliged to strike off the registration of a right of common to graze 60 sheep as a result of the decision in the Clwyd County Council case. The right was registered in March 1968 when it was being exercised but the holder released his right to the soil owners in April 1968.'

b) The Effects of Failure to Object

It is interesting to compare the effects of failure to register with those of a failure to object. In the case of Re Sutton Common, Wimborne ' the respondent made application in January 1969 for the registration of 74 acres of land as common land. Different parts of the land were owned by different people T Limited being one such owner. In July 1969 certain rights by B over T Limited's land were registered. T Limited objected to the registration of the rights but not to the registration of the land as common land. Two other landowners lodged objections to the registration of their part of the land as common land. None of the objections were withdrawn and so the matter was referred to a commons commissioner under section 5(6) of the 1965 Act. In the course of the hearing, B's alleged rights over T Limited's land were held to be non existent which left for the commissioner's consideration the question of the validity of the registration of the 74 acres as common land on the only basis available, namely that it was waste land of a manor. The commissioner heard evidence relating to the objections by the two landowners and as a result he refused to confirm these registrations. T Limited then applied for the registration of its land as common land not to be confirmed but the commissioner refused to entertain the applications on the grounds that because the only formal objection made by T Limited had been to the registration of B's rights, T Limited was not a party entitled to be heard under the Commons Commissioners Regulations 1971 on the question of the validity of the registration of the 74 acres as common land. The commissioner confirmed the registration of T Limited's land as common land without calling on the respondent to prove her case in relation to T Limited's land and without taking into

account evidence which was before him which cast grave doubts on whether T Limited's land was waste land of a manor. T Limited appealed contending that the commissioner ought to have required the respondent to prove her case before making the confirmation and ought to have taken into account evidence before him and to have allowed T Limited to adduce relevant evidence. It was held by Walton J in the High Court that the case would be remitted to the commissioner with a direction to hear and determine the validity of the registration so far as it affected T Limited's land. Walton J considered that the commissioner had erred in law by failing to require the respondent to prove her case because, once the validity of a provisional registration of land as common land was referred to a commons commissioner under section 5(6) of the 1965 Act, the person who had made the registration had to prove to the satisfaction of the commissioner that the registration was valid.

Walton J's opinion of the 1965 Act is made abundantly clear at an early point of his judgement.

"Once again, I am sure that these obligations were duly complied with, but, for whatever reason, they do not in the event appear to have been as successful in alerting landowners to the registrations made against their land as they were in alerting would-be busybodies that they were able to their hearts' content to register anything they pleased against any portion of land they pleased."

Walton J is also convinced that numerous bogus registrations have become final for want of an objection.² Counsel for the respondent argued that although it was "the matter" which was referred to the commissioner and not simply the dispute arising from the making of an objection yet the commissioner had a discretion whether or not to proceed to consider the validity of the registration in so far as it was not directly challenged. The commissioner considered that as T Limited was not a party entitled under Regulation 19(1) of the Commons

Commissioners Regulations 1971 ' to be heard it would be wrong to consider an objection of which parties entitled to be heard would have had no notice.

Walton J referred to three unreported decisions of the commons commissioners which showed that there has been no uniformity of approach. In Re Cock Moor Brompton by Sawdon North Yorkshire (no 2) ² and Re Walton Heath Surrey,³ the commissioners concerned had confirmed registrations simply in view of the absence of any objection. However, in Re Incleborough Mill and other Commons at Runtun Norfolk⁴ Commissioner C A Settle had taken a harder approach and taken the view that the matter which is referred to the commissioner is the provisional registration for his decision as to whether to confirm it with or without modification or alternatively refuse to confirm it.

There are two particular points which are relevant to the case of Re Sutton Common⁵ and which are not referred to in the law report. The first is the significance of subsection 5(7) in the 1965 Act and the second is the contents of the letter from the Department of the Environment referred to in the Clwyd County Council case.⁶ Section 5(7) states that an objection to the registration of any land as common land or as a town or village green shall be treated as being an objection to any registration of any rights over the land. There is no provision that an objection to a registration of rights is to be treated as an objection to the registration of the land. Walton J refers briefly to sub-section 5(7) but regards it as simply stating the obvious. He does not draw attention to the lack of a sub-section which would of been of direct relevance in the case before him.

The letter from the Department of the Environment pointed out the absence of any converse subsection to subsection 5(7) and supported the idea that a registration of the land itself could stand

without there being a registration of rights over the land.

Walton J's decision can be supported by the wording of the 1965 Act but it does demonstrate the ambiguities present in the Act and the difficulties which faced those wishing to register and those wishing to object. The decision has not escaped judicial criticism.'

c) The meaning of waste land of a manor

Waste land of a manor falls within the definition of common land contained in the Act even where it is not subject to rights of common.¹ The question of whether a particular piece of land is or is not "of a manor" has created problems for the commissioners which resulted in conflicting decisions. The uncertainty concerned the situation where land had been waste land of a manor but the ownership of the land and the lordship had passed into separate hands. The view which has prevailed is that the land must be part of a manor at the date of the hearing before the commissioner if it is to fall within the definition of waste land of a manor.² This problem has been included amongst the unforeseen effects because it would appear that the Department of the Environment would have preferred the wider view to be accepted.³

It is interesting to trace the way in which the narrow view was finally accepted. The first case to consider is Attorney General v Hanmer⁴ in which Watson B provided the following definition:

"The true meaning of wastes" or "waste lands" or "waste grounds of the manor" is the open uncultivated and unoccupied lands parcel of the manor or open lands parcel of the manor other than the demesne lands of the manor."⁵

The commissioners who were obliged to make decisions upon the status of waste land followed the definition of Watson B in Re Church Green Verwood Dorset⁶, Re the Old Ford Halcombe Newington⁷ and Re Box Hill Common Box Wiltshire⁸. Therefore where the land had been severed from the manor, the commissioners refused to confirm the registrations. The definition was also adopted by Slade J in the case of Re Britford Common⁹ (referred to as "the Britford case"). The facts were that Britford Green formed part of the Manor of Britford and the lordship of the manor had been in the same ownership throughout living memory. The land was registered as common land, the owner objected and, before Chief Commons Commissioner G D Squibb QC, evidence was given

that the land was unenclosed and uncultivated but the owner had sometimes cut the grass on the land for hay or silage. The commons commissioner found that the land was not presently subject to rights of common but he made no findings whether it had ever, in the past, been subject to rights of common. The conclusion reached was that the land was waste land of a manor and the registration was confirmed. The owner appealed on the grounds that no evidence had been adduced to justify the finding, the commissioner had not had regard to the definition of "waste land of a manor" in section 37 of the Commons Act 1876 and the land had become demesne land as a result of the lord taking the produce.

Slade J dismissed the appeal on the basis that it was not open to the court to look at the sufficiency of the evidence in view of the form of the question in the case stated; on the second point he considered that the definition in the 1876 Act was not of general application and on the third point, the cutting of hay was insufficient to change the status of the land to demesne land. The land had not been severed from the lordship and so Slade J did not have to consider the effects of such a severance but he did refer in some detail to 'Watson J's definition' and the case has been used as evidence to support the "narrow" definition of waste land of a manor.²

The Britford case was followed, chronologically, by two cases, both in the Chancery Division, which adopted a definition of waste land of a manor which was wider. These three cases were not reported in the order in which they were decided. The second case was Re Yateley Common, Hampshire Arnold v Dodd and others³ (referred to as the Yateley case) before Foster J and the third was Re Chewton Common Christchurch Borough of Christchurch v Milligan and Others⁴ (referred to as the Chewton case) before Slade J.

The facts of the Yateley case have been discussed' in relation to the abandonment of rights of common. The appellant also contended that, if he succeeded in proving that the Blackbushe part was not subject to rights of common, it should cease to be registered as common land because it was not waste land of a manor having regard to its use as an aerodrome since 1942 and to the fact that the present owner was not the lord of the manor. It will be recalled that Foster J held that the rights had not been abandoned but, in the alternative, he clearly stated that

"in my judgement there is no reason why Parliament in the 1965 Act intended that land should cease to be registrable if it is not owned by the lord of the manor".²

Accordingly it was held that the land had not ceased to be waste land of a manor even though it had been severed from the lordship by a Conveyance in 1891.

In the Chewton case, certain parcels of waste land formed part of the manor of Somerford until 1804 when they were sold to T and, thus, severed from the manor. In 1811 the manor was conveyed to T and his successors in title were the trustees of the M Trust. In 1968, the registration authority registered 81.78 acres of the land and, shortly afterwards, the local authority made a similar application which also included an additional 0.36 acres. The trustees of the M trust objected to the provisional registration on the grounds that once the severance had taken place, the subsequent purchase of the manor by the owner of the land did not have the effect of reannexing the parcels to the manor. The commons commissioner, Mr C A Settle QC refused to confirm the registration and the Christchurch Borough Council appealed to the High Court where Slade J allowed the appeal.

Counsel for the local authority put forward two arguments, first that as the lands had always been waste land and had once been of the

manor of Somerford, that was sufficient to bring them within the definition of the 1965 Act. Second, that the lands were still waste land of a manor "by repute". In giving his judgement, Slade J referred to the Britford case but indicated that the lack of a severance of the land from the manor in that case, meant that his comments in the earlier case were not relevant to the Chewton case. Having dealt with the Britford case, Slade J proceeded to accept the first of Counsel's arguments

"In my judgement the phrase 'waste land of a manor' used in relation to a particular piece of land in the context of a statute passed some forty years after copyhold had been abolished, does not as a matter of legal language by any means necessarily import that the ownership of the land still rests with the lord of the relevant manor."

Slade J did not consider the second of Counsel's arguments because the commissioner did not refer to it in his decision and, in view of the affirmative answer to the first argument, it was not essential for the second to be considered.

The confusion surrounding the definition of "waste land of a Manor" was resolved by the case of Box Parish Council v Lacey² which was taken to the Court of Appeal. Chief Commons Commissioner G D Squibb QC refused to confirm the registration, the Parish Council appealed to the High Court where Foster J allowed the appeal whereupon the owner of the land appealed to the Court of Appeal and was successful in having the registration rejected.

The facts were that the land was formerly waste land of the manor of Box and various members of the Northey family had been lords of the manor. Under the will of Edward William Northey who died in 1914 and who was not³ lord of the manor, the land passed to his eldest son who sold it to Mr Neate. Although the land was open, unoccupied and uncultivated it had been severed from the lordship long before 1922.

On the construction of section 22(1)(b) the Court of Appeal was unanimous in deciding that the words "of a manor" referred to the date of registration.

"and as a matter of English the phrase 'waste land of a manor not subject to rights of common' will hardly tolerate a construction which will comprehend land which has long since ceased to be in any way connected with a manor." '

The report provided an indication that the effects of the Act have not been entirely beneficial.

"Once the registers are complete, the 1965 Act should ... bring to an end the unhappy history of disputes and litigation regarding such matters involving, as it did, expensive and difficult enquiries into the past" ²

The decision of the Court of Appeal will have resulted in less injustice because the commissioners had been refusing registrations by adopting the narrow view and some applications for registrations may not have been made as a result of the prevalence of the narrow view.³ If the Court of Appeal had adopted the wider view there would have been no remedy for those whose registrations had been refused or who had failed to make applications. There remains the question of whether owners of land whose registration was confirmed in accordance with the wider view can successfully make application for the removal of the land from the register. Any such application would have to be made on the basis that the land was within section 22(1)(b) until the decision of the Court of Appeal in Box Parish Council v Lacey⁴ whereupon it ceased to be waste land of a manor, but the argument does not appear to be attractive.

The decision in Central Electricity Generating Board v Clwyd County Council⁵ has been applied to the definition of "waste land of a manor". In the case of Re Waste Ground on Custard Hill, Gussage All Saints, Dorset⁶ the question arose of whether, if land was waste land of a manor at the date of registration but had ceased to be so,

the registration should be confirmed. It was held, following the decision in the Clywd County Council case that the confirmation of the registration should be refused because, inter alia, if it were confirmed and thereafter the land ceased to be common land, that would lead to an unanswerable application under section 13 of the 1965 Act. The report of the decision is very brief but, even so, it is possible to accept that waste land which is not "of a manor" in accordance with the narrow view would be eligible for removal from the register.

An unsuccessful attempt was made¹ to extend the definition of "waste land of a manor" to "waste land reputed to be of a manor" and the case will be considered in detail in connection with the fluctuating nature of common land and common rights.²

d) The Extinguishment of Valid Common Rights and the Creation of New Rights

It was the declared intention of Parliament that the 1965 Act would record existing rights as accurately as possible. It was not intended that valid rights should be changed in any way. However, the way in which rights could be registered and become final provided, for a relatively short period of time, a new method of creating rights and the consequences of non-registration were sufficient to render existing rights either unexercisable or even extinguished.'

So far as the creation of new rights is concerned, there are no reported decisions which provide evidence of new rights being made² but that is not surprising because the creation of the right would involve the absence of any objection and so there would not be a reference to a commons commissioner which could appear as a reported case. The sequence of events would be a registration of specific rights which would be provisional³ in the initial period and, if no objections were received or if all those received were withdrawn⁴ the registration would be automatically final and conclusive evidence of the matters registered as at the date of registration.⁵ Publicity would be given to the initial application and if the right were a complete fabrication then the landowner would be likely to object but where grazing had been carried on by the owner's indulgence or on payment of a nominal rent it would be possible that the landowner would not be aware of the implications of failing to make an objection. The case of G & K Ladenbau (UK) Limited v Crawley & De Reya (a firm)⁶ establishes that areas of land were incorrectly registered as common land without any objection being made and so it is conceivable that, by analogy, common rights may have been created. Walton J in Re Sutton Common Wimborne⁷ is quite certain that new rights have been created

"I have no doubt that this obligation on local authorities was duly complied with, and, in the nature of things, such publicity has brought forth a crop of claims which are entirely without merit, and some of these, as is well known and recognised, because of the subsequent provisions of the Act have by now become final and therefore indisputable." '

The question of valid rights being unexercisable² is equally serious and the possibility stems from the provisions of section 1(2)(b) which provides that rights which are not registered either under the 1965 Act or the Land Registration Acts 1925 and 1936³ shall not be exercisable. There are three factors which could result in valid rights being omitted from the register.

The first influential matter concerns the question of bargaining power. The more rights which exist over a piece of land the less it is worth to the landowner and, therefore, it is in his interests to ensure that as few rights as possible appear on the register. It is obvious that the rights will be of tremendous value to the commoner and so he will be anxious to ensure that they do appear on the register. However, the existing areas of common land are often in remote areas of the country where the landowner may be an individual of considerable wealth and influence and in a position to bring pressure upon the commoner to discourage him from registering particularly where the commoner is a tenant of other land from the landowner. If the rights have been registered, the landowner is more likely to be able to afford barristers and surveyors to assist in the presentation of his case before the commons commissioner and if he were to succeed in reducing the number of rights over the common he would gain a bonus which Parliament could hardly have intended.

It is arguable that evidence of the loss of valid rights may be found in the case of Central Electricity Generating Board v Clwyd County Council*. Goff J was prepared to state, in the alternative, that no rights existed on 17 July 1970 but the commons commissiner who listened

to the witnesses and who was dealing with cases concerning common land frequently was satisfied that the rights did exist. It is impossible to calculate how many rights if any have been lost but it is theoretically possible that losses have occurred.

The second major factor in the loss of valid rights is the existence of three separate sections within each of the two registers. The effect of the existence of separate sections is that the registration of the land as common land would be completely independent of the registration of any rights over the land. It is clear from the case of Central Electricity Generating Board v Clwyd County Council¹ that where land is registered but there are no registered rights, the registration should not be confirmed unless the land is waste land of a manor. However, it is possible to appreciate that a commoner would not realise that each individual right had to be registered and that the registration of the land as common land afforded him no protection whatsoever. It is clear from the wording of the Act that the sections of each register are separate and each individual right must be registered but the majority of commoners are neither lawyers nor accustomed to interpreting acts of Parliament and so it is possible to accept that omissions from the register might be the result of a misunderstanding as to the effect of the registration of the land itself as common land.

A third factor in the non registration of valid rights concerns the inter action of the 1965 Act and the Land Registration Acts 1925 and 1936.² Common rights are overriding interests and their importance in the sphere of registration of title has been discussed.³ It is highly likely that where the title of the servient tenement is registered at H M Land Registry then the existence of the rights will be apparent from the details on the register. However, it is not essential that

references to the rights do appear on the register because the registered owner will take subject to them in any event. The provisions of the 1965 Act are such that common rights must be registered either under the 1965 Act or at H M Land Registry if they are to remain exercisable. Therefore, where the title to the servient land was registered at H M Land Registry immediately before the 1965 Act, common rights which were perfectly valid as over-riding interests, even where they did not appear on the register, will be rendered incapable of being exercised by a different statute. This result does not accord with the general concept of over-riding interests and could result in unfortunate omissions from the register.

It is possible to foresee that valid rights may have been lost but the precise effects of failure to register depend upon whether the view of Goff J in the CEGB case is accepted. It was his opinion that section 1 did not merely render unregistered rights unenforceable but that it extinguished them. If that view is correct and if there is no amending legislation, the consequences of failure to register are disastrous for any commoners who, for whatever reason, failed to ensure that their rights appeared on the register.

d) Practical Changes in Land Usage

The alterations to valid rights, either by creation, extinguishment or loss of their exercise, have been discussed but it is important to acknowledge that a major effect of the 1965 Act has been to produce significant changes in the uses for land which existed before the Act came into force even where the uses were not the exercise of valid rights. It was the intention of Parliament to ensure, so far as possible, that all valid rights were accurately recorded. Parliament did not concern itself with differences which might exist between the rights as they were being exercised and the rights as defined in accordance with legal theory which was not readily intelligible even to the professional lawyer. By referring to the accurate registration of subsisting rights, the Government created an impression that the result of the Act's provisions would be the recording of the rights which were actually being exercised. If this impression had been accurate there would have been very little upheaval in the lives of commoners and landowners, their expectations being unaffected. However, there is evidence to suggest that on some commons there were substantial changes as a result of the registration requirements and there have been alterations to land use which have been surprising to those with an interest in the land who cannot have been aware of the existence or extent of rights before the matter was decided by the commons commissioner. Indeed, the number of references to the commissioners is evidence of the fact that there have been discrepancies between the expectations of the commoners and the legal realities.

Evidence of the distinction between practical uses and legal rights can be found in the case of New Windsor Corporation v Mellor and Others ¹ which has been discussed.²

The second case in which expectations have been disappointed and existing land usage varied is that of Central Electricity Generating Board v Clwyd County Council¹ which has been discussed. Goff J was of the opinion that there were no subsisting rights but it is clear from his judgement that there was evidence of grazing on the land. The commissioner had stated that the owner of Pentre Farm and of neighbouring farms had common rights of grazing over the land.² Whether Goff J was correct in his opinion or not there can be no doubt that the effect of the decision in the High Court would be to prevent the use of the land for grazing by individuals who had anticipated that they would be able to make use of the land for the foreseeable future.

Section 15 of the Act which contains the quantification provision is capable of causing substantial alterations to the use made of common land and has created particular problems in the Manor of Spaunton in North Yorkshire. The common was unstinted and a considerable number of local people had rights over the land although very few were actually exercising them. There was an active Court Leet which took its duties of regulating the common seriously. Appendix II contains a selection of press cuttings from local newspapers giving details of the general interest taken by the Court Leet and of the serious problems which section 15 created. All the commoners registered rights and, because no agreement could be reached about the manner of quantification large numbers were registered by many commoners with no land near their house, inbye land, and no intention of exercising their rights at the present time. A register prepared at the beginning of the twentieth century provided details of the rights which were considered as existing although there was no stint mentioned. The common was not over grazed as a matter of fact although it could not possibly have provided grazing for all the beasts referred to in the provisional registers.

Objections were received to all the provisional registrations and so a hearing took place before the Chief Commons Commissioner.

The problem was which method to use for deciding upon the extent of each commoner's right. If the rule of levancy and couchancy was used, some of the commoners who were using the common and whose livelihood depended upon the income from sheep farming would suffer drastic reductions in the size of their flocks because of the small area of inbye land which they had. It is possible to run large flocks of sheep on a common from a small area of inbye land because concentrated animal feedstuffs are readily available to support the sheep during the winter and it is not necessary to be self sufficient in hay because it can be obtained from other farmers even where they live at a considerable distance from the commoner's holding. Therefore, the rule of levancy and couchancy would result in substantial injustices.

One alternative was to decide upon the carrying capacity of the common, which would not be a simple task, divide the total by the number of commoners giving each common an equal number of rights. The legal justification for such a course of action was that an amount of compensation for land compulsorily acquired had become payable to the commoners and it had been divided equally between the commoners implying that, by the custom of the manor, each commoner had an equal right. However, if the commissioner had used the alleged custom of the manor and divided the rights equally, the result would have been that the commoners who were actively exercising their rights would have had to reduce their flocks so substantially that they could no longer have continued as farmers on a commercial basis.

Perhaps the fairest course to adopt would have been to give the active farmers sufficient rights to continue as they had been doing and give those who did not wish to exercise their rights but equally

did not wish to lose them a nominal amount. However, no authority could be found for such an arrangement and so the rule of levancy and couchancy prevailed both before the Commons Commissioner and in the High Court. It is small comfort to the commoners to be told that they did not lose any rights they were simply prevented from using the common as trespassers.

Further complications have arisen in the Manor of Spaunton as a result of the decision taken by the Court Leet in October 1980 to grant an extension to five common right holders who had had their rights drastically reduced by the commons commissioner. The extension lasted until October 1981. The lord of the manor had insisted that the sheep which were in excess of the number confirmed by the commissioner must be removed by the end of October 1980: details from the local newspaper are given in Appendix II. Obviously, the enforcement of the provisions regarding quantification will not be without its problems.

Three instances have been given of situations where the expectations of commoners or landowners have been substantially altered resulting in confusion and annoyance for those affected. It is unlikely that the instances given were isolated and could not be repeated throughout England. The Parliamentary debates in the House of Commons over the Commons Registration Bill created the impression that the process of registration would be the task of noting down the practical land usage on each common. However, in view of the divergence over the years of legal theory and general understanding of the public, the registration process has produced surprising and disturbing results on some commons and greens.

It is appropriate to refer briefly to Re Yately Common Hampshire Arnold v Dodd and Others ' which has been discussed. Having considered the question of the abandonment of common rights, Foster J

referred briefly to quantification of the rights. The appellant had argued that the rights were exaggerated and should be reduced. The commons commissioner, A A Baden Fuller Esq, made a note on the register to the effect that the number of rights had not been determined and were merely those put forward by the commoners. There was no appeal from the commissioner's decision and so Foster J did not consider that it was open to the appellant to argue the point before him. However, he did make the following remark

"It may be that Parliament will lay down some other test than levancy and couchancy."

From this comment it would appear that the strict rule applied to Spaunton Moor has not necessarily been rigorously adhered to throughout the country.

f) The Loss of the Fluctuating Nature of Commons and Greens

It is impossible to trace the precise origins of common land but it is apparent that the concept of common rights arose as a result of the existence of areas of land which were not required for intensive cultivation and the needs of the villagers regarding food for their animals and materials for their houses, implements, fires and roads. It is unlikely that the rights were closely defined when they were in their infancy and so long as the commoners were a small group of people in contact with the lord of the manor, there would be scope for varying the rights to meet changing circumstances. The rights could be reduced or increased, extinguished or created and the location of the land over which they were being exercised could be altered. The Royal Commission Report makes reference to such an alteration in Barrowby Lincolnshire in 1697

"The inhabitants agreed to divide the common into three parts, ploughing one third at a time and keeping it in tillage for four years successively and then putting it back to grass." '

The decision was made as a result of the loss of a number of horses and cattle through disease which the inhabitants attributed to the unwholesome nature of the common which had not been ploughed for some years. It is clear that common land was not immutable.

The Manor of Spaunton provides an example of the fluctuating nature of the rights over the land. The Court Leet had succeeded in regulating a common where the number of inhabitants with common rights was very large and yet there had been no necessity to impose a stint. The reason was that although all the commoners did not wish to exercise their rights, they did not wish to lose them and the system which had evolved enabled those who wished to use their rights in a commercial manner without other commoners permanently forfeiting their rights. The fact that the system had worked can be attributed, in part, to the

necessity of hefting the sheep. A heaf is a small area of land to which a flock has become accustomed by grazing there. If a flock is turned onto a common then, unless it is restrained in some way it will wander from the commoner's holding and become lost. Therefore, each commoner must take steps to ensure that his flock is trained to frequent a certain part of the common. The only practical way in which to achieve this end is by buying sheep from that particular common and the sheep are most likely to become available when another commoner retires. It would be impractical to buy in sheep from a different area and expect them to settle on a particular area of the common. Therefore it is unlikely that a manor such as Spaunton would be surcharged by a sudden influx of new flocks. The system imposes its own restraints which had worked successfully, but in the future, the new statutory limits will operate serving to reduce the number of animals grazing the common.

It is necessary to state that there are provisions in the 1965 Act for alterations to be made to the register where the circumstances on the common have changed.' However, it is unlikely that steps would be taken to keep the register up to date when there is no obligation to do so and, in any event, the capacity of common land to adapt to changing circumstances has developed over the centuries with very small changes on some commons and it is possible that the question of registration would not occur to commoners in the years to come.

One case which has provided an excellent example of the lack of flexibility in the registration process is Baxendale and Others v Instow Parish Council and Others². Devon County Council had registered without application a strip of land at Instow as waste land of a manor. The estate owners objected but the commons commissioner confirmed the registration whereupon the owners appealed to the High Court. The complexity of the case can be gauged from the comment by Sir Robert

Megarry V-C that there were questions upon movable freeholds, the law of accretion of land occurring on the imperceptible retreat of the sea, on the boundaries and nature of manorial waste and on the construction of a Crown Grant of 1855 as well as the 1965 Act. In 1855, a grant had been made of land lying between high and low water mark. Since that time, the sea had receded and the land which had been below high water mark in 1855 was now above it. The local authorities contended that the grant in 1855 was not of a fixed area of land but of a movable area of foreshore which varied with the movement of the sea. Devon County Council had registered the land between high water mark in 1855 and high water mark in 1965 as waste land of a manor. In allowing the appeal by the estate owners, Sir Robert Megarry V-C, whilst giving full weight to a possible presumption that a grant of a movable foreshore was intended, held that there was sufficient in the parcels clause of the 1855 grant, combined with the plan to rebut that presumption. Therefore, no land was produced lying between that granted in 1855 and the manor which was registrable as waste land of a manor.

A further point was taken by the local authorities upon the definition of "waste land of a manor". It was contended that the registration should be allowed to stand because when it was made, the land in dispute was reputed to be waste land of a manor. In the Conveyancing Act 1881 and the Law of Property Act 1925 the word "manor" included "reputed manor" and it was argued, by analogy, that waste land of a manor or reputed manor should include waste land which was of the manor by repute. This argument did not find favour with Sir Robert Megarry V-C and the appeal by the estate owners was allowed. Whilst it is hardly surprising that the arguments put forward by the local authorities did not succeed, in view of the facts of the case and appropriate rules of law, the decision that the registration should be

cancelled provides an example of legislation effectively placing in danger the land it was intended to protect. The passage of time had changed the nature of this particular piece of land but no recognition could be given to the fact that it may have become suitable for a new purpose.

g) The Advantages of Certainty to the Landowner

Prior to the introduction of registers for common land and rights, the landowner was confronted with substantial problems if he wished to develop or regulate the land because he could not be certain that he had succeeded in locating all the commoners. Once all the registrations are final, the landowner will be in a far more confident situation because he will be able to identify all the right-holders, at least as at the date of registration. One added bonus which will be available to the landowner is that he will be able to discover how many commoners there are and if he wants to acquire their rights he will know when all the rights have been acquired and he may be able to apply for the de-registration of the land.' Before the passing of the Act, the landowner could try to buy up all the existing rights but he could never be certain that he had succeeded. Once all registrations are final, he will be able to act with greater certainty.

The problem has been acknowledged in the Working Party Report

"It would seem that the registration process, by identifying all the commoners for the first time, will facilitate the efforts of an owner of a common who is minded to extinguish all rights of common, either by purchase from the right holders or by the acquisitions of all the properties (identified in the registers) to which the rights are attached."²

In order to remedy the defect, the Working Party recommended that land should not be removable from the register until statutory processes had been followed involving the approval of either Parliament or of the appropriate Secretary of State.³ If this recommendation were adopted, the landowner would still be able to identify the rights and their owners but, even if he were able to acquire all the rights he would not be able to have the land itself removed from the register until a formal process had been followed, in which presumably, it would be open to the person with the power to give approval to withhold consent

where it was considered that the owner had acted improperly. Therefore, it is possible that there will be amending legislation to reduce the risk of common land being lost but it is unlikely to be enacted in the near future and the recommendations of the Working Party will not necessarily be accepted.

h) The Effect of Section 21(1)

Section 21(1) provides that the application of sections 193 and 194 of the Law of Property Act to land registered under the 1965 Act is to be unaffected by section 1(2) of the 1965 Act which specifies the sanctions for non-registration of rights. Therefore, so long as the land is registered under the 1965 Act, the application of the sections in the Law of Property Act 1925 does not depend upon the registration of the rights under the 1965 Act.¹ Unfortunately, the result of the saving in section 21(1) is to increase the doubts and uncertainties as to the statutory provisions which might affect a particular piece of land. The sections in the Law of Property Act 1925 have different applications and so it is necessary to consider them separately.

Section 193 provides a right of access for the public and applies to

- a) any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts 1866 to 1898
- or b) manorial waste or a common which is wholly or partly situated within an area which immediately before 1 April 1974 was a borough or urban district
- or c) any land which on 1 January 1926 was subject to rights of common and in respect of which the owner has deposited a deed declaring that the section shall apply.

The section ceases to apply to

- a) any land over which the commonable rights are extinguished under any statutory provision
- or b) any land over which the commonable rights are otherwise extinguished if the council of the county in which the land is situated by resolution assents to its exclusion from the

operation of the section and the resolution is approved by the Minister.

By virtue of section 21(1) the public's rights of access will continue to apply to metropolitan commons and manorial wastes and commons in urban areas but it will only apply to the third category so long as the land is registered under the 1965 Act. If it is not, then the right of access will be lost. It is not necessary for the rights to be registered under the 1965 Act. The practical consequences are that it will be even more difficult to ascertain whether a right of access does exist over a particular piece of land.

However, the effect of section 21(1) upon section 194' is even more serious. Section 194 prohibits the construction of works or the building of erections or fences and applies to any land which was subject to rights of common on 1 January 1926 and it ceases to apply to

- a) any land over which the commonable rights are extinguished under any statutory provision
- or b) any land over which the commonable rights are otherwise extinguished if the council of the county in which the land is situated by resolution assents to its exclusion from the section and the resolution is approved by the Minister.

The effect of section 21(1) is to remove the protection of section 194 from all land which is not registered under the 1965 Act. Where the land is registered but the rights are not it will be possible for section 194 to apply but it will be necessary for the applicant to show that the land was subject to rights of common on 1 January 1926 and where the rights are not registered under the 1965 Act the task will be difficult. A different practical problem could arise where the owner acquires all registered rights over the land and applies for the de-registration of the rights and the land. In theory, section 194

would continue to apply and protect the land until a resolution had been passed by the county council and approved by the Minister but it could be expected that the landowner would regard the removal of the land from the register as the most significant step and would carry out work in breach of section 194 on the assumption that he was unlikely to be prevented.

Section 194 does not apply to manorial waste and so land registered under the 1965 Act is at risk from the owner who could fence the land without there being a remedy available to the public.

The Working Party Report has considered the problems which could arise as a result of the interaction between the 1965 Act and the Law of Property Act 1925 and recommends' that section 194 should apply to all land registered under the 1965 Act but legislation will not be forthcoming in the immediate future and may not follow the Working Party's recommendations.

IV CONCLUSION

The 1965 Act partially adopted the recommendations of the Royal Commission and attempted to inject a degree of certainty into a very complicated area of law. The registration process is incomplete and until every registration is final, it is impossible to draw conclusions upon the effect of the 1965 Act. However, at this interim point, it is possible to identify the short term problems which have arisen and to draw attention to the more permanent areas of conflict which have emerged over the previous sixteen years.

A limited measure of certainty has been achieved though with a greater degree of upheaval than might have been expected. The probable result of the increase in knowledge about the status of the land will be an immediate reduction in the acreage of land which is used as common land followed by a more gradual reduction in the exercise of rights as landowners benefit from the increased certainty about the existence of rightholders.

The opportunity will be taken to consider the ways in which Parliament may decide to rectify mistakes which were made or make alterations to provisions which have proved difficult to administer. In addition, there remains the question of the vesting of common land which is without a registered owner.

NOTES AND REFERENCES IN THE TEXT

PART FOUR

<u>Page No</u>	<u>Ref. No</u>	<u>Reference</u>
90	1	See appendix IV
92	1	Official Report Fifth Series Parliamentary Debates Commons 1964-65 Volume 71 p460 per Mr Frederick Willey
	2	See post Part Three
93	1	Commons Registration (General) Regulations 1966 SI1966 No 1471 Reg 32
94	1	Ibid Reg 22
	2	Ibid Reg 24
	3	Ibid Reg 24(1)
95	1	The notes which accompanied the application for registration of ownership stated that where the land was registered at H M Land Registry claims to ownership under the 1965 Act would not be permitted (Note 2)
	2	Section 12(b) of the 1965 Act
	3	1965 Act
96	1	<u>Central Electricity Generating Board v Clwyd County Council [1976] 1AER 251</u>
	2	Post pages 156 to 162
97	1	Then, Joint Parliamentary Secretary to the Ministry of Land and Natural Resources
	2	Official Report Fifth Series Parliamentary Debates Commons 1964-5 Vol 711 28 April 1965 8.03pm
98	1	ie The registration system
	2	Para 3.16 Inter Departmental Working Party Report 1975/77
	3	Ibid para 3.24
99	1	Post pages 114 to 115
100	1	Post page 113
	2	<u>Robertson v Hartopp [1889] 43 Ch D 484</u>

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
100	3	Ryan The Law Relating to Common Land Chapter 2 section 3(b)(iii) 2.66 to 2.70
101	1	Section 15(3)
103	1	Section 1(2)(b) Now 1925 to 1971
	2	The situation is uncertain. See post pages 207-210
	3	See the following cases in particular in relation to the loss of rights:- <u>Central Electricity Generating Board v</u> <u>Clwyd County Council (1976) 1AER 251</u> <u>Corpus Christi College v Gloucestershire</u> <u>County Council 1982 The Times 27 July</u> <u>Re Turnworth Down Turnworth Dorset (1977)</u> <u>P & CR 192</u>
106	1	Section 2(2)
	2	Local Government Act 1972 section 272(1) and Schedule 30
	3	Commons Registration Act 1965 section 3
	4	Commons Registration (General) Regulations 1966 SI 1966 No 1471 Regulation 4 and Schedule 2
	5	Commons Registration Act section 4(7) and Commons Registration (Publicity) Regulations 1966 SI 1966 No 971
	6	Commons Registration Act 1965 section 4(2)(b) see also the Commons Registration (General) Regulations 1966 SI 1966 No 1471
	7	Ibid section 1(2)(a)
107	1	Ibid section 5(1) and the Commons Registration (General) Regulations 1966 SI 1966 No 1471 para 11
	2	Ibid section 5(5)
	3	Commons Registration (General) Regulations 1966 SI 1966 No 1471 Regulation 5; Commons Registration (Time Limits) Order 1966 SI 1966 No 1470; Commons Registration (Time Limits) (Amendment) Order 1970 SI 1970 No 383
	4	Central Electricity Generating Board v Clwyd County Council [1976] 1AER 251 and Re Tillmire Common Heslington [1982] 2AER 615

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
107	5	Commons Registration Act 1965 section 5(6)
	6	Ibid section 8(1)
	7	Ibid section 7(2)
	8	Ibid section 12(b)
	9	The Commons Commissioners Regulations 1971 SI 1971 No 1727 para 19
	10	Ibid para 30
	11	The 1965 Act section 6(2)
	12	Ibid Section 19(1) and the Commons Registration (General) Regulations 1966 SI 1966 No 1471 Reg 32 and SI 1980 No 1195 (revoking SI 1970 No 1996)
108	1	Section 19(1)(d)
109	1	SI 1966 No 1471 as amended
	2	SI 1971 No 1727
	3	It is interesting to note the case of <u>Re Cock Moor Brompton by Sawdon North</u> <u>Yorkshire (No 2)</u> 21 June 1977 in which three entries had been made in the rights section of the right to shoot game which cannot be a right of common
	4	Commons Registration (General) Regulations 1966 SI 1966 No 1471 para 7
	5	Section 5(3)
	6	Commons Registration (General) Regulations 1966 SI 1966 No 1471 para 7
110	1	2 January 1967
	2	SI 1966 No 1470
	3	Official Report Fifth Series Parliamentary Debates Commons 1964-5 Vol 711 26 April to 7 May P. 459 28 April 1965
111	1	Post pages 137 to 144
	2	G & K Ladenbau (UK) Limited v Crawley v De Reya [1978] 1A ER 682
	3	SI 1971 No 1727

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
111	4	For a detailed exposition of the false assumptions and the consequences of failure to register see <u>Central Electricity Generating Board v Clwyd County Council [1977] 1AER 251</u>
112	1	Ante page 64
	2	Section 13
	3	Section 12(a)
113	1	Ante pages 67 and 72
114	1	Official Report Fifth Series Commons 1964-65 Vol 717 Report Stage p344 27 July 1965
	2	Ibid p350
	3	Ibid p358
	4	Ibid p360
115	1	Ante pages 111 to 112
	2	Ante page 91
	3	Now 1925 to 1971
	4	See the discussion upon the meaning of these words in Central Electricity Generating Board v Clwyd County Council considered post pages 157 to 158
	5	Now 1925 to 1971
	6	Section 8(3) and section 8(5)
116	1	Local Government Act 1972 section 189(2)
	2	Section 9
117	1	Royal Commission Report para 159
	2	Butterworths Annotated Legislation Service Statutes Supplement No 156 p5
	3	1 October 1966 Commons Registration (Exempted Land) Regulations 1965 SI 1965 No 2001
	4	40 applications covering approximately 4500 acres were received by 1 October 1966
	5	Ante page 66

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
117	6	Royal Commission Report p367
118	1	Ibid p89 footnote 5
	2	Now 1925 to 1971
	3	Writer's emphasis
119	1	Section 17(1)(a)
	2	Section 6(1)
	3	Sections 18(1) and 18(2)
	4	Royal Commission Report para 299
121	1	Ante page 65
	2	Writer's emphasis
122	1	Royal Commission Report para 264
	2	Land Registration Act 1925 Section 112 and Land Registration Rules reg 287
	3	Ibid
123	1	Now 1925 to 1971
	2	See Ruoff and Roper Registered Conveyancing 4th Edition p112 to 114
	3	Land Registration Rules 1925 rr 3(2)(c)
	4	Ruoff and Roper Registered Conveyancing 4th Edition p 97
	5	1965 Act
125	1	Land Registration Act 1925 section 70(1)(a)
	2	1965 Act
126	1	Commons Registration (General) Regulations 1966 SI 1966 No 1471 para 29(1)
	2	Post pages 145 to 147
128	1	Ante page 33
	2	Section 16(1)(b)
	3	Ante pages 47 to 48

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
129	1	Royal Commission Report para 402
	2	Post pages 168 to 173
	3	Writer's emphasis
	4	Section 22(1)
	5	Also known as pasturegates
130	1	Section 22(1)
	2	Royal Commission Report para 403
	3	[1974] 2A ER 510 and [1975] 3A ER 44
	4	[1977] 3A ER 521
131	1	Ibid
	2	Ante page 130
	3	[1975] 3A ER at page 48
132	1	<u>Re Sutton Common, Wimborne, Dorset</u> [1982] 2 AER 376
	2	Writer's emphasis
133	1	As to town or village greens generally see Halsbury's Laws Vol 6 paras 525 to 534
134	1	1965 Act section 15
137	1	Ante pages 110 to 111
	2	SI 1966 No 1470
	3	Commons Registration (Time Limits)(Amendments) Order 1970 SI 1970 No 383
	4	Sections 17 and 18
138	1	[1972] 1AER 439
139	1	[1968] 19 P & CR 525
	2	[1969] 21 P & CR 293
	3	The 1965 Act
	4	[1972] 1AER at page 441
	5	[1972] 3AER 579

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
140	1	[1972]3AER at page 581a
	2	Section 10 provides "the registration under this Act of any land as common land or as town or village green or of any rights of common over any such land, shall be conclusive evidence of the matters registered as at the date of registration, except where the registration is provisional only
141	1	[1972] 3AER at page 581b
	2	Ibid
	3	Official Report Fifth Series Commons 1975-76 Vol 918 29 October 1976 Written answer 397
	4	Official Report Fifth Series Commons 1976-77 Vol 934 8 July 1977 Written answers 698-700
142	1	Official Report Fifth Series Commons 1977-78 Vol 946 16 March 1978 Written answer 324
	2	[1973] 1AER 226 [1973] 2AER 1214
143	1	[1973] 1AER 229 e and f
145	1	Ante pages 126 to 127
	2	[1978] 1AER 682
146	1	Section 13(a)
	2	Chapter 4
	3	Post pages 215 to 238
	4	[1973]2AER 1214
	5	At page 1216h Per Russell LJ
147	1	[1978] 1AER 682
	2	[1973] 2AER at page 1217h
149	1	The Law Relating to Common Land Chapter 2 Section 4(d)(iii)
	2	CPSJ Vol XIII No 5

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
150	1	[1977] 1AER 505
	2	Ibid at page 510
151	1	Commons Registration (General)(Amendment) Regulations 1980 SI 1980 No 1195
	2	[1978] 1AER 682
	3	A partner in the defendant firm
	4	A solicitor called on behalf of the defendant firm
	5	[1978] 1AER at pages 701 and 702
152	1	Sections 8 and 9
	2	Section 8(5)
153	1	Section 1(3)(b)
	2	Working Party Report 4.5
155	1	Ante pages 141 to 142
156	1	[1976] 1AER 251
157	1	[1976] 1AER at page 253d
	2	[1976] 1AER at page 253f cf The comments of Foster J in the case of Re Yateley Common [1977] 1AER at page 510 and ante page 150
	3	Now 1925 to 1971
158	1	[1976] 1AER at page 255b
	2	But see <u>Corpus Christi College v Gloucestershire County Council</u> [1982] 3AER 995 and post pages 204 to 214, <u>Smith and Another v East Sussex County Council</u> [1977] 76 LGR 332 and the article 'Commons Registration: Some Problems' by Kevin Heynes SJ Vol 126 p405-7
	3	[1976] 1AER at p256c
159	1	But see <u>Re Sutton Common (Wimborne)</u> [1982] 2AER 376 and post pages 164 to 166
160	1	[1982] 3AER 995 and post pages 204 to 214

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
161	1	ie Comparing the case of Central Electricity Generating Board v Clwyd County Council Op Cit with G & K Ladenbau (UK) Limited v Crawley & De Reya (a firm) Op Cit
	2	The Sunday Times 10 February 1980
	3	Working Party Report 3.17
	4	Journal of Planning and Environmental Law June 1977 p352-358
	5	[1977] 76 LGR 332 1977 7 CL 289 see also the discussion of this question by Kevin Heynes in the article 'Commons Registration: Some Problems' at 1982 SJ Vol 126 p 405 to 407
162	1	Ibid at page 335
	2	[1976] 1AER at page 255d
163	1	Working Party Report para 3.19
164	1	[1982] 2AER 376
165	1	At page 379
	2	At page 380d
166	1	SI 1971 No 1727
	2	Chief Commons Commissioner G D Squibb 21 June 1977
	3	Commissioner A A Baden Fuller 11 November 1977
	4	23 February 1977
	5	[1982] 2AER 376
	6	Ante pages 156 to 162
167	1	Post page 212
168	1	Section 22(1)(b)
	2	<u>Box Parish Council v Lacey [1979] 1AER 113 and Re Waste Ground on Custard Hill Gussage All Saints Dorset 210/D/317 [1980] CL 32</u>
	3	Working Party Report 3.18
	4	(1858) 27 LJ Ch 837 at page 840

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
168	5	(1858) 27 LJ Ch 837 at page 840
	6	Ref 10/D/13 30 May 1972
	7	Ref 29/D/4 14 July 1972
	8	Ref 249/D/56-60
	9	[1977] 1AER 532 May 1976
169	1	Ibid at page 539
	2	Journal of Planning and Environmental Law June 1977 p352-358 Richard Vane
	3	[1977] 1AER 505 October and November 1976
	4	[1977] 3AER 509 March 1977
170	1	Ante page 150
	2	[1977] 1AER 505 at p517
171	1	[1977] 3AER 509 at p514b
	2	[1979] 1AER 113
	3	Writer's emphasis
172	1	[1979] 1AER 113 at page 115b
	2	Ibid at page 116c
	3	However, the decision has not attracted the support of Lord Denning MR, see <u>Corpus Christi College v Gloucestershire County Council</u> [1982] 2AER 995
	4	[1979] 1AER 113
	5	[1976] 1AER 251
	6	210/D/317 [1980]CL 32
173	1	<u>Baxendale and Others v Instow Parish Council and Others</u> Law Gazette 1981 p499
	2	Post pages 184-186

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
174	1	See Goff J <u>Central Electricity Generating Board v Clwyd County Council</u> [1976] 1AER at page 255b
	2	There is, however, a reference in <u>Re Sutton Common (Wimborne)</u> [1982] 2AER376 at p383 to the confirmation in the absence of objection to a right to shoot game despite the fact that such a right cannot be a right of common
	3	Section 4(5)
	4	Section 5(6) and section 7(1)
	5	Section 10
	6	[1978] 1AER 682
	7	[1982] 2AER 376
175	1	At page 379c
	2	Ante pages 157 to 158
	3	Now 1925 to 1971
	4	[1976] 1AER 251
176	1	Ibid
	2	Now 1925 to 1971
	3	Ante pages 121 to 125
178	1	[1974] 2AER 510 and [1975] 3AER 44
	2	Ante pages 130 to 131
179	1	[1976] 1AER 251
	2	[1976] 1AER at page 257a
181	1	[1977] 1AER 505
182	1	Ante pages 179 to 182
183	1	Royal Commission Report Appendix II para 42
184	1	Section 13
	2	Law Gazette 1981 p499
185	1	Writer's emphasis

Notes and References in the Text (Part Four continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
187	1	<u>Central Electricity Generating Board v Clwyd County Council [1976] 1AER 251</u> but compare the cases of the Tillmire referred to ante page 160 and <u>Corpus Christi College v Gloucestershire County Council [1982] 3AER 995</u>
	2	Working Party Report 3.17
	3	Ibid 3.24(ii)
189	1	This distinction between the registration of land and rights provides more support for the view that a registration of common land should stand even where no rights have been registered over it cf Central Electricity Board v Clwyd County Council
190	1	Law of Property Act 1925
191	1	Working Party Report 3.24

PART FIVE

COMMON LAND SINCE THE COMMONS REGISTRATION ACT 1965

I INTRODUCTION

The 1965 Act has been described as providing a "fact finding exercise" ' with the intention that there would be additional legislation in the future. In view of the significant long term effects of the 1965 Act, which have been discussed², it is doubtful whether the term "fact finding" can be accepted as entirely accurate. However, when considering the future of common land, one may anticipate that more legislation will be brought forward at an unspecified date. The Working Party Report refers to "second stage legislation" which has "always been contemplated."³ Lord Denning MR has expressed a wish that the legislation which will make provision for the registered land be enacted as soon as possible:

"In some cases the public have rights of access on those lands, as set out in section 193 of the Law of Property Act 1925. But, apart from this, there is nothing to tell us what the effect of registration is. It confers no rights in itself. All is left in the air. The explanation is that Parliament intended to pass another statute dealing with these and other questions on common land and town or village greens. This Act twice refers to matters which "Parliament may hereafter determine": see section 1(3)(b) and 15(3). I hope that another statute will not be long delayed."⁴

In this chapter it is proposed to examine the events since 1965 and to consider the discussions taking place with regard to future legislation.

II COMMON LAND SINCE 5 AUGUST 1965

A Significant Events in Parliament and the Government

Obviously, the most important events since 1965 have been the commencement and continued progress of the registration procedures including the appointment of commons commissioners.¹ It is likely to be at least five years before all the registrations are final.² However, there have been other significant developments which will be considered.

An important event regarding common land took place in 1968 with the passing of the Countryside Act 1968³. Mention has been made of the National Parks and Access to the Countryside Act 1949⁴ which established the National Parks Commission⁵ and made provision for access agreements over open country. The 1968 Act continued the process commenced by the earlier Act and, after enlarging the powers of the Commission, it also made important provisions for common land. It is proposed to give a brief account of the purpose and scope of both the 1949 and the 1968 Acts so that the sections relating to common land can be understood. They are important because they provide evidence of the confusion of thought which exists over the purposes and functions of common land.

The 1949 Act was a new development, so far as legislative action was concerned, to preserve the amenities of the countryside and to make the countryside more easily available for access purposes to the general public. It provided for the establishment of the Commission, the designation and administration of National Parks, nature conservation, public rights of way and access to the open country.⁶ It was of general application and so it affected common land as much as any other type of land in England and Wales.⁷ The Commission had the power to designate suitable areas as National

Parks and could make recommendations and give advice for the purpose of preserving and enhancing the natural beauty of those areas. The part of the Act which made specific reference to common land was Part V which made provision for access agreements.' However, it only provided the initial framework to which the more important sections of the 1968 Act have been added.

By section 9 of the 1968 Act, a local authority was given the power to do anything appearing to the local authority to be desirable for purposes connected with the enjoyment of the countryside by the public, and in the interests of persons resorting to the common land, and in particular -

- a) to provide facilities and services for the enjoyment or convenience of the public, including meals and refreshments parking places for vehicles, shelters and lavatory accommodation,
- b) to erect buildings and carry out works.²

The accommodation, meals and refreshments could only be provided where it appeared to the local authority that existing facilities in the neighbourhood of the common land were inadequate or unsatisfactory. The local authority was given the power to acquire the land and rights compulsorily to enable it to carry out the purposes contained in section 9.³

There are several points raised by section 9 which require further clarification and the first of those is the definition of "common land" used in the 1968 Act. Section 9(6) provides that "common land" has the meaning given by section 22(1) of the Commons Registration Act 1965. It should be noted that section 9(6) does ⁴not refer to land ⁵registered under the 1965 Act. The definition

in section 22(1) of the 1965 Act was not exhaustive and, therefore, it was not an entirely suitable choice. In addition, it is questionable whether land which was eligible for registration but was not in fact registered would fall within the definition of common land in the 1968 Act. In view of the provision in section 1(2)(a) of the 1965 Act which states that land which is not registered shall no longer be deemed common land then presumably the 1968 Act will only apply to land actually registered under the 1965 Act. However, the position is not certain.

The second important point relating to section 9² is that it only applies to common land "to which the public have rights of access".³ Section 9(6) provides a definition of that phrase as follows:

"a) land to which section 193 of the Law of Property Act 1925 applies, other than land to which that section applies by virtue of a revocable instrument,
or

b) common land comprised in an access agreement or access order under Part V of the 1949 Act, other than a revocable access agreement or an access agreement expressed to have effect only for a period specified in the agreement,
or

c) any other common land to which the public have rights of access permanently or for an indefinite period."

By referring to section 193 of the Law of Property Act 1925, section 9(6)⁴ imports all the doubts and uncertainties over the application of section 193 which have already been discussed.⁵ The reference to access agreements is less difficult to understand. However, the final paragraph of section 9(6) is extremely vague and provides the local authority which desires to proceed under section 9 with very little guidance.

A third point of importance in connection with section 9 is the identity of the local authorities which may exercise the powers

granted. Section 6 provides that for the purposes of, inter alia, section 9, a local authority means:

- a) the council of a county, county borough or county district,
- or b) The Greater London Council, the Common Council of the City of London or any London borough council,
- or c) a National Park joint planning board, that is to say a joint planning board constituted under section 2 of the Town and County Planning Act 1962 for an area which consists of or includes any part of a National Park.'

In addition, section 6(3) specifically provides that a local authority may exercise the powers conferred by section 9 inside or outside its area, except that only the council of a county borough may exercise those powers wholly or partly within the county borough. Certain consents from other local authorities may be required depending upon the identity of the local authority intending to use the powers.²

The effect of local government re-organisation has been to repeal the words "county borough" and the words "except that only the council of a county borough may exercise those powers wholly or partly within a county borough" in subsection (3). Subsection (4) relating to consents has also been repealed.

Although the powers in section 9 only relate to a limited amount of common land, there is a striking resemblance between those powers and the recommendations of the Royal Commission upon the role which county councils ought to be given in the future management and use of common land.³ Leaving aside the question of the value or desirability of such recommendations, one cannot fail to realise the lack of co-ordination which was displayed in the enactment of the provisions affecting common land. The result is that the legislation affecting common land has become even more piecemeal

at the very time that initial steps had been taken to correct the problem.' The Working Party Report envisages a less dynamic role than the Royal Commission for the county councils and so the provisions of section 9² appear to be a regrettable anomaly.

It should be noted that the Countryside Act 1968 and the Local Government Act 1972 also contain provisions³ which enable the Countryside Commission to give financial aid in the form of grants and by the funding of research and experimental projects. For grant purposes, common land is given a high degree of priority particularly where it is situated in:-

- a) green belt areas;
- b) buffer areas between main centres of population and national parks;
- c) "heritage coast" areas;
- and d) areas of high demand but poor provision.

The Working Party Report gives details of the types of activity which might attract a grant.⁴ They include:-

- a) acquisition of common land (to which the public have right of access), including common rights, in order to provide or improve opportunities for the enjoyment of the countryside by the public and in the interests of persons resorting to the common land, and in particular to "provide facilities and services for the enjoyment or convenience of the public, including meals and refreshments, parking places for vehicles, shelters and lavatory accommodation;
- b) acquisition of land in the neighbourhood of the common to be given in exchange for common land acquired;
- c) warden services;
- d) rehabilitation or enhancement, eg amenity tree planting.

However, the importance of the sections concerning finance depends upon the use which local authorities make of the powers given to them by the 1968 Act.

The 1968 Act contained one further section which could be of importance to common land because section 14 provided that, where it was expedient to do so, the Minister' could make an order in respect of land in a National Park which was predominantly moor or heath. The effect of such an order would be to prevent any occupier of the land from converting the land to agricultural land unless six months written notice of his intention had been given to the local authority. The section did not apply to land which had been agricultural land at any time during the preceding twenty years. Failure to give the necessary notification could result in a fine.² The section provided that agricultural land did not include land which afforded rough grazing for livestock but was not otherwise used as agricultural land. However, the Act provides no assistance upon the definition of "moor" or "heath". It would appear that the section could be applicable to common land and could assist in protecting common land from enclosure but no specific reference to common land is contained in the section. The omission is unfortunate because it can only increase uncertainty and add weight to the speculation that the legislature did not address themselves to the applicability of the section to common land.

Ten years after the Commons Registration Act 1965 was brought into force and seven years after the enactment of the Countryside Act 1968, a Working Party was set up to assist in making proposals for future legislation regarding common land.

The Working Party held nine meetings in London between 1975 and September 1977, its report being produced in September 1978.

It was an inter-departmental body with representatives of the various Government Departments whose interests encompass common land.' The Crown Estate Commissioners and H M Land Registry were each represented at one meeting. No oral or written evidence was called and no outside visits were made but it was intended that consultations would take place with various national bodies and societies after the report had been prepared. A list of the bodies consulted is given in Appendix VII. It is obvious that the terms of its recommendations are significant and they will be considered in detail.² The Working Party also produced a consultation document³ which was distributed with the Report and which asked specific questions.

It is interesting to note that despite the fact that future legislation is being actively considered, the period since 1965 has seen three attempts, all unsuccessful, to introduce new legislation relating to common land. In November 1978, Mr Arthur Blenkinsop⁴ presented a private member's bill, the Access to Commons and Open Country Bill, to Parliament. The Bill contained a provision to extend sections 193 and 194 of the Law of Property Act 1925 to all land finally registered under the 1965 Act. It also contained two paragraphs which would have had the effect of partially over-ruling the decisions in the Central Electricity Generating Board v Clwyd County Council⁵ and Box Parish Council v Lacey⁶ Paragraph 2 specified that a commons commissioner should only have regard to events which occurred before the date on which the land or rights of common were provisionally registered whilst paragraph 3 provided that land which was provisionally registered should not be regarded as falling outside the definition of common land contained in the 1965 Act solely because it had ceased to be part of a manor. Finally, the Bill provided

a right of access for open air recreation to land which was for the time being open country as defined in section 59(2) of the National Parks and Access to the Countryside Act 1949. That section relates to land in the countryside which consists predominantly of mountain, moor, heath, down, cliff or foreshore, woodlands, rivers, canals or expanses of water. Certain land is excepted from the definition of open country and two of those exceptions are common land to which section 193 of the Law of Property Act applies and farm land other than rough grazing. The Bill received a First Reading but no more.

The second Bill was ordered to be brought in by eleven Members of Parliament' including four who had supported the earlier Bill. It bore the same title, the Access to Commons and Open Country Bill and was ordered by the House of Commons to be printed on 27 February 1980. It contained almost identical provisions to those in the earlier Bill but a further clause was added relating to the removal of land from the register under the provisions of section 13 of the 1965 Act. Clause 4 of the 1980 Bill specified that where an application was made for land to be removed from the register, no account should be taken of the grounds that the land had ceased to be manorial waste or that common rights had ceased as a result of the operation of the 1965 Act. The effect of the clause would have been to reduce still further the impact of the decisions in the Central Electricity Generating Board v Clwyd County Council² case and also in the Box Parish Council v Lacey³ case.

Whilst successfully seeking leave to introduce the 1980 Bill Dr David Clark, speaking in the House of Commons, illustrated a surprising lack of knowledge about the history of common land and its original function,

"The paradox is that by their definition the commons belong to people yet the traditional rights of many people have been

limited over the past hundred years." ¹

He also stated,

"The time has come when we should give this right² back - I emphasise the word 'back' to our people to wander freely over open moorland and countryside." ³

It is small wonder that those with an interest in the furtherance and prosperity of agriculture are unwilling to actively support any campaign to provide greater access to common land. In any event, the 1980 Bill was also unsuccessful.

The third bill which bore the same title as the earlier bills had its first reading in the House of Commons on 10 February 1982 and was again introduced by Dr D Clark. The supporters were Mr Andrew Bennett, Mr Dale Campbell Savours, Mr Patrick Cormack, Mr Sydney Chapman, Mr Alfred Dubs, Mr Frank Hooley, Mr Peter Hardy, Mr Leslie Spriggs, Mr Philip Whitehead and Mr Frederick Willey. Its provisions were similar to those of the second bill and it was also unsuccessful.

The fact that further legislation will not be brought forward by the Government in the near future was clearly stated in a written reply to a question put by Mr Major.⁴ The Secretary of State for the Environment indicated that he and the Secretary of State for Wales recognised the desirability of further legislation to clarify the position in relation to the public's right of access to common land and to make it easier to secure the better management of the land. However, the Secretary of State went on to say that the subject was complex and because any preparation of legislation would make heavy demands on staff resources, a decision had been made not to propose any legislation on the subject for at least two years.

However, since the Countryside Act 1968 the Government has not been entirely inactive so far as legislation affecting the countryside is concerned because on 25 November 1980 the Wildlife and Countryside Bill received its first reading in the House of Lords

and it received the Royal Assent on 30 October 1981. Details of the content of the Act will be given briefly because it will affect common land although it does not contain any specific provisions, providing yet another statute which would have to be consulted whenever decisions are to be made about the future of an area of land.

The Act' is divided into three sections and Section One which makes provision for the protection of particular birds, animals and plants is not of direct relevance in the present context. Section Two, however, is specifically designed to preserve wildlife habitat, moorland and marine reserves and so its sections are important. There is a power for the Secretary of State for the Environment to designate certain areas of special scientific interest and there is also a section which permits the Nature Conservancy Council to declare that an area is a national nature reserve. Either of these provisions could apply to common land. However, section 42 could be of even more significance for commoners and the owners of common land. It states that an order may be made preventing any person from ploughing or otherwise converting into agricultural land any land which is moor or heath and which has not been agricultural land within the last twenty years. An order can also be made prohibiting other agricultural operations which will affect the character or appearance of the land. The section is intended to replace section 14 of the Countryside Act 1968 which has been repealed.² Agricultural land is again expressed to exclude land which affords rough grazing for livestock which is not otherwise agricultural land. Identical questions to those raised by section 14³ will arise under the Act⁴ concerning when the provision is applicable.

Since the Government accepts that common land is a complex

subject, it is unfortunate that a new Act perpetuates old problems without providing any greater assistance to those concerned to enforce the legislation. It would appear that neither the existing measures for protecting common land nor section 14 of the Countryside Act 1968 have been successful in protecting moorland whether subject to common rights or not. Research carried out at Birmingham University has revealed that one fifth of the North Yorkshire Moors has been lost to agriculture and forestry since the national park was designated in 1951.

It seems unlikely that the section in the Act concerning moorland will have any significant effect on common land but it does illustrate the confusion of thought which exists concerning future uses for common land and the preparation of legislation to protect it.

There has been further activity, albeit of a rather minor nature which has directly affected common land and details will be given.

Section 1(3) of the Local Government Planning and Land Act 1980 amended section 2 of the Commons Act 1899 by deleting the requirement for the approval of the Secretary of State for a scheme under the 1899 Act. The Commons (Schemes) Regulations 1980¹, prescribed a revised form for the making of a scheme under the 1899 Act to conform with the changes brought in by the 1980 Act. The Commons Registration (General) Regulations 1966² have been amended and further amended³ but the alterations are only of administrative significance. One significant event has been the issuing of a Department of the Environment Circular⁴ which is intended to speed up the rate at which the hearings before commons commissioners are determined.

B The Practical Consequences of the Commons Registration Act 1965

Reference has been made' to the short term and long term effects of the 1965 Act and cases decided under the procedure laid down by the Act for the resolution of objections have been discussed.

However, the major issue which was not settled by the Act was the question of whether a registration of land which became final without registered rights in support was liable to be removed from the register on application from the owner. There are three cases to consider and, in each, the question was approached in a different way.

Copthorne Common in West Sussex was once part of the manor of Ditchling but in 1930 it was sold to the local golf club by the Marquess of Abergavenny. The golf club also acquired the lordship and in 1938 they deposited a deed in accordance with the terms of section 193 of the Law of Property Act 1925 giving the public a right of access to the Common for air and exercise. Subsequently the Upper Common was sold to Copthorne School at a nominal cost because of its accepted status as common land. A fair visits the common each summer and a Common Ranger had been employed to look after the land. The common was registered by its owner as common land but subsequently Copthorne School changed hands to become Copthorne School Trust Limited and the Governors successfully applied to West Sussex County Council for the land to be removed from the register because it was no longer common land. No rights of common had been registered over the land and the school had not acquired the lordship of the manor thus preventing the land from being waste land of a manor. The Parish Council strenuously resisted the application for de-registration and the County Council were reluctant to allow it but eventually did so because they felt bound by the provisions of the 1965 Act.

The common is close to Gatwick Airport and the Parish Council are concerned that eventually the land will be developed. The present Governors of the school have stated that they have no intention of altering the status of the land but there is no guarantee that the land will remain accessible to the public. An application has been made for the compulsory purchase of the Upper Common as Open Space in an attempt to protect the land in a way which the 1965 Act has failed to do.

The case of the Upper Common at Copthorne raises several interesting points and it is useful to consider the application of the 1965 Act and the relevant case law to the facts in issue.

The first question is the effect of the deed deposited in accordance with section 193 of the Law of Property Act 1925. By section 22(1) of the 1965 Act, the non-registration of land under the 1965 Act shall not affect the application of either section 193 or section 194' to land registered under the 1965 Act. However, once the successful application for de-registration has been made section 22² will no longer provide any protection. Section 193(1) extends its protection to, inter alia, any land which on 1 January 1926 was subject to rights of common and, by section 193(2), in respect of which a deed had been deposited by the person entitled to the soil. However, section 193(1)(d)(i) provides that the right of access shall cease to apply to any land over which commonable rights are extinguished by any statutory provision and also over which the rights are otherwise extinguished where the county council passes a resolution to that effect which is subsequently approved by the Minister. The saving provision in section 22 of the 1965 Act cannot protect Upper Common at Copthorne because it is no longer registered. However, it may be possible to argue that any common

rights which had been in existence on the Upper Common on 1 January 1926 had been extinguished by abandonment prior to the 1965 Act and, because the County Council had not passed a resolution providing that the right of access cease, section 193 would still apply. The argument is hardly straightforward and contains an element of irony because it would result in land being better protected if rights had been abandoned through non-user than if they had continued until the provisions of section 1(2) of the 1965 Act took effect. So far as the Upper Common at Copthorne is concerned, the deed which was deposited in 1938 may have been revoked or it may have ceased to be effective. However, even if it did continue in force its effect is a matter of some doubt.

The next point to consider in relation to Upper Common, Copthorne is the form of the registration itself. The land was registered by the owner as common land and no rights were registered over it. The registration of the land could have led the local inhabitants to believe that the land was adequately protected. From a description of the usage made of the land it may be that a registration of the land as a town or village green would have been more appropriate and would have avoided the danger of an application being made for de-registration. It is easy to understand how the registration was made because the name of the area, Upper Common, would lend itself to a registration as common land rather than as a town or village green. In addition lack of knowledge about the meaning of the term common land and the necessity for rights over it to be separately registered would account for the lack of a registration of rights which would have ensured that the land would remain on the register.

However, the application for de-registration was successful

and there can be little doubt that the decision made by West Sussex County Council must have been based upon the judgements in the cases of Central Electricity Generating Board v Clwyd County Council' and Box Parish Council v Lacey.²

In the CEGB case it was Goff J who decided that the words "no rights of common shall be exercisable" in section 1(2)(b) of the 1965 Act meant that those rights would be extinguished.³ It was also Goff J who considered that it was the date of the hearing before the commons commissioner which was the appropriate date for considering whether land was subject to rights of common. The question of whether to choose that date or the date upon which the land was registered was of great significance. By stipulating that the later date was the correct one, Goff J was placing a heavy penalty on those who had not registered rights either by mistake or because they felt the rights were protected by the registration of the land itself. One of the reasons given for the selection of the later date was connected with the question of an application for de-registration. Goff J was of the opinion that if, when all registrations were final, an area of land was registered as common land with no rights registered over it then it could be the subject of an unanswerable application for de-registration.

"To confirm registration because at that time it might have been right, when you know at the hearing that it is wrong, leaving the objector to apply to amend the register seems to me a wrong course to pursue."⁴

The case of Box Parish Council v Lacey⁵ is relevant because it was in that case that the Court of Appeal decided that in order for waste land of a manor to fall within the definition contained in section 22(1) of the 1965 Act the land must be owned by the relevant lord of the manor at the date of the hearing before the

commons commissioner. Copthorne Common had been part of the manor of Ditchling but had been severed from the lordship when it was purchased by Copthorne School. It may be that, had the decision in the Box Parish Council case been reversed, Upper Copthorne Common could have remained on the register as waste land of a manor.

The provisions of the 1965 Act have provided no protection at all for the Upper Copthorne Common and, indeed, have provided the owners with certainty as to the strength of their position. The facts have been referred to every Member of Parliament by Worth Parish Council but the response from the Government has been a reiteration of the problems surrounding any future legislation on this complex subject. In addition, the Government has stated that their enquiries have failed to reveal evidence that there is likely to be a widespread removal of land from the registers although it is accepted that certain High Court judgements have revealed weaknesses in the 1965 Act.

The second area of land which has been the subject of an application for de-registration is situated near York and it is known as the Tillmire. It consists of one hundred and twenty-seven acres of low lying wetland near Heslington adjacent to Fulford Golf course. The land is owned by Lord Halifax and although the land had been subject to common rights which had been exercised in the past, by 1965 only two commoners remained. The rights were for pasture and turbary, one belonging to a private individual Miss Smith and the second to York City Council. The Council had acquired a right of common under the terms of the will of a commoner who had been anxious to ensure that the rights were not lost. The Council had registered their rights but had only registered

them over Heslington Common which did not include the Tillmire. Miss Smith had not applied for the registration of her rights until the final date for registration had passed.

On 24 January 1980, the trustees of the Halifax estate indicated that they were applying to the Secretary of State for the Environment for consent to erect fences on the common. It was decided to hold a public enquiry on 16 December 1980 but a month earlier the application to the Secretary of State was withdrawn and the public enquiry cancelled. In December 1980 the trustees applied to North Yorkshire County Council for the removal of the land from the register. No public enquiry could be held in connection with the application for de-registration and so the procedure had considerable advantages for the trustees. However, the application, unlike that made in respect of Upper Copthorne Common, was unsuccessful and the County Council decided that the land must remain on the register. It is puzzling that the two applications were treated in different ways by the county councils in question. The Association of County Councils has indicated that there is a difference of opinion upon the subject of de-registration among county councils and it has also indicated that the difference is the result of two interpretations placed upon the Clwyd Case by two Counsel in the same Chambers.

Having been unsuccessful in their application under section 14 of the 1965 Act the trustees applied by way of originating summons in the Chancery Division for a declaration that they were entitled to have the land removed from the register. The trustees were, once again, unsuccessful but the reason in this instance was that Dillon J considered that the correct procedure was to apply in the Queen's Bench Division for judicial review and so

the summons was struck out as an abuse of process. In giving judgement in Re Tillmire Common, Heslington,¹ Dillon J did not discuss the likelihood of the success of the trustees application for judicial review but confined himself to the question of jurisdiction. It would seem from the judgement that the reason for adopting the procedure used was to save time and money,

"I am well aware that, for a plaintiff who is eager to get his case on, the procedure by originating summons in the Chancery Division for the determination of a point of law on affidavit evidence can be extremely expeditious and, as litigation goes, cheap"²

A third attempt was made to remove land without registered rights from the register in Gloucestershire and the case has now been considered by Lord Denning MR in Corpus Christi College v Gloucestershire County Council.³ His lordship together with Oliver L J and Kerr L J dismissed an appeal by the College from a decision of Bulger J refusing an application in the county court for a declaration that land owned by the College had ceased to be common land within the meaning of section 13 of the 1965 Act. The land in question consisted of twenty-six acres and was known as Temple Ham Meadow, Little Rissington and it was accepted that the land had been demesne land. The parish council had made application for the registration of the rights of pasture in favour of the residents of the parish. The clerk to the county council registered the rights provisionally and also made an entry in the land section of the register. The College objected to the registration of the rights but not to that of the land. Lord Denning MR considered that the lack of an objection to the registration of the land was because the College was well aware that the land was common land and his view is supported by one of the grounds for objection to the registration of the rights

"Only the tenants of the manor of Little Rissington have rights over the land"⁴

Lord Denning MR gave a brief exposition of the evolution of common rights and the structure of the manor. He then turned to the events of 1976 when the hearing before Mr Settle QC Commons Commissioner took place. The commissioner refused to confirm the registration of rights because the parish council could not prove title to the rights. Lord Denning MR regretted that decision and felt that the commissioner should have taken a dynamic role. An extensive quotation from the judgement follows:

"The hearing by the commissioner should be regarded more as an administrative matter - to get the register right - rather than as a legal contest. He should inquire carefully whether any land was common land; and, if it was, register it in the lands section. If it appeared that there were commoners who had rights of common, he should take all necessary steps to register their rights in the rights section. He should make any amendments that were necessary or desirable for that purpose.

His lordship felt confident that that was the intention of the legislature."

The decision in Re Sutton Common Wimborne² was criticised because Walton J had put the burden of proof on the commoners. The correct course, according to Lord Denning MR, would have been for the commissioner to confirm the registration of rights and then the present litigation would not have arisen. Attention was drawn to the letter from the Department of the Environment which was referred to initially in the Clwyd County Council Case³ and which stated that a registration of land could subsist even without a supporting registration of rights. Lord Denning MR supported the views contained in the letter and he considered that even though Temple Ham Meadow was never waste land of a manor, the land could be deemed conclusively to be waste land of a manor as a result of its registration as common land. He then proceeded to criticise the decision in Re Box Hill Common⁴ indicating that the result would have been different if the court had been more fully informed of the history of the manor.

The feelings of Lord Denning MR upon the 1965 Act are clear

and the decision reached in the case can be said to accord with a general sense of "justice". However, to resort to the device of deemed waste land of a manor does little credit to the Master of the Rolls or those responsible for drafting the legislation. Leave to appeal to the House of Lords has been granted and it remains to be seen whether Temple Ham Meadow and others like it will remain on the register.

The case has been considered in an article entitled "Problems with the Commons Registration Act 1965" by Ruth E Annand¹ where she expresses disapproval of the device of deemed waste land of a manor adopted by Lord Denning MR.

The position regarding the future of Spaunton Moor is far from clear and represents an illustration of an additional problem created by the provisions of the 1965 Act. Reference has been made² to the effect of section 15 of the 1965 Act on Spaunton Moor but the facts will be repeated because they are a valuable illustration of the continuing arguments which have been the result of the commons commissioner's decisions. Spaunton Moor is actively grazed and a large number of rights were registered by the commoners. The commons commissioner confirmed the majority of the registrations but drastically reduced the number of animals in relation to which the rights could be exercised. As a result some of the commoners could no longer continue as farmers because they did not have the right to pasture sufficient sheep on the common. The Manor of Spaunton has an active Court Leet which regulates the grazing on the moor. In October 1980 the Lord of the manor ordered that the sheep which no longer had any right to be on the moor be removed. After a heated discussion, the jury of the Court Leet granted the commoners a year in which to continue exercising their "rights". The Steward of the

Manor has a difficult problem because, before the 1965 Act, the Lord of the Manor had accepted the decisions of the jury. It is readily apparent that the 1965 Act has caused problems on Spaunton Moor which will not be resolved easily or quickly. The compromise which has been reached is, in reality, a means of disregarding the consequences of the 1965 Act.'

The future of Upper Copthorne Common and Spaunton Moor is unlikely to be improved by any new legislation which is introduced. The former is no longer registered and, so far as the latter is concerned, future legislation is unlikely to increase the numbers of sheep which may graze on one individual common. The Working Party Report contains a careful exposition of the matters which need to be considered in any new legislation and, particularly for an area of amenity value such as the Tillmire, the Report is extremely important. Therefore it is proposed to consider the points covered by it with comment upon their possible effects. A summary of the recommendations made in the Report is set out at Appendix VII.

III THE SCOPE OF FUTURE LEGISLATION

A Public Access

The recommendation of the Working Party is that there should be a legal right of public access, subject to certain restrictions, over all common land. It was envisaged that access would be restricted:-

- a) Where the land was held for Naval, Military or Air Force purposes
- or b) Where a management scheme was in force which might involve afforestation, improvement of the land for grazing purposes, the construction of sheep dips or the setting aside of areas for organised games or nature conservation.

In addition, the Working Party felt that it would be appropriate to impose restrictions on the public right of access which would be similar to those contained in the second schedule to the National Parks and Access to the Countryside Act 1949. The restrictions are set out in Appendix VIII and the Working Party concluded that non-compliance with them should attract a criminal sanction rather than a civil remedy in trespass. There was also a recommendation to enable the owner of the soil or one or more of the commoners to apply to the Secretary of State for further limitations on the right of access. Otherwise, those with an interest in the land could only obtain specific restrictions where a full management scheme was being implemented. The Working Party accepted that there may be some commons surrounded on all sides by private land or which had been fenced for many years and, consequently had the appearance of private farm land. However, no definite recommendations were made, the implication being that the matter would be considered when

representations had been received from landowning and farming interests.'

The Working Party did consider the alternative idea of extending public access to individual commons as and when a management scheme was proposed for each one. The Forestry Commission was in support of this proposal because it considered that it would be difficult to curtail access under a management scheme once unrestricted access had been enjoyed by the public.² However, the piecemeal extension of the right of access was rejected by the Working Party because it would achieve too little, too slowly. The extent of the proposed limitations upon the right of access which have been discussed³ provides an indication of the reservations which the Working Party had about the effects of a general right for the public.

The proposal by the Working Party would accord with that of the Royal Commission upon the subject of access but the extent of the restrictions proposed by the former is greater than those proposed by the latter. In the words of the Working Party Report:-

"The Working Party recognises, however, perhaps to a greater degree than was expressed by the Royal Commission, that a variety of circumstances are likely to arise necessitating the restriction and qualification of such a general right in its application to particular commons, even perhaps involving the temporary or permanent exclusion of the public from part of the land."⁴

It was considered that the Occupiers Liability Act 1957 should not apply to those using common land as of right under any legislation creating such rights.⁵

It is clear that future legislation will contain a general right of access and pressure for action to be taken is increasing.⁶ It is sensible that there should be restrictions on the right so that the land may be used productively. However, the creation of a general right would be preferable to the piecemeal extension limited to the introduction of management schemes because the public would

be faced with difficult problems in identifying the areas to which they were entitled to have access. Therefore the Working Party recommendations appear sensible and feasible.

B Management, Regulation and Improvement

It is stated in Chapter Two of the Working Party Report that one of their most important tasks was to review and appraise the recommendations of the Royal Commission upon the question of management schemes in the light of the conditions existing in 1975/77. It was estimated that approximately 18½% or 275,000' acres of common land was managed or regulated under one of the appropriate Acts of Parliament² at that time. The Working Party felt that it was necessary for there to be more facts available about the condition of common land so that viable proposals could be made. They anticipated that movements towards better land management might have been made as a result of consultations about the manner and extent of the registrations to be made.³ The Report refers in general terms to a large common where there had been friction in the past between the commoners but in 1967 a meeting held to discuss informally the claims which would be registered encouraged the commoners to discuss agricultural improvements to be carried out jointly by the commoners. There is also reference to the actions of some local authorities who may have carried out improvements on unsightly areas in and around villages once the problems of boundaries, status and ownership have been settled.⁴

It may well be that improvements such as those referred to in the Report have been carried out throughout England. However, to advise a further fact finding exercise appears to suggest that more legislation is not regarded as a matter of urgency. The Report specifically states that

"It is not to be expected that the enquiries suggested above would of themselves result in the creation of a possible option for not providing, or for postponing, fresh enabling powers on the lines which the Royal Commission recommended." ⁵

However, two factors are then isolated which could contribute to postponement and it is difficult to avoid the conclusion that the Working Party was not anxious to recommend new legislation at the earliest opportunity. The first comment concerning possible delay states that some amenity groups might be apprehensive that any changes could lead to improvements which would reduce the remoteness and inaccessibility of the areas. The second point is that there could be pressure from agricultural and amenity groups for an injection of funds on the grounds that any work carried out on the land would be making good dilapidations which went back many years. Having indicated that future progress was likely to be slow, the Working Party considered the Royal Commission recommendations and indicated the reservations which it had about some of the proposals.

The major criticism concerned the role of the county councils which had been envisaged by the Royal Commission as being a major one. In particular, the Working Party considered that the formal screening of proposed management schemes by a county council would be inadvisable. It was acknowledged that if the schemes did have to be submitted to the county council then it was more likely the schemes would meet the formal requirements when submitted to the Secretary of State and the burden upon the Department of the Environment would be reduced. However, the introduction of a screening process would result in more delay in the implementation of a scheme, expense for the ratepayers, a possible inhibition on local initiatives and the imposition of further duties upon the county councils which might conflict with their obligations towards the maintenance of the register and their quasi-judicial functions in determining applications for de-registration.' Therefore, the

procedure for the introduction of a management scheme would commence with prior consultation with interested local bodies, regional representatives of Government Departments and agencies such as the Countryside Commission and the Nature Conservancy Council and, where appropriate, the National Park Committee.' There would be an obligation on the promoters of a scheme to publicise the proposals locally, to deposit copies of the plan and notify all those with a registered or noted interest in the relevant land. The public notices would be required to invite objections and the proposals would be notified by the Secretary of State to national bodies such as the Commons Open Spaces and Footpaths Preservation Society. The proposals of the Working Party regarding the position of the landowner differ from those of the Royal Commission; the latter did not consider it necessary for the landowner to have a power of veto where a management scheme was proposed. However, the Working Party considered that the special circumstances of the owner should be acknowledged by elevating his position. One suggestion was that the owner should be able to demand a public local inquiry even if the appropriate Secretary of State did not consider it necessary. In addition, there could be a requirement that the appropriate Department consult the owner before making a decision in those cases where the owner had not responded to a notice.

The Working Party was not required to consider the precise contents of any management schemes but did make some general comments. The Royal Commission based its recommendations on the assumption that the implementation of the registration and management scheme provisions would be contemporaneous. It will be appreciated that in 1965 only the provisions regarding registration were enacted and, therefore, members of the Working Party had had a further period

of ten years in which to consider the potential problems in establishing viable management schemes. In 1967 a book was published providing a detailed survey of five hundred commons and the practical problems to be found on each of them. The research was carried out under the auspices of the Nuffield Foundation and it revealed that the commons could be classified into twenty-one different types for which management schedules and codes for management practice were suggested.¹ The complexities revealed by the survey were such that the Working Party considered central Government should make available model forms of scheme and model rules for the committees of management constituted by the schemes to encourage potential scheme promoters to take a local initiative and put forward a draft for consideration.²

The Working Party also had to consider the problem of the quantification of grazing rights which arose as a result of the wording of section 15 of the 1965 Act,

"or such other number or numbers as Parliament may hereafter determine."

It is reassuring to note that the Working Party did acknowledge that the inclusion of that phrase in the 1965 Act enabled the Minister responsible to resist pressure from agricultural interests for claims under the 1965 Act to be made on practical farming considerations and, hence, placed the Government under an obligation to provide at a later stage for necessary adjustments to registered rights of common so that they can be geared to the carrying capacity of the common. However, despite the recognition of the obligation by the Working Party their proposal is limited to the inclusion in a management scheme of powers enabling the management body to adjust the extent of the rights to match the capacity of the land.³

The question of compensation for landowners and rightholders

where use of the land was affected by the proposed scheme is mentioned in the Report but no indication is given as to the source of such finance.

Finally, in relation to improvements on common land, the Working Party turned to the question of grant aid from the Ministry of Agriculture, the Countryside Commission and the Forestry Commission. The fact that commoners had not applied for the grants which are available was attributed to the difficulties in tracing all the remaining commoners, securing their agreement and inducing them to share their part of the cost rather than to the fact that commoners might be ineligible for the grants. However, the Working Party proposed more fact finding upon the reason why grants were not more widely used in connection with improvements to commons.' Finally, the Working Party indicated that it might be necessary to amend the Forestry Commission's Dedication Scheme so that the afforestation of common land could be assisted.

In conclusion, the proposals of the Working Party upon the management, regulation and improvement of common land add little to the extensive proposals put forward by the Royal Commission. A reduced role is envisaged for the county councils and a larger measure of protection is considered desirable for the landowner. However, it is clear from the content of the proposals that no far-reaching changes are regarded as likely or desirable.

The third chapter of the Working Party Report considers the methods for ensuring that common land is preserved in its existing state without being inclosed. Reference has been made to the unsatisfactory nature of the existing legislation by providing an account of the events which resulted in the creation of Cow Green reservoir in Teesdale.¹ However, the members of the Working Party were of the opinion that

"the procedures for validating inclosures through the appropriate Secretary of State seem to work reasonably well."²

The proposals contain minor suggestions for the amendment of the existing procedures but do not recommend a major overhaul of the system.

Section 194 of the Law of Property Act 1925³ is regarded as a useful provision which should be extended so that extra land may be added to the common to compensate for any ill effects resulting from the proposed works. The criteria to which the Secretary of State should have regard in deciding whether to permit work to be carried out are found in the Commons Act 1876 and the Working Party considered that these criteria could be updated whilst still enabling the Secretary of State to reject any works which were purely for private gain. The Royal Commission had not recommended a new provision to replace section 194⁴ and this is indicative of the less dynamic changes which are envisaged for common land in the Working Party Report that existing legislation is to be preserved and, where appropriate, improved rather than being completely revised.

The Working Party then considered the provisions which enable Government departments, local authorities and public utility undertakings to inclose and, where appropriate, purchase compulsorily common land. The promoting authority proceeds either in accordance

with the Acquisition of Land Act 1981' or, more rarely, by agreement with the landowner and commoners and subject, in certain circumstances, to the consent of the appropriate Secretary of State under section 22 of the Commons Act 1899². Where the 1981 Act is used, there is provision for land to be given in exchange for the land inclosed and where the land given in exchange is adequate, special parliamentary procedure is avoided. The Working Party proposed that the 1899 Act should also contain a provision whereby land could be given in exchange for the land inclosed. A second cause for concern with regard to the 1899 Act is that where the acquiring authority is a Government department there is no necessity for the consent of the appropriate Secretary of State to be obtained. The Working Party could see no justification for such a distinction.

Where the inclosure of common land is to be carried out, the Working Party considered that there should be powers enabling the procedure to be either compulsory or voluntary and it considered that the power to inclose should be limited to public authorities.

The question of the suspension of common rights was also considered³. The Royal Commission had referred to the fact that even where common land is required for only a short period of time, there is no procedure which authorises a public authority to suspend the rights temporarily and then return the land to its original status when it is no longer required by the public authority. The Working Party endorsed the view of the Royal Commission that there should be provision for a temporary suspension to take place.

Although members of the Working Party did not consider that any major changes were necessary in the law relating to the inclosure of common land, they did appreciate that it would be advantageous

to amend the law where it had ceased to serve any useful purpose. The repeal of the general inclosure provisions of the nineteenth century and in particular those contained in the Commons Act 1876 is recommended together with the formal abolition of the power of the soil owner to inclose manorial waste which was superfluous to the needs of the commoners.' The provisions contained in the 1876 Act have not been used since 1914 and it is stated in the Working Party Report that no soil owners had inclosed land in accordance with the facility for inclosure known as approvement for many years.² Although approvement was an ancient right developed under the common law it has since 1925 required the consent of the responsible Minister under the Law of Commons Amendment Act 1893 and under the Law of Property Act 1925.

The members of the Working Party did consider that one nineteenth century provision regarding inclosure was of value and should be retained, namely section 147 of the Inclosure Act 1845. That section enables exchanges of land to take place by means of an order of the Secretary of State for the Environment provided that the following three conditions are satisfied:-

- a) The proposed exchange must be beneficial to the owners of the respective areas of land
- b) The terms of the exchange must be just and reasonable
- and c) The value of the land to be received by each party must be no less than the value of the land he or she is giving up.

The provisions of the section are of practical significance because about five orders³ are made each year and the purpose of those orders is to carry out minor adjustments to the boundaries between common

land and adjoining private land or to provide an access over common land where the owner of adjoining land is able to give part of his land in exchange.

Having considered the benefits of and necessity for the nineteenth and early twentieth century legislation, the members of the Working Party proceeded to consider the weaknesses of the 1965 Act and suggested ways in which the defects could be remedied. The Working Party Report does not refer to all the problems which have been identified' but it does refer to some of the more serious ones.

A preliminary point which emerges from the Working Party Report is that the removal of uncertainties regarding common land by the introduction of the system of registration has assisted those who wish to either enclose or inclose the land as much as it has helped those who wish to manage and improve the land as common land.²

"It would seem that the registration process, by identifying all the commoners for the first time, will facilitate the efforts of an owner of a common who is minded to extinguish all rights of common affecting his land, either by purchase from the right holders or by the acquisition of all the properties (identified in the registers) to which the rights are attached."³

With reference to manorial waste to which there is no public right of access it is stated,

"Prior to registration, the uncertainties may have helped to protect the land, but now the registers demonstrate that no common rights exist and that legally the land is unprotected."⁴

The Working Party Report refers to five separate criticisms of the 1965 Act and cases relating to its provisions.

The first point relates to the wording of section 10 of the 1965 Act where it is stated that the registration of land or rights shall be conclusive evidence of the matter registered as at the date of registration.⁵ It is recommended that, in order to remedy the defect, amending legislation should be introduced which would make the final registration of the land or rights evidence of the matters

registered at any current date. The Report in its main body⁴ does not use the words "conclusive evidence" but merely states that the registration would be "evidence". However in the summary of recommendations set out at Annex A of the Report the words "conclusive evidence" do appear and it is reasonable to suppose that the summary of recommendations represents the true opinion of the Working Party members because the omission of the word "conclusive" would make any new provision of little value.

The next criticism concerned the effect of the decision in Central Electricity Generating Board v Clwyd County Council² so far as it related to the question of applications for de-registration. In the CEGB case, Goff J, as he then was, expressed the opinion that a registration of land as common land could not stand where it was unsupported by a registration of common rights unless the land was waste land of a manor. The Working Party Report³ confirms the view of the Department of the Environment expressed in the CEGB case⁴ and referred to previously⁵ that a registration of land is a separate entity which can stand alone even when unsupported by a registration of common rights. Amending legislation was regarded as desirable and it would have to be retrospective in its effect if it was to protect all common land which does not have a registration of common rights to support it.

The next criticism concerned the definition of "common land" contained in section 22 of the 1965 Act. The members of the Working Party are of the opinion that waste land which was formerly of a manor should have been included in the definition of common land. There is no criticism of the judgement given by the Court of Appeal in the case of Box Parish Council v Lacey⁶ where it was held that in order for land to fall within the definition it had to be of a

manor at the date of registration and not solely at some date in the past. Indeed, there is reference in the Working Party Report' to "a High Court judgement in 1858" where the same conclusion was reached and the reference is presumably to Attorney General v Hammer⁴ which has been discussed.³ However, no specific recommendation is made about the extension of the definition of common land so far as it relates to waste land of a manor. The members of the Working Party are more specifically concerned about the possibility of land being sold away from the manor after its registration has become final and then being removed from the register by a successful application for de-registration. Therefore, the recommendation made is that land should be removable from the register only after the completion of statutory processes involving either the approval of Parliament or the appropriate Secretary of State.⁴ However no details are given of the criteria which would be applied before a decision was reached.

The fifth criticism relates once more to the decision of Goff J (as he then was) in the CEGB case⁵ and, in particular, the question of the date at which the commons commissioner must look in order to decide whether the land is subject to rights of common. Prior to the decision, commons commissioners had looked at the date of the registration of the land and, if they were satisfied that the rights existed at that date, the commissioners were prepared to confirm the registration of the land as common land. The fact that the rights might not, for whatever reason, have been registered by the date of the hearing did not affect the decisions of the commissioners. However, in the CEGB case, Goff J stated that the commissioners must consider the existence of the rights as at the date of the hearing and

if no rights had been registered by that date, Goff J considered that the registration of the land must not be confirmed unless it could be regarded as waste land of a manor. The Working Party members consider that the appropriate date should be the date on which the land was registered and recommends that the effects of the decision should be amended by appropriate legislation.' It is interesting to note that the members of the Working Party had been informed that as a result of the decision in the CEGB case one registration of 177 acres at Ibberton Long Down in Dorset had been struck off the register.⁴ The facts were that the common was registered in March 1968 when it was subject to a right to graze sixty sheep. The right-holder released the right to the owner in April 1968 and failed to register it. When the hearing took place in January 1976 the Commons Commissioner refused to confirm the registration because by that time the right had been released. Therefore, it is clear that the question of the appropriate date for the commons commissioner to consider is a practical one and not simply an academic exercise.

The final criticism of the 1965 Act which is referred to in the Working Party Report concerns the effect of that Act on sections 193 and 194 of the Law of Property Act 1925. Reference has been made to the unfortunate consequences which flow from the effects of section 21(1) of the 1965 Act⁴ which provides

"Section 1(2) of this Act shall not affect the application to any land registered under this Act of section 193 or section 194 of the Law of Property Act 1925 (rights of access to, and restriction on inclosure of, land over which rights of common are exercisable)"

The protection of both sections 193 and 194 of the 1925 Act was thus removed from any land which was not registered under the 1965 Act whether it was subject to rights of common on 1 January 1926 or not. In addition, although sections 193 and 194 would continue to apply to land which was registered under the 1965 Act

it might be difficult to convince a court that rights existed over the land in 1926 if no rights were registered under the 1965 Act. An additional problem would arise where the rights were registered under the 1965 Act but were extinguished subsequently. The provisions contained in sections 193 and 194 would continue to protect the land but the landowner might well consider that once the de-registration had taken place, the risks involved in ignoring the effects of sections 193 and 194' would not be very great. Therefore, the 1965 Act has reduced the importance of the provisions in the Law of Property Act without providing any adequate alternative protection.

Whilst section 21(1) of the 1965 Act presents problems in its interpretation and effect, it does, at least, preserve protection to certain areas of land. It does not, however, extend protection to all land registered under the 1965 Act. Therefore, there are areas of registered land which are entirely at risk of physical enclosure by the soil owner.

The Remedies

In order to ensure that common land is adequately protected, the Working Party made four recommendations² which it felt should be contained in amending legislation.

- a) The final registration of land or rights of common should be evidence³ of the matters registered at any current date and not merely at the date of registration
- b) Land should not be removed from the register unless a statutory process for changing its status had been followed and that process would involve the approval of either Parliament or the appropriate Secretary of State.

- c) All registered land should be protected from the construction of works or fences without the consent of either Parliament or the appropriate Secretary of State. Remedial powers could be given to those with a legal interest in the land and to local authorities, possibly including parish councils
- d) The decision in Central Electricity Generating Board v Clwyd County Council should be reversed to the extent that it requires the Commissioner to consider the existence of rights as at the date of the hearing rather than at the date of registration.

The recommendations cannot be regarded as extensive and, more significantly, the Working Party made no suggestion that there was any urgency about the need for amending legislation.

D Mistaken Registrations of Land

The fourth chapter of the Working Party Report considers the problems caused by registrations of common land or town or village greens which were mistaken or were the result of errors. The 1965 Act provided a method for the creation of common land or town or village greens where a registration was made and subsequently became final without objection.¹ The Department of the Environment and the Welsh Office have received representations relating to forty-two separate areas of such land where the owner has only become aware of the registration after the prescribed period for objections has expired.² The majority relate to small areas of relatively minor importance. However, it is conceivable that mistaken registrations may have been made and the owner may still not be aware of the existence of the registration.

The Working Party was of the opinion that there ought to be a procedure available for making alterations to the register where the registration had been made mistakenly or in error but it was not felt that the need for such a procedure was a pressing one. Obviously, to give a second chance to landowners to object to the initial registrations would create unwelcome uncertainty. The solution suggested by the Working Party was the extension of the jurisdiction of the High Court to cover an order for the rectification of the register in certain specified circumstances or when it was just to do so.

One alternative procedure was considered³ and rejected by the Working Party. It involved the giving of a power to the appropriate Secretary of State to direct the registration authority to refer to a commons commissioner any registration of land either which would not have been confirmed or which would have been confirmed subject to modifications if it had been objected to during the

relevant objection period. The Secretary of State would make the direction either on his own initiative or as a result of an application made by a third party.

The procedure is not attractive because the Secretary of State would find difficulty in making a decision in the absence of a full hearing and so it is likely that a large percentage of the applications would result in directions being made. The cost for the applicant would be lower than if the High Court jurisdiction were extended but if the procedure involving the Secretary of State were to be adopted it is likely that more applications would be made thus introducing a substantial element of uncertainty into the law. The recommendation of the Working Party is tentative,

"... The Working Party recommends that when the time comes to legislate further, the possibility of extending the jurisdiction of the High Court in the circumstances then prevailing, might be explored¹"²

but it is to be preferred to the proposals in which the Secretary of State would be involved.

E The Vesting of Unclaimed Land

The problem of land which did not appear to have an owner was one which greatly concerned the members of the Royal Commission on Common Land' because it was felt that any uncertainty contributed to the neglected state of the land. It was envisaged that once all the registrations under the 1965 Act were final, there would be areas of land without a registered owner and so provision was made for the question of ownership to be referred to a commons commissioner. If, after a local hearing, the commons commissioner was not satisfied as to the identity of the owner then the vesting of the land depended upon whether it was common land or a town or village green. The latter were automatically vested in the Parish Council, District or the Council of the appropriate London borough in accordance with the provisions of the 1965 Act (as amended)². The former were to be vested,

"as Parliament may hereafter determine"³

The Working Party was concerned with these areas of common land about which the commons commissioner had doubts as to their ownership. It was estimated that out of 16,250 registrations of land only about 6,000 were matched by initial claims to ownership.⁴ However, the hearings before the commons commissioners would operate to reduce that number substantially and the acreage of common land falling to be vested is likely to be about 10,000 acres made up of 2,000 separate areas.⁵ There is one substantial upland common of 500 acres in North Yorkshire which will fall to be vested.⁶

However, it is apparent that the unclaimed land will vary considerably in its nature and its geographical location giving the Working Party a difficult problem when deciding upon the most appropriate body for ownership.

The Royal Commission concluded that the Public Trustee would be

the most suitable recipient for the land' but it is clear from the Working Party Report that such a solution would not be satisfactory.⁴ The Public Trustee does not have the resources to look after the land. The final recommendation was that a similar policy should be adopted for common land to that used for the vesting of unclaimed tow or village greens.⁵ One exception would occur where the land was situated within a national park because, in that case, the Working Party recommended that the land should be vested in the National Park Authority.⁴

Two alternative methods of actually vesting the unclaimed land were also considered.

Method One

Under this method, the registration authority would advertise the areas of land which did not have an owner by inserting notices in the local paper and by posting notices. If a claimant came forward then a hearing before a commons commissioner would take place and should the claimant fail to establish his case at the hearing then the land would vest in the local authority. Obviously, if the claimant succeeded at the hearing then his name would be inserted in the ownership register. If no person came forward within the prescribed period, the land would vest automatically in the local authority.

Method Two

A cheaper method of vesting the land could be utilised if the local authorities, who already have certain duties in relation to unclaimed land⁶, continued to look after the land with a provision that from a chosen date, the appropriate authority was deemed to be in possession adverse to the owner and so if, within the following twelve years, the owner did not come forward, he could not do so in the future.

The Working Party Report gives the advantages and disadvantages of each method but fails to make a choice between them. The first method would be quicker and could not be criticised on the grounds that the land was being taken in a secretive manner. However, it would necessitate administrative and advertising expenditure and the Working Party felt that the question of compensation might arise. From a practical point of view, it is difficult to see who could require payment of compensation because anyone who could establish a claim to ownership would be regarded as the owner. Presumably, then, the Working Party must be referring to a payment into court for a presumed owner and not for a specified claimant. In view of the fact that there have been no compensation payments where town or village greens have been vested, it seems inappropriate that such payments should be required in the case of common land. Method one is however, open to the obvious criticism that it is a repetition of the earlier procedures giving owners another opportunity to create uncertainty and involve local inhabitants in further expense.

The second method would take longer to achieve the desired result although at less expense and with less publicity. However, the Working Party felt that the twelve year period during which claims could be made would have the effect of discouraging local authorities from spending money in improving land during that period in case the missing owner appeared and gained the benefits of the improvements.

F Town or Village Greens

The final chapter of the Working Party Report concerned town or village greens and recommended that there should be one legal code which would contain provisions for both common land and town or village greens. As a result, there would be a general right of access for the public to the greens, effective management schemes could be proposed and works on the green could be authorised by the appropriate Secretary of State if the requirements of section 194¹ were satisfied.

If the recommendation were adopted, the registers of common land and town or village greens could be amalgated thus reducing the administrative costs of the registration authorities and simplifying the search procedures.

The Working Party Report is a useful element because it indicates the extent to which the Government is aware of the problems surrounding common land and the 1965 Act as well as giving suggestions for the content of future legislation. However, it is also clear that the question of amending legislation is not regarded as urgent and, therefore it is likely to be a considerable time before any draft legislation is seen. In addition to the Working Party Report, the Department of the Environment has published a consultation document² on which it has invited comments from interested organisations such as the Commons, Open Spaces and Footpaths Preservation Society, the final section of this chapter will bring together the differing opinions to be found in the replies sent. The documents were received as a result of an inquiry made by the writer. The comments are not intended to provide a comprehensive survey of the opinions of all the official bodies who have been affected by the 1965 Act but they do give an interesting cross section of differing views.

IV INFORMED COMMENT

The documents set out at Appendix VII consist of comments from the following bodies:-

Association of County Councils (ACC)

The Commons Open Spaces and Footpaths Preservation Society (COSFPS)

The Ramblers Association (RA)

The Council for the Preservation of Rural England (CPRE)

The National Farmers Union (NFU)

The majority of the replies are reasonably predictable and so it is proposed to simply refer to the most significant or interesting replies contained in each section. The questions contained in the Consultation Document will be divided into the following groups:-

- A Questions I to V
- B Questions VI to XVI
- C Questions XVII to XXV
- D Question XXVI
- E Questions XXVII to XXVIII
- F Questions XXIX to XXX

A Public Access

The first group of questions reveal the fundamental difference in approach between those wishing to restrict and those wishing to extend public access. The ACC makes the following statement:-

"But the fact that the growth of urban development in the Victorian era led to many commons in urban areas being by the early part of this century, no longer used for the exercise of common rights while still representing open space in areas where open space was at a premium, which made it very desirable that they should be open to the public, is no reason for saying that all common land in rural areas should be made open to the public."¹

It is interesting to compare this comment with an extract from the COSFPS's report²

"It should not be possible under a scheme to restrict public access permanently. If this was done, the land would cease to have one of the essential characteristics³ of common land (ie public access)."

It is immediately apparent that where such different conceptions of common land exist, there is likely to be a wide variation in the response to the questions raised by the Working Party. The ACC considers that compensation should be payable if public access is granted contrary to the will of the landowner.⁴

B Management, Regulation and Improvement

Perhaps the most significant comment to emerge from the second group of questions is the following remark made by the ACC

"Whilst it is impossible to say whether more schemes would be made if the statutory provisions were simpler, it is certainly likely that no fewer schemes would be made." '

However, none of the groups have any innovative suggestions to make so far as new procedures are concerned. The ACC would wish to see a larger role for the county councils than that put forward by the Working Party. However, the ACC is in the minority with the remaining groups favouring the involvement of the appropriate Secretary of State.

The next point of significance concerns the comments made by the COSFPS in their reply to Question XIII which asks for details of the matters to be covered by model forms of management schemes and model rules governing the powers and conduct of committees of management. The COSFPS² begins by referring to numerous matters such as the grazing of stock and the regulation of public access. However, it then proceeds to make far reaching suggestions relating to afforestation, ploughing and the extraction of minerals. The proposal is that these matters be regulated by the necessity for obtaining the Secretary of State's consent, whether or not there is a management scheme in operation on a particular common. It will be recalled that section 194 of the Law of Property Act 1925³ does not apply to any buildings or fence erected or work constructed in connection with the taking or working of minerals and section 193(5) provides that the right of access granted by section 193(1) and (2) shall not prejudice the right of any person to get and remove minerals from the land. Therefore any legislation which included the COSFPS's suggestions would need to make amendments to the Law of Property Act 1925.

The ACC draws attention to the existence of the provisions in the Countryside Act 1968 which have been discussed' and makes the important point that existing powers must be taken into account so that there are no overlapping or alternative provisions. This is a valuable comment because it draws attention to the problem which has existed for many years regarding common land, that is, the lack of a comprehensive code of legislation.

Reference has been made² to the problems which have been caused by section 15 of the 1965 Act requiring the quantification of rights. Therefore, the reply to question XIV is particularly interesting. No significant comment is made by any of the groups except the NFU which refers to the problem of under-grazing,

"Commons suffer from problems of under grazing as well as over grazing and where the total of the stints is less than the carrying capacity of the common it should be possible to add to the stints."

The next nine questions are related to Chapter 3 of the Working Party Report.

C The Safeguarding of Common Land

In discussing the retention of section 194 of the Law of Property Act 1925, the ACC shows its desire to see a simplification and rationalisation of the existing law. In particular, it suggests that a new criterion should be adopted in deciding whether section 194 applied to a piece of land, the proposal is that the section would apply only to land which was registered under the 1965 Act. The attractions of such an amendment are obvious, it would bring far more clarity into the application of the section. However, it is probable that it would remove protection from areas of land which had been provided for by section 21(1) of the 1965 Act.

The COSFPS has interesting proposals to make regarding the amendment of section 194, it considers that in deciding upon any consents to applications under the section, the Secretary of State should have regard to:-

- "i) the interests of persons with legal interests in the land (as at present);
- ii) the benefit of the general public;
- iii) the general desirability of conserving natural beauty and amenity ..."

Such an amendment would represent a substantial change and, in view of the general comments of the Working Party, would be unlikely to receive governmental support.

Question XXII is the next question which evokes interesting responses from the five bodies. It asks whether the registration of land or rights should be evidence of the matters registered at any current date and not merely at the date of registration. It is unfortunate that the questions is not worded more precisely because, from a practical point of view, it is obvious that the registers of land and rights would be of some evidential value at any current date.

It would seem that the intention of the Working Party was to ascertain whether the interested bodies wishes the two registers to be conclusive¹ evidence of the matters registered at any current date. However, the criticism of the words used in question XXII is somewhat academic because the replies from the interested bodies suggest that they have understood the true intentions of the Working Party. The answers reveal a sharp division between the NFU and ACC who broadly support the present system and the RA, CPRE and COSFPS who wish to see the implementation of the Working Party's proposals.

The ACC regards the recommended change as a "radical" one which would be undesirable in its opinion.² No specific reason is given for the disapproval expressed by the ACC although it is interesting to note that an analogy is drawn with the provisions relating to the definitive map. The NFU explains its objection rather more fully and considers that it would be illogical to have a registration of grazing rights where those rights did not exist any longer. However, the NFU is prepared to accept that it might be feasible to have a register of common land which was conclusive evidence at any current date of the matters registered but that this provision should not be extended to the register of common rights.³ Given that the distinction between the register of land and the register of rights has already created so many problems during the registration process, it is highly unlikely that the NFU's proposal would be regarded as an attractive proposition.

The COSFPS gives a comprehensive list of proposals which would make major changes to the nature and content of the registers.⁴ It wishes to see all parts of the registers as conclusive, including the ownership register and, therefore, it wishes those purchasing common land to be under a duty to register their ownership. It will be recalled that the effect of section 12 of the 1965 Act is to make all land whose

ownership is registered under the 1965 Act subject to the compulsory registration provisions of the Land Registration Act 1925.' However, the COSFPS would not regard this provision as sufficient in itself because the registers maintained at H M Land Registry are private whereas those maintained under the 1965 Act are available for public inspection. In order to solve the problem of secrecy, the COSFPS wishes the registers under the 1965 Act to contain all common land and rights whether they are registered at H M Land Registry or not so that the public do not suffer from any lack of information. The RA lends its support to the Working Party's recommendation and, in doing so, makes reference to the definitive maps regarding public rights of way.² By section 32 of the National Parks and Access to the Countryside Act 1949 a definitive map and statement are conclusive evidence of the existence, position and width of all public paths shown at the date of the survey.³ However, it is clear from the cases of Walwin v West Sussex County Council⁴ and Morgan v Hertfordshire County Council⁵ that any attempt by the owners of the land to challenge the use of a path by the public once it appears on the definitive map will be unsuccessful. It is indicative of the confusions which surround the question of common land and its legal status that both the RA and the ACC relied upon the same section⁶ in support of their opposing recommendations. The CPRE is content to agree with the Working Party's proposal simpliciter and urges its prompt implementation.⁷

Question XXIII relates to the removal of common land from the registers and the question is of particular importance because the effect of the Clwyd County Council Case⁸ has been to imply that land may be removed where rights are not registered or are acquired by the owner of the land or where the land is sold away from the manor. The present position is governed by the case of Corpus Christi College v Gloucestershire County Council⁹ which has been discussed.¹⁰ The Working Party

recommended that land should be capable of removal from the register only with the approval of Parliament or the Secretary of State.' The CPRE, COSFPS, NFU and RA accept the recommendation whereas the ACC considers there are provisions in the 1965 Act and subordinate legislation which govern the situation. The ACC's comments were made before the Corpus Christi Case^c and they are surprising because it was apparent from 1976 that there was doubt and uncertainty concerning the removal of land without registered rights from the register.³

The extension of the protection contained in section 194 of the Law of Property Act 1925 to all land on the register is accepted by all interested bodies although the ACC suggests that a constraint of this type could inhibit the use of the land by the commoners. In view of the fact that the NFU is prepared to accept the extension of section 194 to all registered common land it seems unlikely that the ACC's reservation would carry a great deal of weight.⁴ The COSFPS wishes to see section 194 applying to all registered land whether the registration is provisional or final and it would also like to see amendments to the section so that the remedial powers would be given to a wider group of people, the powers of a county court judge would be strengthened and the local authority would have powers to remove the offending works.

The decision in the Clwyd County Council Case⁵ has been the subject of scrutiny already⁶ and the question from the Working Party⁷ about whether the decision should be overturned receives emphatic answers. The ACC considers that the effect of the case should not be removed,

"A closing date for registration must mean something and the issue should not be re-opened by the Commons Commissioners or anybody else."⁸

All the remaining interested bodies want the decision overturned and, in addition, the COSFPS also wants the decision in Box Parish Council v Lacey⁹ over-ruled. In support of its recommendation, the COSFPS

referred to in the case of In the Matter of Kingsley Moss, Morley, Cheshire'. In that case the Chief Commons Commissioner had to adjudicate upon a dispute affecting an area of land in Cheshire which had been registered as common land but in respect of which there was no entry in the Rights Section of the Register Unit. Counsel for the objectors took the point that the land could not fall within the definition of "common land" in section 22(1) of the 1965 Act in view of the lack of any registration of rights. Having considered the point, the Chief Commons Commissioner decided that he must look at the existence of rights as at the date of the original registration and not that of the hearing. In fact, in the Kingsley Moss case, it was decided that no rights were in existence when the land was provisionally registered.

D Mistaken Registrations of Land

Question XXVI raises difficult questions concerning land which appears on the registers where the registration has become final as a result of the lack of any objection being made but which was never common land. It has been explained that this land probably cannot be removed from the registers by the provisions made for the removal of registrations because land which has never been common land cannot be said to have ceased to be common land. The COSFPS, DPRE and RA have such strong reservations that they do not accept that mistaken registrations should be capable of being removed. One reason for their disinclination to accept the proposal is given by the CPRE,

"We would add that the Working Party has not proposed that registrations 'mistakenly' not made during the relevant period should now be permitted."

The COSFPS supports the CPRE in this comment and also makes the important point that the 1965 Act does not provide for the transfer of land from the common land section to the town or village green section or vice-versa. It considers that a provision enabling such transfers to take place would be useful.²

The NFU accepts, in principle, the recommendation that mistaken registrations should be capable of being removed but it accepts that the problem is a difficult one and considers that the provisions brought in to carry out the alteration should be "very carefully drafted."³ The High Court is considered by the NFU to be the appropriate forum to deal with the question of rectification. The ACC has a still more enthusiastic approach to this problem and welcomes the proposal that there should be provision for the removal from the register of erroneously registered land. Indeed, it considers that the registration authority could refer the matter to a commons commissioner for a decision to be made. The Association does stress, however, that any new

provisions should not enable wider claims to be made because the Association considers this would undermine the stability of the registers.

F Town or Village Greens

The final two questions relate to the status of town or village greens and it is clear from the answers by the interested bodies that these questions raise important issues which are central to the debate about the future uses for land which is unenclosed.

The COSFPS and the CPRE favour the merging of the registers for common land and town or village greens and the adoption of a common legal code for both of them. The NFU and ACC are adamant that the two types of land are quite different and cannot be treated in exactly the same way, although they are prepared to accept the extension of a right of public access, subject to the control of any management scheme, to town or village greens. The ACC explains at some length its reasons for regarding the two registers as separate entities which should not be merged and points out that problems have arisen where highway verge has been registered as a village green.

The final question which concerns the differences between common land and town or village green gives a clear indication of the different views which prevail about the nature of common land and the uses to which it could be put in the future.

V CONCLUSION

The period since the 1965 Act has been a difficult one for commoners, common land owners and for those who have been advising upon the provisions of the Act and the ensuing case law. Pressure from interested groups for the introduction of second stage legislation has been mounting with the attempted introduction of three private members bills into Parliament. At the same time, evidence has emerged of the profound changes which have been brought about by the 1965 Act despite the intentions behind the legislation to provide a fact finding registration exercise. It is clear from the comments on the Working Party Report that wide divergences of opinion exist and second stage legislation will only serve to alienate still further the amenity groups, the landowners, the commoners or those concerned with the administration of the Act and its subordinate legislation.

NOTES AND REFERENCES IN THE TEXT

PART FIVE

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
193	1	Working Party Report para I
	2	Ante pages 148 to 191
	3	Working Party Report para I
	4	<u>New Windsor Corporation v Mellor and Others</u> <u>[1975] 3 AER 44</u> at page 51g
194	1	Details of the commissioners and the dates of their appointments are given in Appendix VI
	2	Ante pages 137 to 144 The Department of the Environment has issued a circular dated 4 March 1982 in which the Secretary of State expresses anxiety that the work of the Commons Commissioners be completed as soon as possible and to this end, registration authorities with disputes still outstanding are requested to let the Commissioners know immediately
	3	Referred to as the 1968 Act
	4	Referred to as the 1949 Act
	5	Now the Countryside Commission, the title the Commission will be used throughout this work
	6	Halsbury's Statutes Vol 24 p10 to 11
	7	The part of the 1949 Act relation to Nature Conservation extended to Scotland section 115(2)
195	1	Ante page 53
	2	Section 9(3)
	3	Schedule 2
	4	Writer's emphasis
	5	Ibid
196	1	Ante page 129
	2	1968 Act
	3	Section 9(1)

Notes and References in the Text (Part Five continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
196	4	1968 Act
	5	Ante pages 52 to 53
197	1	Section 6(2)
	2	Section 6(4)
	3	Ante page 80
198	1	ie by the implementation of the Commons Registration Act
	2	Countryside Act 1968
	3	Countryside Act 1968 section 2 and section 4 Local Government Act 1972 section 9
	4	Working Party Report Appendix F1
199	1	Then the Minister of Housing and Local Government
	2	Section 14(4)
200	1	The representatives were from the Department of the environment; Ministry of Agriculture, Fisheries and Food; Countryside Commission; Ministry of Defence, Property Services Agency; Forestry Commission; Nature Conservancy Council and the Welsh Office
	2	Post pages 215 to 237
	3	The consultation document is reproduced at Appendix VII
	4	He was supported by Mr G R Strauss, Mr Geoffrey Rippon, Mr Frederick Willey, Mr Arthur Jones, Mr John Parker and Mr Frank Hooley
	5	[1976] 1AER 251
	6	[1979] 1AER 113
201	1	The supporters were Dr David Clark, Mr Andrew Bennett, Mr Dale Campbell-Savours, Mr Patrick Cormack, Mr Sydney Chapman, Mr Alfred Dubs, Mr Frank Hooley, Mr John Parker, Mr Geoffrey Rippon, Mr Leslie Spriggs and Mr Frederick Willey
	2	[1976] 1AER 251
	3	[1979] 1AER 113

Notes and References in the Text (Part Five continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
202	1	Hansard House of Commons Official Report Parliamentary Debates vol 979 No 126 Wednesday 27 February 1980, 1375
	2	Writer's emphasis
	3	Hansard House of Commons Official Report Parliamentary Debates vol 979 No 126 Wednesday 27 February 1980, 1376
	4	Written answers 15 July 1980
203	1	The Ramblers' Association attempted, unsuccessfully, to propose amendments to the Act which would have incorporated the Private Member's Bills referred to pages 200 to 202
	2	Ante page 199
	3	Section 42(9)
	4	Countryside Act 1968
204	1	SI 1980 No 209
	2	SI 1966 No 1471
	3	SI 1970 No 1996 and SI 1980 No 1195
	4	3/82 4 March 1982
205	1	Ante pages 136 to 192
206	1	Law of Property Act 1925
	2	The 1965 Act
208	1	[1976] 1AER 251
	2	[1979] 1AER 113
	3	Ante pages 157 to 158
	4	[1976] 1AER at page 256c and ante page 158
	5	[1979] 1AER 113
210	1	[1976] 1AER 251
211	1	[1982] 2AER 615
	2	Ibid at page 622c

Notes and References in the Text (Part Five continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
211	3	[1982] 3AER 995
	4	Ibid
212	1	Ibid cf Walton J in <u>Re Sutton Common Wimborne</u> [1982] 2AER 376
	2	[1982] 2AER 376
	3	Ante page 159
	4	[1979] 1AER 113
213	1	New Law Journal 1982 pages 956 to 958
	2	Ante pages 179 to 182
214	1	Appendix II
216	1	Working Party Report 1.15
	2	Ibid 1.9
	3	Ante pages 215 to 216
	4	Working Party Report 1.10
	5	Ibid 1.19
	6	Ante pages 200 to 202
218	1	Working Party Report 2.4
	2	Commons Act 1876; Commons Act 1899; Metropolitan Commons Act 1866; Inclosure Acts 1845 to 1878; Commons Act 1908; Law of Property Act 1925 section 193. A useful resume of the provisions regarding management schemes is given in Annex D of the Working Party Report
	3	Working Party Report 2.5
	4	Ibid
	5	Ibid 2.7
219	1	Ibid 2.12 to 2.15
220	1	Ibid 2.19
221	1	Written by Dr D R Denman, the late Professor R A Roberts and Mr Hubert Smith, published by Leonard Hill

Notes and References in the Text (Part Five continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
221	2	Working Party Report 2.22 An excellent example of a potential management scheme is that put forward by the North Yorkshire National Park Committee for Levisham Moor
	3	Appendix A, chapter 2, Proposal 5
222	1	The Royal Commission members were of the opinion that common land was not eligible for grant aid because of the lack of an occupier
223	1	Ante pages 58 to 60
	2	Working Party Report Chapter 3.2
	3	Ante pages 26 to 28
	4	Law of Property Act 1925
224	1	Hereinafter referred to as the 1931 Act
	2	Hereinafter referred to as the 1899 Act
	3	Working Party Report 3.11
225	1	The right is known as approvement
	2	Working Party Report 3.12
	3	Ibid 3.13
226	1	Ante Chapter Three part III
	2	Working Party Report 3.17 and 3.23
	3	Ibid 3.17
	4	Ibid 3.23
	5	Writer's emphasis
227	1	Working Party Report 3.16
	2	[1976] 1AER 251
	3	Working Party Report 3.17
	4	[1976]1AER at pages 255 and 256
	5	Ante pages 158 to 159

Notes and References in the Text (Part Five continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
227	6	[1979] 1AER 113
228	1	Working Party Report 3.18
	2	(1858) 27 LJ Ch 837
	3	Ante page 168
	4	Working Party Report 3.24
	5	[1976] 1AER 251 and ante page 227
229	1	Working Party Report 3.24
	2	Ibid 3.19
	3	Ante page 189 to 191
230	1	Law of Property Act 1925
	2	Working Party Report 3.24
	3	Presumably conclusive evidence see ante page 227
231	1	[1976] 1AER 251
232	1	Ante pages 174 to 177
	2	Working Party Report 4.8
	3	Working Party Report Appendix J
233	1	Writer's emphasis
	2	Working Party Report 4.10
234	1	Ante page 35 and the Royal Commission Report paras 209 to 213
	2	Section 8
	3	The 1965 Act Section 1(3)(b)
	4	The Working Party Report 4.5
	5	Ibid 5.5
	6	Ibid
235	1	Ante page 71
	2	Working Party Report 5.6
	3	Working Party Report Annex AII

Notes and References in the Text (Part Five continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
235	4	Working Party Report para 5.8
	5	Ante page 116
237	1	Law of Property Act 1925
	2	The document is set out at Appendix VII
239	1	The ACC's comments pages 2 and 3
	2	The COSFPS's comments page 2 para 11
	3	Writer's emphasis
	4	The ACC's comments para 4(i)
240	1	The ACC's comments page 5(vi)
	2	The COSFPS's comments para 30
	3	Ante page 36 and page 52
241	1	Ante pages 194 to 199
	2	Ante pages 179 to 182
	3	The NFU's comments page 5(xiv)
242	1	The COSFPS's comments para 36
243	1	Writer's emphasis
	2	The ACC's comments page 9(xxii)
	3	The NFU's comments page 7(xxii)
	4	The COSFPS's comments page 8 para 47
244	1	Section 123
	2	The RA's comments page 6 para 31 cf ante page 243
	3	Writer's emphasis
	4	[1975] 3AER 604
	5	[1965] 63 LGR 456
	6	Section 32 National Parks and Access to the Countryside Act 1949
	7	The CPRE's comments page 5 (xxii)
	8	Ante pages 156 to 163

Notes and References in the Text (Part Five continued)

<u>Page No</u>	<u>Ref No</u>	<u>Reference</u>
244	9	[1982] 3AER 995
	10	Ante pages 211 to 213
245	1	Ante page 230
	2	27 July 1982
	3	Ante page 213
	4	In any event note the ACC's comments at page 8(xvii) of their paper
	5	[1976] 1AER 251
	6	Ante pages 156 to 163
	7	Question XXV
	8	The ACC's comments pages 10 to 11
	9	[1979] 1AER 113
246	1	No 5/D/3 25 June 1973
247	1	The CPRE's comments page 5 para 22
	2	The COSFPS's comments page 9 paras 49 to 53
	3	The NFU's comments page 8(xxvi)
249	1	The RA's comments page 7 para 36
	2	Ante pages 235 to 236

CONCLUSION

In view of the fact that second stage legislation is being considered seriously, it is impossible to draw final conclusions about the Commons Registration Act 1965. Its full impact cannot be gauged until amending legislation has been enacted and its effect assessed. It is reasonable to conclude that second stage legislation will be enacted eventually and it is most likely to contain a provision granting a right of access to the general public to common land and town or village greens.

So far as the 1965 Act is concerned, there can be little doubt that its drafting was not without fault and its interpretation has given rise to decisions which have been subject to criticism. Details have been provided in the preceding two chapters of the problems and difficulties which have arisen.

However, the most fundamental consequence of the 1965 Act must be that rights have been altered and been lost as a result of its implementation and areas of land are threatened with enclosure which would otherwise have remained open. The evidence for these statements can be found in the decided cases and in the words of the commoners who exist throughout the country. The conclusion to be drawn from these tragic consequences is that the criteria for registration which were laid down in the 1965 Act were the wrong ones. They failed to take account of the changes in the significance of common land which took place, for the most part, in the nineteenth century. The expressed intention of the Government was to compile a register of rights which actually existed. On a purely theoretical level, such an intention sounds eminently desirable and without adverse consequence. However, the impact of changes in land usage upon the existence and nature of rights was ignored by the legislation. In addition, there can be little doubt that before the 1965 Act was passed the intention to use the registered land for amenity purposes had

been considered. Once again, it is obvious that to use purely agricultural criteria, as with common land, or an outdated concept relating to use by local inhabitants, as with town or village greens, would lead to inappropriate registrations and the omission of land which one would expect to be included for registration. The difficulties over drafting and interpretation are unfortunate but they are of a minor nature when compared to the fundamental error in the choice of criteria.

The Commons Registration Act 1965 is an example of legislation described by its promoters as making no fundamental changes but which, in view of the gap between actual land usage and legal theory, has produced significant alterations to the expectations and actions of landowners, commoners, ramblers and those who enjoy the views of open countryside which are to be enjoyed in this country. It is difficult to ignore the unpalatable fact that land which is not subject to rights of common is worth more in financial terms than land which is burdened in this way.

A degree of certainty has been achieved but only at considerable cost.

APPENDIX I

The identity of the Minister with responsibility for common land is not always easy to ascertain because the functions have been transferred several times. Therefore, this Appendix contains details of those who have had responsibility for common land.¹

The Inclosure Commissioners for England and Wales were established by the Inclosure Act 1845 section 2. Their office was amalgamated with the Copyhold Commissioners and the Tithing Commissioners by the Inclosure Commissioners Act 1851 section 2. Under the Settled Land Act 1882 section 42 the Inclosure Commissioners became the Land Commissioners for England and their functions passed to the Board of Agriculture under the Board of Agriculture Act 1889 section 2(1)(b). The Board was renamed the Board of Agriculture and Fisheries by the Board of Agriculture and Fisheries Act 1903 Section (1). The Board was succeeded by the Ministry of Agriculture when that Ministry was established under the Ministry of Agriculture and Fisheries Act 1919 section 1 and the Ministry was renamed the Ministry of Agriculture Fisheries and Food by SI 1955 No 554.

In 1965 the functions of the Minister in relation to common land were transferred to the Minister of Land and Natural Resources by the Minister of Land and Natural Resources Order 1965 SI 1965 No 143 art 2(1)(B) Schedule. That Minister's functions were transferred to the Minister of Housing and Local Government (as regards England) by the Minister of Land and Natural Resources (Dissolution) Order 1967 SI 1967 No 156 Art 2 (2)(5) and there was a further transfer of functions in 1970 to the Secretary of State for the Environment by the Secretary of State for the Environment Order 1970 SI 1970 No 1681.

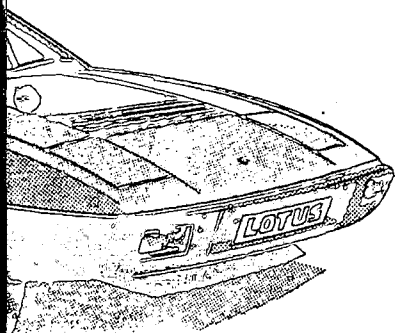
¹ See Halsbury's Laws of England Volume 6 Para 705.

APPENDIX II

Newspaper cuttings relating to the manor of Spaunton on the North
Yorkshire Moors.

Villagers seek a way round grazing ruling

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Saturday 10 a.m. to 5.30 p.m.

COMMON rights holders of the manor of Spaunton on the North York Moors are to meet next week to try to find a way of enabling a Hutton-le-Hole shepherdess to keep her flock.

For years Miss Rose Farrow, who is in her 70's, and her nephew, Mr. Geoffrey Featherstone, have made a livelihood grazing sheep in the manor.

Their flock is often to be seen in the summer cropping the grass within the village of Hutton-le-Hole.

But under a ruling of a Commons Commission inquiry held at Malton last year the size of the flock will have to be reduced from 400 sheep to a mere 16.

The ruling is based on the law of "levancy and couchancy" under which the number of sheep commoners can graze on common land in summer depends on the amount of land they have to support them in winter.

The Commons Commissioner decided on two-and-a-half sheep

per acre, which means that Miss Farrow, who owns a little over six acres, is allowed only 16 sheep.

Villagers say this is "bureaucracy gone mad" which will deprive Miss Farrow of a living.

The chairman of the common rights holders, Mr. Tom Strickland, has called a meeting for next Wednesday.

Mr. Strickland, foreman of the jury of the manor of Spaunton court leet, said Miss Farrow had been the hardest hit by the Commissioner's decision.

"We're hopeful that we might be able to help her keep her flock which is mainly why I called a meeting of the common rights holders — we're already looking to see if there is a way round the situation."

Miss Farrow, of Rose Cottage, declined to comment until after the meeting but a number of villagers pointed out that Miss Farrow's family had been among the handful of commoners to exercise their rights for generations on Spaunton Common which includes Appleton-le-Moors, Lasingham, Hutton-le-Hole, Spaunton and Rose-dale West.

'Ridiculous'

"It's absolutely ridiculous," said one villager. "Everyone is very upset about it. It's a terrible thing to have done. How on earth can Miss Farrow and her nephew make a living out of 16 sheep?"

"We're hoping something can be done about it. Some people are suggesting that villagers who do not exercise their right to graze sheep might be able to let Miss Farrow graze her sheep for them."

Mr. Chris Wood, who keeps

Blow to lord of the manor

THE Commons Commission inquiry also dealt a nasty blow to the Lord of Spaunton Manor, Mr. Geoffrey Wardle-Darley.

Each of his 11 applications for registration to graze sheep in the manor were rejected by the Commissioner who said that since Mr. Darley was the owner of the land in the register unit, any rights which may have been attached to his other property in the past had been "extinguished by unity of ownership and possession."

Included in these applications was High Askew Farm, near Cropton, where the tenant was believed to be grazing some 150 sheep.

Mr. Tom Strickland, foreman of the jury of the court leet of Spaunton manor said the commission's decision had come "very hard" on the tenant of the farm.

"The lord of the manor has lost all his grazing rights. It's been a very expensive operation

the village shop and petrol station, does not exercise his right to graze 15 sheep. He said he would happily let Miss Farrow graze his entitlement and was sure other villagers would do the same.

Mr. Matthew, Clark, of Cropton Mill, near Pickering, who is well versed in the complicated issues surrounding common rights said:

"It's diabolical that they can go to all this trouble and spend thousands of pounds to put the boot into a few common rights holders.

"If this is a law where's the justice? It's just bureaucracy gone raving mad."

"Common rights holders, who can increase the size of their flocks are unlikely to do so, whereas those who have their allocation reduced have no option but to cut down on the number of sheep they have."

"The number of sheep on the common land is bound to fall over the years as it is unlikely that new young grazers will come from the bigger farms that have a better living without sheep."

"This surely cannot be good for the common, the national park or the nation's food larder."

"I find it incredible that the county council and farmers are erecting fencing on the Guisborough road to protect the sheep when here we are making a law to reduce their numbers."

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To the manor worn . . .

A LORD of the manor clashed with his manorial court jury yesterday when he refused to change his mind over curbing sheep grazing rights on moorland.

The number of sheep grazed on Spaunton Manor, which covers 7,000 acres of common land and moorland, had to be reduced following a recommendation by a Commons Inquiry commissioner, Mr. G. D. Squibb, at Maiton, North Yorks., last autumn.

The annual Spaunton Manor Court Leet, held at Spaunton, near Kirkby-moorside, yesterday heard the Lord of the Manor, Mr. Geoffrey Wardle-Darley, refuse to increase the size of flocks.

He said part of the land needed at

Yorkshire Post Correspondent

least three years' rest and 1,000 acres had been ruined.

The jury foreman, Mr. Tom Strickland, said Mr. Wardle-Darley had cost the 179 common right holders between £10,000 and £12,000 in legal expenses.

Mr. Strickland said: "You took us to the inquiry, compelling us to take our deeds to prove our livelihoods. It shows what kind of person you are."

He said the problem had been caused by the encroachment of bracken over 40 years and this had been caused by the lack of sheep.

A spokesman for a committee of common right holders, Mr. Philip Trevelyan, said: "We find it difficult to believe the claim that the moors are being over-grazed."

He said that acrimony had resulted from Mr. Wardle-Darley's decision to reduce common right holders' flocks.

Many farms did not exercise their full rights and he urged a compromise on sheep numbers.

His proposal that the Court Leet should cancel the orders reducing the number of sheep on the moors was carried.

The court decided to use some of the £5,000 in its funds towards clearing bracken which was spreading on the moorland.

LOOPHOLE MAY SAVE ROSE'S SHEEP

A HUTTON-LE-HOLE shepherdess, faced with the loss of her livelihood, may be saved by a "rent a sheep" scheme.

This could be a way round the law after a Commons Commission inquiry into grazing rights on the Manor of Spaunton on the North York Moors.

The scheme was suggested at a well-attended special meeting of common-rights holders at Appleton-le-Moors.

Since the turn of the century the family of Miss Rose Farrow has had a right to graze 400 sheep on common land. But under a ruling of the Commons Commission inquiry at Malton last year, Miss Farrow, who is in her 70s, will have to reduce her flock to 16 sheep.

SUBSIDY

Solicitor Mr. Robin Lakin, who acted on behalf of many of the common-rights holders at the inquiry, told the special meeting that a way round the problem could be for someone like Miss Farrow to lend her sheep to common-rights holders who were not exercising their rights.

"It would seem there is nothing to stop people from borrowing someone else's sheep for a nominal sum of say 5p a year," said Mr. Lakin.

It was also suggested that common-rights holders like Miss Farrow could carry on grazing their sheep and be fined by the Manor of Spaunton Court Leet, a nominal amount such as 1p a sheep. However, this could prevent them from getting their hill sheep subsidy from the Ministry of Agriculture.

A 10-man committee made up of two common-rights holders from each of the five parishes within the Manor of Spaunton was elected at the meeting to seek legal advice and to open negotiations with Mr. Geoffrey Wardle-Darley, Lord of the Manor of Spaunton.

The committee will also have an important role as an authoritative body representing common-rights holders.

Row over grazing rights

Jury defies Lord of Manor's orders to reduce flocks

FIVE COMMON rights holders ordered to reduce their flock within weeks by the Lord of Spaunton Manor, were given a year's stay of execution by the jury of the ancient court leet.

At the end of a bitter row between Lord of the Manor, Mr. Geoffrey Wardle-Darley, and the common rights holders, the jury asked that orders asking the five people, whose grazing rights had been drastically reduced by the Chief Commons Commissioner, to reduce their flocks, be suspended. During the heated discussion, Mr. Wardle-Darley was adamant he would stand by his orders — to three people — to reduce their flocks by the end of this month.

The other two — 70-year-old Hutton-le-Hole shepherdess Miss Rose Farrow, and Mr. Eddon, of Rosedale, were given until the end of December.

The jury's request left the Steward of the Manor, Col. Anthony Leech, with a legal problem, because in the past the Lord of the Manor has always abided by the jury's decision.

It could yet take a higher court to resolve the matter.

But the jury's unanimous decision means that the five flockmasters will be able to keep their sheep until the next annual meeting of the court leet in October, 1981.

Many of the common rights holders had their grazing rights greatly reduced by the Chief Commons Commissioner, Mr. G. D. Squibb, when he applied the old law of levancy and couchancy at the inquiry held in Malton last year.

POOLING

This restricts the number of sheep to the amount of in-bye land — winter grazing — owned by the rights holder. Those with less than half an acre of land attached to their holdings lost all their grazing rights. At the same time, large farms were given more grazing rights than they needed.

Mr. Wardle-Darley asked for the inquiry because he felt the 700 acres of moorland and commonland was being "grossly overgrazed."

The common rights holders want the Lord of the Manor to allow the pooling of grazing rights so people like Miss Farrow, whose family has earned its livelihood by sheep for at least three generations, can keep her flock.

Mr. Tom Strickland, foreman of the jury, said he was absolutely disgusted with the way Mr. Wardle-Darley had treated his friends. He told him he had cost the 179 common rights holders between £10,000 and £12,000 in legal expenses. Only 162 were left with grazing rights after the inquiry.

In a bitter attack on Mr. Wardle-Darley, Mr. Strickland went on: "It hurt us very much when you compelled us to take our family deeds to Malton for the Chief Commons Commissioner's inquiry, to prove our livelihood."

"We've been pressing for years for something to be done about the encroachment of bracken on the moors. The lack of sheep is the cause of bracken growth and the sooner you realise the co-operation of the common rights holders is your solution, the better."

Speaking for the Common Rights Holders' Association, Mr. Philip Trevelyan said they did not believe the moors had been seriously damaged by the number of sheep. The problem was caused by excessive bracken. He added that money from the common rights holders fund could be used to help eradicate the bracken.

Proposals put forward included levying a headage — no more than 50p per head — on common rights holders, the money to be spent improving the commons.

Some large farms with more grazing rights than needed had agreed to pool their rights on a one, two of five yearly rental basis.

"We went to work with the Lord of the Manor so long as he indicates a willingness to listen to our proposals," he said, adding that if nothing was done the common rights holders would be left with feelings of acrimony and dissent.

Mr. Wardle-Darley refused to listen to the proposals to pool grazing rights, but indicated it could be a subject for discussion in future years.

"The moors are grossly overgrazed — the land at the bottom of the moor is dead. It's disgusting," he said. "I don't know how you dare ask for more sheep, it's always snatch, snatch from you."

He added that it was because of poor grazing that sheep were invading villages and breaking into people's gardens. He said he spent about £800 each year spraying the bracken.

The court leet agreed to resurrect a committee to investigate starting a programme to control the bracken. The committee was given £500 from commons rights holders' funds.

Damage by tourists is claimed

TOURISTS are destroying parts of Hutton-le-Hole.

Visitors to the picturesque village were also blatantly using a field as a public toilet.

These claims were made at the court leet of the Manor of Spaunton.

Dr. Richard Theakston, clerk of the parish council, said discussions had been held with Mr. Arthur Pearson, chief executive of Ryedale District Council, about the problem caused by the pressure of tourists.

Dr. Theakston said court leet permission was needed before anything could be done to protect two vulnerable parts of the

village — the area at the bottom of the village near the beck and Ox Close Lane which was being used as an unofficial car park, and the west bank near the old ash tree, which was being used as a play area.

He said cars parked so close by the beck that they were almost touching each other. The grass was being worn so badly that it was leading to erosion.

This summer, both gates had been broken down and adjacent fencing trodden down around

a nearby field. He had seen people carrying rolls of toilet paper as they came out of the field which they were using as toilet.

People had been using the roots of the ash tree as a kind of shelter as well as swinging on ropes attached to the branches and making a mud chute down the bank.

Since April this year a 4ft. section of the bank had been eroded.

"If we can get permission to

direct people properly to the footpath we might be able to get some earth back around the roots of the tree," he said.

The court leet agreed to support the parish council in any action it took to protect the two areas.

The court leet also heard that North Yorkshire County Council had plans to lay flagstones between the public toilets and the Crown Inn pub. The area would be fenced off to prevent motorcyclists from driving up and down the path.

Pedestrians would be encouraged to use the paths visitors had already worn alongside the road kerb.

Estate agents fined for common land notices

THREE ESTATE agents were among those fined by the court leet of the Manor of Spaunton. Nominal fines — the maximum is £1.99 — are imposed for encroaching on manor land.

The 120 annual fines imposed last year were re-imposed this year en bloc by the jury.

Wells Cundall were fined £1 for each of five "for sale" notices erected on common land in Spaunton, Lastingham and Appleton-le-Moors. Boulton and Cooper Ltd. and Nicholson were both fined £1 for similar signs at Hutton-le-Hole.

An Appleton-le-Moors woman, Mrs. Allison, of Appleton Mill Farm, was fined £1.50 for having two manure heaps on common land.

Mrs. Usher, of the Three Faces, Appleton, was fined 75p for erecting rails around the front of her house, while a similar encroachment cost Dr. Richard Theakston, of Hutton-le-Hole, 50p.

ENCROACHMENT

Miss Patricia Pring, of the New Inn, Spaunton, was fined 50p for sewer pipes and a manhole cover — the Yorkshire Water Authority already pays about £10 for several similar encroachments — and Mr. F. K. Robinson, of Hutton-le-Hole, was fined £1.50 for his garage driveway which crosses the common.

The court leet is to ask Mr. Arthur Harris, of the Barn Cafe, Hutton-le-Hole, to remove tables from outside the cafe as they are blocking a vehicular right of way. The jury decided against fining him because "a fine indicates the encroachment can go on next year."

The court leet decided to remove a wooden structure from the top of Douthwaite Road, after hearing from Mrs. Annabella Shaw, of Douthwaite Dale, that the structure did not belong to her and she did not use it so consequently did not see why she should pay the £1.99 fine imposed at last year's court leet.

Sheep pen must go, farmer is told

A KELDHOLME farmer who has lost all his grazing rights on Spaunton Manor, is to be told to remove a sheep pen from Appleton le Moors common.

Mr. Lorne Wilkinson of Oaklands, who grazed a flock of 130 sheep, before the Chief Commons Commissioner ruled he had no grazing rights, claimed in a letter to the court leet that he was using the pen for sheep he was shepherding for other people.

Bailiff Mr. R. Groom said he had seen about six sheep in the pen, but had been unable to find out who owned them except for one.

He did not see there was any need for Mr. Wilkinson to shepherd a flock of just half a dozen sheep and the jury agreed to write to him telling him to remove the pen.

The steward of the Manor, Col. Anthony Leech, was also to write to Hargreaves Quarries, following complaints from Mr. Wilkinson that the firm is not fined for the fence erected on common land around Thornton Quarry.

A similar complaint was raised last year by Mr. Wilkinson, when it was pointed out to him that the Lord of the Manor, Mr. Geoffrey Wardle-Darley, owns the mineral rights of the land, and that quarries were required by strict laws to be fenced off because of the possible dangers.

Col. Leech said he would negotiate with Hargreaves to see if the firm was prepared to make some sort of payment and report back at next year's court leet.



retires

manageress," he added, "she was one of the first women general managers in the company, if not the first."

○ ABOVE: Mrs. Slape tries out her garden seat watched by members of the staff. With her on the seat are Mr. Masi, left, and Mr. Jim Maines, general manager for the North.

Malton manager leaves council

A Malton member of Ryedale District Council since May last year, Mr. Derek Talbot, of 47 Ashfield Avenue, Malton, has resigned from the council because of changed private circumstances. Mr. Talbot is officer manager with Malton and Norton Co-operative Society

Dispute on grazing rights settled

THE COURT Leet of the Manor of Spaunton, which began in medieval times, met in annual session at Manor Farm, Spaunton, when the main item for discussion by the jury representing common-right holders, was a report on the future administration of grazing rights over the 7,000 acres of commonland.

This follows the formal agreement of the Register of Common Rights as a result of the public inquiry three years ago by the Chief Commons Commissioner.

Since then there have been disagreements about the number of sheep grazed on the moor, following difficulties caused by reduction of sheep numbers in some flocks.

The steward of the manor (Mr Anthony Leach) said the final register would shortly be available for public inspection.

He referred to meetings with the Common Right Owners Association of which Mr F Hebron (Rosedale) is chairman, and Mr James Holt (Ravenswick), secretary.

As a result of the court leet deliberations on proposals from the lord of the manor (Mr Geoffrey Darley) and the Common Right Owners Association, general agreement between the two was reached.

The number of sheep gaited allocated by the Chief Commons Commissioner to owners of common rights is about 6,217, but the steward pointed out that it was envisaged that at no time in the future would there be that number of sheep grazing at any one time, nor was there evidence that this figure had ever been attained during the last 100 years.

To comply with the official register, the 16 people now exercising their rights would be entitled to have about 2,000 sheep grazing. To help those who may have had dif-

ficulties through the reduction of the number of sheep in their flocks, this figure could be increased to 3,000 to which the lord of the manor agreed.

The Common Right Owners Association proposed that no maximum number be agreed, but that the numbers should be flexible at the discretion of the court leet. This proposal was agreed to.

The steward said the registration of claims made by the lord of the manor and his tenants should be added to the approved register with entitlement to the same consideration to any one of the occupiers of those farms should they apply to keep more sheep.

The farms concerned are Bainwood Head with a claim for 60 gaited, High Askew (200 gaited), Farm building near Lund Farm (25 gaited), Mes-suage Farm, Spaunton (150 gaited), Manor House Farm, Spaunton, (150 gaited) — a total of 585 gaited.

Only the tenant at High Askew, Mr T H Jemison, was exercising a grazing right.

Mr T H Strickland (foreman of the jury) felt that the five farms should have grazing rights as they were in the centre of the moor. It was essential that had the rights, which would in no way infringe the 1965 Commons Registration Act, as they would not be permanent rights, but licences.

Mr Holt said that proposal would be perfectly all right as long as it was accepted that the court leet dealt with any applications from the tenants concerned.

This was agreed to and it was also agreed that the court leet should act as a ready-made management committee as envisaged by the second phase of the Commons Registration Act.

The proposal of the Common Right Owners Association that a charge of 50p per head for sheep grazed on commonland be made and that the money go into the Common Right Holders fund to be used for improvements to the moor, was agreed.

It was also agreed that any common right holder wishing to graze sheep in excess of the registered number, must apply to the steward of the manor, in time for the start of the grazing year. Existing graziers will be notified of the start of the grazing year to enable applications to be considered by the court leet.

Priority will be given to the reduction and ultimate eradication of bracken which is the worst menace to grazing on the moor. Already areas of bracken have been successfully treated with spray and with a bracken crusher.

Mr Strickland announced that future operations will involve expenditure of £1,500, including £500 to be spent in Rosedale on some description of aerial spraying because of hilly terrain. Details of this operation would be left to the Rosedale farmers.

Mr Strickland thought that some financial assistance could be forthcoming from government grant, in addition to money from the common right holders fund.

The recommendation of the Common Right Owners Association to contribute £300 towards the cost of the cattle grid at Lowna Bridge, was approved.

The cost of the grid was about £2,100, and though it was installed a short distance over the Spaunton Manor boundary, Mr Holt said it would be of considerable benefit to the Spaunton Manor graziers in preventing their stock straying onto the Gillamoor side.

The spending of £300 would be justified and while it could be argued that the court leet had no jurisdiction over the grid, it had to be recognised that 85 per cent of the total cost was being contributed by other people.

APPENDIX VI

Names of Commons Commissioners appointed to hold hearings to determine disputes regarding registrations under the Commons Registration Act 1965

Chief Commissioner	Date of Appointment

G D Squibb MVO QC	1971

Commissioners

A A Baden Fuller	1972

G T Hesketh	1978

L J Morris Smith	1980

APPENDIX III

Official Report 5th Series
Parliamentary Debates - Commons
1976 - 77 Vol 934
Written Answers 698 - 700
8th July 1977
Commons Registration

Mr Jopling asked the Secretary of State for the Environment whether he will list for each County in the United Kingdom the number of objections received to registrations under the Commons Registration Act 1965; how many of those have been heard by Commons Commissioners, how many have been resolved by him and how many remain to be heard.

Mr Marks pursuant to his reply Official Report 29 June 1977 Vol 934 circulated the following information.

(see table overleaf)

Position at 30 June 1977

<u>County</u>	* <u>Objections</u> <u>received</u>	* <u>Disputes</u> <u>heard</u>	<u>Disputes</u> <u>resolved</u>	* <u>Number of Disputes</u> <u>remaining to be heard</u>
Avon	458	40	33	457
Beds	44	53	53	7
Berks	155	4	4	114
Bucks	67	67	36	94
Camb	107	25	12	19
Cheshire	39	16	10	36
Cleveland	272	11	2	9
Cornwall	1398	266	185	1623
Cumbria	914	17	16	340
Derbys	19	24	19	1
Devon	774	128	71	10757
Dorset	667	354	294	629
Durham	200	63	62	158
E Sussex	114	147	75	0
Essex	269	95	70	195
Glos	272	80	49	293
Greater London	91	49	46	2
Greater Manch	266	0	0	13
Hants	392	110	89	130
Hereford & Worcs	379	243	209	210
Herts	128	29	27	85
Humberside	85	56	4	0
I O W	10	0	0	10
Kent	342	29	23	21
Lancashire	144	106	32	206
Leics	28	41	35	1
Lincs	346	48	48	71
Merseyside	147	0	0	5
Norfolk	136	213	163	84
Northants	73	37	37	67
Northumberland	18	46	33	0
North Yorks	296	286	229	1442
Nottinghamshire	27	1	0	8
Oxon	177	73	69	5
Salop	255	145	142	0

Position at 30 June 1977 (continued)

<u>County</u>	<u>* Objections received</u>	<u># Disputes heard</u>	<u>Disputes resolved</u>	<u># Number of Disputes remaining to be heard</u>
Somerset	148	268	123	0
South Yorks	516	13	0	3177
Staffs	16	18	9	23
Suffolk	99	130	123	32
Surrey	462	111	68	455
Tyne & Wear	34	3	3	1
Warwicks	4	0	0	0
West Midlands	50	3	3	2
West Sussex	286	97	74	178
West Yorks	810	19	19	753
Wiltshire	72	60	16	42
TOTAL FOR ENGLAND	<u>11,606</u>	<u>3,626</u>	<u>2,615</u>	<u>21,755</u>
Clwyd	327	192	175	76
Dyfed	877	21	21	1265
Gwent	317	18	1	158
Gwynnedd	527	310	111	52
Mid Glam	247	214	18	332
Powys	848	246	202	2391
S Glam	140	0	0	9
W Glam	133	0	0	580
TOTAL FOR WALES	<u>3,416</u>	<u>1,001</u>	<u>528</u>	<u>4,863</u>
GRAND TOTAL	<u>15,022</u>	<u>4,627</u>	<u>3,143</u>	<u>26,618</u>

* The last date for making objections was 31 July 1972. The figures given are based on those provided by former county and county borough councils, adjusted to take account of local government reorganisation in April 1974. The figures include objections subsequently withdrawn.

** A single objection may give rise to more than one dispute, eg, an objection to the registration of any land has to be treated as also being an objection to any registration of rights of common over the land. Consequently, the number of disputes in any county may greatly exceed the number of objections received.

APPENDIX IV

1 Commons Registration Act 1965 (Commencement No 1) Order 1965

SI 1965 No 2000

Date

Purpose

1 January 1966

Section 2 (2)

1 January 1966

Section 11

2 Commons Registration Act 1965 (Commencement No 2) Order 1966

SI 1966 No 971

Date

Purpose

1 October 1966

Section 4 (7)

2 January 1967

All purposes except the purposes of sections 2(2), 4(7), 11, 17 and 18

1 January 1980

Section 17 and section 18

APPENDIX V

Copy of a letter from the Department of the Environment dated 25 September 1973.



Department of the Environment
Caxton House Tothill Street London SW1 H 9LZ

Telephone 01-834 8540 ext 353

The Clerk of the Durham
County Council
Clerk's Office
PO Box
County Hall
DURHAM DH1 5UL

Your reference

ODC/EM

Our reference

PRD/SP/MC/309

Date

25 September 1973

Dear Sir

COMMONS REGISTRATION ACT 1965

1. I am replying to your letter of 11 September to the Clerk of the Commons Commissioners concerning the removal of land from the commons register and referring to an article on the subject in the September 1973 issue of the Journal of Planning and Environment Law.
2. The proposition suggested, which was considered by the Department's legal advisers some time ago, is based on the definition of common land in the 1965 Act, namely, land which is waste of the manor, or which is subject to rights of common. The proposition is that where land is registered as common, the owner of the land would be entitled to apply for its removal from the commons register if it could be demonstrated that (a) the land is not waste of the manor; and (b) no rights of common were registered under the 1965 Act (or under the Land Registration Acts).
3. The heart of this proposition is that rights of common which were not registered ceased to exist at the end of the period allowed for registrations (31 July 1970) because of the sanction against the non-registration of such rights in section 1(2)(b) of the 1965 Act, which reads "no rights of common shall be exercisable over any such land (ie land registered as a common or green) unless they are registered either under this Act or under the Land Registration Acts 1925 and 1936". Thus, the argument runs, where you have land which demonstrably is not manorial waste and over which no rights of common are registered, the operation of the sanction referred to above results in the land being a candidate for removal from the register on the grounds that it is now outside the definition of common land, being no longer subject to rights of common.
4. The Department cannot accept this proposition. In our view, in order to justify taking common land off the register, the applicant for removal must show some event, other than one arising out of the process of registration itself, whereby the land ceases to be common land. It is not sufficient merely to point to rights no longer being exercisable by virtue of the registration process. Section 13(a) of the Act, which provides for the amendment of the register where land ceases to be common, contemplates in our opinion some event other than the mere passage of time and its effect on section 1(2)(b) resulting in rights which are not claimed no longer being exercisable. If this were not the case, one would have expected to find in the Act provision for automatic deletion from the register as in Section 6(3) (cancellation of a claim to ownership when the registration of the land itself is cancelled) and in Section 12(b) (deletion of ownership registration following registration of the land under the Land Registration Acts).

5. Where land has attained final registration as common land, the effect of section 10 of the 1965 Act is to make the registration conclusive evidence of "the matters registered, as at the date of registration". The registration system created by Parliament allows for commons to be on the register unsupported by rights of common, even where the land is not manorial waste. This seems clear from the case of a common which is not objected to but where all the rights thereover are objected to and are struck down. The common itself is entitled to final registration without regard to whether or not it is waste of the manor. This is apparent from the absence of any converse provision to section 5(7) of the Act which provides for an objection to a registration of land to be treated as an objection to any registration or rights over the land.

6. As the subject is of general interest, you have kindly agreed to the Department sending a copy of this letter for information to all county councils.

Yours faithfully

K W Evans

K W EVANS

APPENDIX VII

- 1 Consultation document
- 2 List of recipients receiving consultation document
- 3 Replies to the consultation document from
 - a) The Association of County Councils
 - b) The Commons Open Spaces and Footpaths Preservation Society
 - c) The Council for the Preservation of Rural England
 - d) The National Farmers Union
- 3) The Ramblers Association

DEPARTMENT OF THE ENVIRONMENT

WELSH OFFICE

CONSULTATION DOCUMENT

COMMONS

1. The Royal Commission on Commons reported in 1958. They found a confused situation with uncertainty about the nature and extent of common rights, ownership of soil and so on. The total area of common land had decreased from 2½ million acres to 1½ million over the previous 100 years. Only a fraction of the loss could be accounted for by legal inclosure. The Commission considered that, as the last reserve of uncommitted land in England and Wales, common land ought to be preserved with wider facilities for public access and an increase in the productivity of the land.
2. With this in mind the Commission made the following principal recommendations:
 - a. Registers of common land and town or village greens should be established recording the nature and extent of such land together with details of the rights exercisable over it, and by whom, and the owner of the soil;
 - b. Any holder of a private interest in a common, whether the soil owner or a commoner, or a Local Authority in whose area the common lies, should be able to promote a scheme for managing and improving the common;
 - c. A general right of access should be created to common land for the public at large subject to certain restrictions.
3. The first of the Commission's recommendations was implemented by the Commons Registration Act 1965. All common land and rights had to be registered by 31 July 1970, and a further 2 years was allowed for the submission of objections to the registrations. The disputed cases are now being heard by the Commons Commissioners, but it will probably be 10/12 years before their task is completed.
4. An Inter-Departmental Working Party of officials have reviewed the nature and extent of the further legislation needed to implement the Royal Commission's other recommendations, and a copy of their report is attached.
5. Ministers are not committed to acceptance of any of the Working Party's recommendations and wish to consult all the interests concerned before addressing themselves to the questions identified in the report as needing to be decided if legislation is to be prepared.
6. While comments on any of the matters covered by the Working Party's Report would be welcome, Ministers would particularly wish to receive views on the following issues:
 - i. Should there be a universal right of public access to all common land (para 1.9 of the Working Party's report);
 - ii. If there is to be such a right, should it be capable of being restricted either permanently or temporarily;
 - iii. If so, under what circumstances should such restrictions be applied (paras 1.11 to 1.15);
 - iv. What provision, if any, should be made for horse riding (paras 1.17 to 1.18);
 - v. Should there be an exclusion under Section 1(4) of the Occupier's Liability Act 1957 in respect of persons using common land for air and exercise (para 1.19);

- vi. Are fresh arrangements required for statutory schemes for the management and improvement of common land;
- vii. If so, should they be promotable by the owner of the land, any of the common right holders or any Local Authority, acting either separately or in conjunction with other interests;
- viii. Should such schemes require the approval of a public authority? If so, should this be a national authority (viz the Secretary of State) or a local authority (eg the County Council). And if the former, should schemes be submitted to him direct or via the County Council (para 2.12-2.15). (Note: It will be seen that the Working Party have tacitly assumed that (as proposed by the Royal Commission) management schemes should be subject to approval by the Secretary of State. It could however be argued that these are essentially matters of local concern in which intervention by central Government is neither necessary nor (in the present climate of opinion) appropriate.)
- ix. Are the Working Party right in rejecting the Royal Commission's recommendation that it should be the duty of each County Council to examine all commons in its area at intervals of not less than 10 years (para 2.17);
- x. Should the owner of the soil have any special rights (para 2.20);
- xi. Should the Nature Conservancy Council have the right to veto any management scheme relating to common land within a National Nature Reserve (para 2.20);
- xii. Should the Government prepare model forms of scheme and/or model rules governing the powers and conduct of committees of management (para 2.22);
- xiii. If so, what are the most important matters to be covered;
- xiv. Should there be provision to adjust rights of common of grazing so that they may be geared to the stock carrying capacity of the common (para 2.23);
- xv. Should there be any right of compensation under schemes of management, and if so, for whom and in what circumstances (para 2.24);
- xvi. Should the Forestry Commission's Dedication Schemes and Small Woods Scheme be adapted to permit assistance to be granted for the afforestation of common land (para 2.28);
- xvii. Should the provisions of Section 194 of the Law of Property Act 1925, modified as suggested by the Working Party, be retained (para 3.5);
- xviii. Should Government Departments continue to be exempted from obtaining Ministerial consent under Section 22 of the Commons Act 1899 (para 3.9)
(Note: If it was desired to make a change in this respect this would, for constitutional reasons, have to be effected by administrative (not legislative) means);
- xix. Should there be provision for the temporary suspension of common rights (para 3.11);
- xx. Is there any reason why the provisions for inclosure under the Commons Act 1876 and "improvement" should not be abolished (para 3.12);
- xxi. Should a provision on similar lines to Section 147 of the Inclosure Act 1845 be retained (para 3.13);

xxii. Should a final registration of land or of rights of common be evidence of the matter registered at any current date and not merely at the date of registration, as at the present (para 3.24 (i));

xxiii. Should land be removable from the register only following statutory process for changing its status (para 3.24 (ii));

xxiv. Should all land on the register be protected from the construction of works or fences without the consent of Parliament or the appropriate Secretary of State (para 3.24 (iii));

xxv. Should provision be made that for the purpose of deciding whether or not to confirm a registration, the Commons Commissioners must consider whether or not rights of common existed over the land immediately before its registration - thus undoing the High Court ruling in CEGB v. Clwyd County Council (para 3.24 (iv));

xxvi. Should there be provision for removing from the register land registered mistakenly or in error (para 4.9); and, if so, should either of the suggestions made by the Working Party be followed or is there any better solution (paras 4.10 to 4.11);

xxvii. Should common land in unknown ownership be vested in the Parish Council (in Wales the Community Council) or in the District Council where there is no Parish (or Community) Council, except in the National Parks where it should be vested in the National Park Authority (paras 5.7 to 5.8);

xxviii. Which of the methods of vesting suggested by the Working Party is preferable (paras 5.10 to 5.13);

xxix. Should town and village greens be brought under the same legal code as that suggested for common land and should the greens register be merged with that for commons;

xxx. If not, should the general public be granted a universal right of access for air and exercise over all land which is a town or village green, and should there be legislation to create a right of recreation over such land.

7. Finally, have you any further information which you consider would assist Ministers in arriving at their conclusions, bearing in mind what is said in paragraphs 2.5 to 2.8 of the Working Party's Report about the gaps in existing knowledge.

8. Comments are invited by 31 January 1979 and should be addressed to:

The Countryside and Recreation Directorate
(CRD 2(c))
Department of the Environment
Tollgate House
Houlton Street
Bristol BS2 9DJ



Department of the Environment

Room 2/65

Tollgate House Moulton Street Bristol BS2 9DU

Telax 449321

Direct line 0272-218 140
Switchboard 0272-218811
GTN 2074

Mrs R A J Oswald
The Green
Carlton
Hustlewaite
Thrisk
NORTH YORKSHIRE YO17 2BJ

Your reference

Our reference

Date

24 February 1982

Dear Madam

COMMONS REGISTRATION ACT 1965

1. I refer to your letter of 15 February 1982.

2. I should explain that the Department are unable to supply copies of the replies received by us in response to the questions contained in our consultation documents, however, the principal organisations consulted may be grouped as follows:

Local Authority Associations

Association of County Councils
Association of Metropolitan Authorities
Association of District Councils
Greater London Council
National Association of Local Councils
Welsh Counties Committee
Council for the Principalities
New Towns Association
Duchys of Cornwall and Lancaster
Land Owning Bodies
Church Commissionaires
Country Landowners Association

Professional Bodies

Town Planning Association
Royal Institute of Chartered Surveyors

Government Departments

HM Land Registry

Crown Estate Commissionaires

Charity Commission

Agricultural Interests

National Farmers Union

National Union of Agricultural Workers

Farmers Union of Wales

Amenity and Recreation

Freeman of England

Council for the Protection of Rural England

Commons Open Spaces and Footpaths Preservation Society

Nature Conservancy Council

Ranblers Association

National Trust

National Society of Leisure Gardeners

Welsh Federation of Commoners Association

Caravan Club

Camping Club

Youth Hostels Association

British Horse Society

British Field Sports Society

British Archaeological Association
Royal Society for the Protection
of Birds
Sports Council.

3. I am afraid I am unable to give details of those persons who replied.

4. I hope this information is of assistance to you.

Yours faithfully

C. Harris

C HARRIS (MISS)

ASSOCIATION OF COUNTY COUNCILS

COMMENTS ON THE DEPARTMENT OF THE ENVIRONMENT'S AND WELSH
OFFICE'S CONSULTATION DOCUMENT ON COMMONS

1. Introduction

In the Consultation Document the Department of the Environment outline the three principal recommendations of the Royal Commission on Commons which reported in 1958. The first of these was implemented by the Commons Registration Act 1965. The Inter-Departmental Working Party have reviewed the nature and extent of the further legislation needed to implement the other recommendations and have produced a lengthy report. The Consultation Document asks thirty questions on the contents of the Report and the Association's answers to them appear below. However in view of the wide-ranging and complex nature of the proposals and the observations thereon the main points arising out of this matter are highlighted in the following summary.

2. Summary

(a) There should not be universal public access to all registered Common Land. Rather provision should be made for management schemes to be introduced which could include public access. Schemes could be promoted by a public body, the owner or the commoners and provision for objection should be available. Where there is no known owner the land should, after suitable enquiry, be vested in the appropriate public body. Any provisions which would take away the rights of landowners or commoners, without their agreement, should carry rights to compensation. If universal public access is not given, there should be a guarantee that the proposal will not be reviewed for a specified period.

(b) Any right of public access should be capable of restriction, either temporary or permanent, and set out fully in management schemes or bye-laws, which where possible should be dealt with by the appropriate public body rather than the Secretary of State.

(c) There should not be universal public access for riders but provision could be made in management schemes for the establishment of bridleways or gallops.

(d) There is need for a consolidation of the present law. Old and predominantly nineteenth century legislation should be abolished and re-enacted where necessary, the base being the Commons

(e) The date of final registration of Common Land must be conclusive. This is seen as consistent with the provisions and intentions of the Commons Registration Act 1965. Any proposal to alter this would be opposed.

(f) If land is registered as Common Land but no common rights are registered it would be improper for the question of whether rights existed to be re-opened. It is submitted that the decision in *C.E.G.B. v. Clywd County Council* is correct and that if land is registered as Common Land but no rights are registered it is proper that the owner should be entitled to the freehold unencumbered by any rights of common or of public access (assuming it is not waste land of the manor). Moreover if rights of common are extinguished by one of the common law means after land has been finally registered, it is appropriate to consider amending the register by deleting the entry (under Section 13). There should, however, be an open debate about whether these Common Law rules should be repealed, which would affect many people's enjoyment of their land.

(g) There should be provision for removing from the register land registered mistakenly or erroneously, subject to safeguards.

(h) There should be a procedure for vesting land of unknown ownership in the appropriate public body, subject to safeguards.

(i) The registers of Common Land and Town or Village Green should not be merged. The two types of land are different.

(j) There should be provision for Parish Councils to have certain modest powers to carry out minor or community works on village greens subject to safeguards.

3. The Association's answers to the questions contained in the Consultation Document

(i) It is appreciated that the Royal Commission recommended a universal right of public access to common land in England and Wales subject to certain restrictions; also that there are large areas of common land in rural areas to which the public have in practice unimpeded access without rights. It is also accepted that there is a public right of access to almost all urban commons. But the fact that the growth of urban development in the Victorian era led to many commons in urban areas being, by the early part of this century, no longer used for the exercise of common rights while still

representing open space in areas where open space was at a premium, which made it very desirable that they should be open to the public, is no reason for saying that all common land in rural areas should be made open to the public. The Working Party have approached the subject from a metropolitan viewpoint, and considered that because urban commons have public access as of right, this principle should be extended to rural commons. Yet the vast majority of registered common land in the rural areas of the country is very different to urban commons. Rural Commons are on the whole areas of agricultural land and moorland which is private land owned by someone who is, in the majority of cases, registered as owner. It is the case that others, i.e. the commoners, have certain rights over the land and that the use of the land is regulated by a code of law. It would be illogical to give the public a right of access over common land from which, to protect the common rights, for example of grazing, they have hitherto been excluded, not only by the landowner but also by the commoners themselves. And it would deprive the landowner and the commoners of land on which they relied for the exercise of their rights where those rights are incompatible with public use. Owners of grouse moors over which there may well be certain grazing rights, would be prejudiced if the public had the right to wander at will. In some cases the registration may have been made because the owner was resigned to certain common rights but not to general public access, and in such a case the owner should not be deprived of his land if nobody registered rights of common; in that event the owner should have the unencumbered freehold. If there are commoners registered they too should have a right to intervene with a view to preventing public rights.

Where the owner is not known, however, and cannot be traced, regardless of whether or not rights are registered, there should be a procedure for vesting the land in either the County or parish council, the GLC or other appropriate public body, such as the National Park Authority. Ordinarily there should be provision that such land, when vested, should be subject to public rights. However universal access should only be granted as of right as a result of a management scheme being brought into force. A scheme could be promoted by the public body in whom the land is vested or the commoners and where there is a registered owner, he too could promote an order in a case where he had no objection to public access. A management scheme would have a period for objection between publication and its coming into force, and opportunity would be available for objection

to be made to the proposal for public access. The Secretary of State could reserve a default power. It would be for the County Councils to look at all commons in their area and to prepare an order of priority for management schemes. These proposals are essentially an extension of the 1925 situation. Otherwise an authority could find itself owning land, which they would have to hold as public open space when neither they nor anybody else saw a need for it and on which the authority might have to incur expenditure. An avoidance procedure would give them the opportunity of putting to the test whether the land was really wanted as public open space.

If public access is granted, against the will of the landowner, provisions for compensation will need to be included in legislation.

(ii) Any rights of public access over common land ought to be capable of restriction, either permanently or temporarily. There could well be situations where public access would not interfere with the owners' or commoners' rights during most of the year, but where public access could be incompatible with the owners' and commoners' rights at other times, for example, during the lambing season, where shooting rights exist, or in areas of scientific value or nature reserves. Restrictions and controls such as those listed in annex B and annex C to the report are examples, and there may well be a need for additional controls, e.g. in relation to dogs on grazing land. Management schemes and bye-laws seem as good a way as any of dealing with the matter.

(iii) Paras. 1.11 to 1.15 seem to cover most of the possibilities here. Shooting rights should be included.

(iv) A universal public right of access for riders is more undesirable than a public right of access generally on foot, and in suggesting alternative courses of action the Working Party clearly acknowledge that universal access for riders is not a viable possibility.

Much of the benefit of opening larger areas of land to the public on foot, whether they want merely to have a picnic or to walk long distances, would be lost if the same areas were open to riders. The need for more places to be open to riders should be met by the establishment of bridleways or even galloping areas, within areas of public access. Where the common rights are rights to graze ponies

or horses it might be argued that a public right of access on horseback should be granted. This, however, could be opposed by breeders who are commoners using common land for grazing their blood-stock. The creation of new bridleways should not be limited to routes where long user could be demonstrated, since a bridleway, as distinct from a right of public access, can already be established by that means (see para. i. above in relation to public access to rural common land). The establishment of bridleways or gallops within individual commons could be dealt with in management schemes and include grant aid for any necessary works.

(v) Yes.

(vi) The complications of the present legislation, as set out in the report and annex B, are such that they may well have inhibited proposals for schemes of management in the past. Whilst it is impossible to say whether more schemes would be made if the statutory provisions were simpler, it is certainly likely that no fewer schemes would be made.

Consolidation of the law is necessary and the obsolete legislation should be repealed.

If proposals for universal public access in a common are not proceeded with there should be a guarantee that there will be no review of that proposal for a period of years (without prejudice to compulsory purchase powers etc. or to voluntary agreements as to public access). This would enable owners and commoners to plan for the future with some degree of certainty.

If universal public access rights are granted this should not stop management scheme arrangements going ahead.

(vii) It would be somewhat difficult for effective schemes to be promoted unless the owners, commoners and local authority were in agreement. If there is to be legislation giving rights of public access over property, owners should be able to require the appropriate authority to take the freehold and any liability in respect of the land off the owner, in which case the appropriate authority could manage it effectively itself. Where there are still commoners with rights they might feel that the management should be in their hands, but it is somewhat difficult to envisage commoners who are anxious to protect their own rights being in a position to give effective regard, through a management scheme, to public rights of access which have been forced upon them by legislation. Any of the parties should have power

to initiate a scheme. The appropriate authority should be determined by the nature of the land and should be the County or Parish Council, or other Public Body, for example the National Park Authority.

(viii) If all such schemes are to require the approval of the Secretary of State there would seem to be little purpose in having them submitted via the County Council. If, however, a procedure akin to present footpath legislation could be introduced, whereby schemes would only be referred to the Secretary of State where there were objections, and otherwise schemes could be approved by the County Council (whether or not the County Council were the promoter), there would be much to be said for keeping some provision for local approval and confirmation. The County Council's role as registration authority should not be confused with any role it might have for approving unopposed schemes or for being consulted on all schemes, if this were thought to be desirable. It has not been the County Council's role thus far to become involved in the approval of schemes, but if these matters are of purely local concern as the Working Party suggest in paragraph 2.14(i), there is no justification for the County Council to be bypassed and for approval to be given exclusively by the Secretary of State. Surely he would not wish to be involved in unopposed matters of detail relating to local affairs.

(ix) If commons become subject to public access there will be a County Council or Parish Council involvement, and, if in the outcome commons do not all become subject to public rights of access, it would probably be because they were privately owned, and/or there were private known commoners and/or because public access was inappropriate (vid.3(i) above). If the commoners' rights were lost, so that only the landowner retained any rights in the land, he would no doubt wish, and should be able, to secure its removal from the register and the action would be initiated by him rather than the County Council. The proposal to look at all commons with a view to establishing priority for management schemes is set out in (i) above.

(x) As stated above, if ownership of land is to come to mean little, because of public rights of access, the owner should be entitled to require a public body to acquire it. If not the land remains his, subject to such rights of common as may exist in respect of it, and if they cease to exist, the freehold should be his to deal with as he thinks fit, subject to planning and other controls.

(xi) If the Nature Conservancy Council are to have the right to restrict public rights of access, which otherwise would be granted, there should be statutory provisions to require the Council to acquire the land. There is no objection to the Nature Conservancy Council having a power of veto provided, in the exercise thereof, they are prepared to back it up with Government money. It is difficult to envisage a situation where the Council would merely wish to oppose a management scheme, if they were not opposed to public access itself.

(xii) These could be valuable and certainly would enable more progress to be made in the early stages after new legislation. Precedents tend to be relied upon by those drawing up bye-laws, schemes etc. and the absence of precedents can be a common excuse for doing nothing or doing it very slowly. Models should prevent that excuse being raised but any models should not be thought to be totally exhaustive.

(xiii) This is difficult to answer until positive proposals as to how schemes are to be administered and what they are supposed to cover is known. The Government should indicate their ideas on the matters to be covered. Simple national standards rather than differences from place to place are in general to be preferred in order that the public are aware of the general nature of the contents of schemes in so far as they affect the public generally. Schemes should not include provisions which in practice are unenforceable and which will not be followed.

Under Section 9 Countryside Act 1968 County and District Councils, the GLC, and London Boroughs and National Park Authorities have powers for the provision of facilities and services in respect of common land to which the public have rights of access, either as of right or by virtue of an access agreement. The powers are most useful particularly in respect of areas covered by access agreements, but it is important that in proposals for new legislation this section is considered so that overlapping and alternative provisions do not arise.

A possible solution would be to restrict section to access agreements, if general public access is not to proceed, and for the new legislation and the management schemes arising therefrom to deal with all aspects of registered commons not being the subject of access agreements. Moreover, if general public access is to be granted as of

right, serious consideration will have to be given to the large area of rural commons covered by access agreements. They have been negotiated and agreed and preserve the balance between access by the general public and facilities for them on the one hand, and the interests of agriculture both from the owners' and commoners' point of view on the other. The role of local authorities under these agreements will also require detailed consideration.

(xiv) This seems sensible.

(xv) It is felt that any action which reduces the powers of a landowner over his land should give him in principle a right of compensation. The same should apply to commoners whose rights are restricted. Bearing in mind that common land is in no way evenly spread across the country, and that the financial resources of a County Council in whose area there is a very large proportion of common land are likely to be lower than the resources of a Council where the use of land is not so constrained, the money required for this sort of compensation will need special grant arrangements.

(xvi) If the common land has in practice ceased to be usable by the owner or the commoners for the exercise of their rights, and is in effect an area subject to public rights of access, it would be desirable to have provision whereby public access and indeed any other rights over the land might be limited to enable afforestation to take place under the Forestry Commission's schemes. And if no public access is given it should be open to the owner and commoners together to agree to afforestation so that the schemes can apply. This would imply that the owners and commoners for one reason or another did not wish to exercise their own rights in respect of the land. If the owners and commoners do not agree that afforestation should take place it would seem that compulsory powers with compensation would be necessary, otherwise one party or the other would be prejudiced. If there are no common rights the owner's agreement alone would suffice as at present.

(xvii) The views of the Working Party as expressed in paragraph 3.5 of the Working Party report are agreed.

The base for an updating should be the Commons Registration Act 1965 and it should apply to all land registered thereunder.

If any area of common land is changed to become ordinary freehold by one of the legal procedures, Section 194 should cease to apply to that land.

A private members Bill, the Access to Commons and Open Country Bill 1978 attempts, inter alia, to modify Sections 193 and 194 of the Law of Property Act 1925. The Department of the Environment is understood not to support this bill, since it cuts across the present consultations, and the Association support that attitude. It is undesirable that new legislation should be introduced in a piecemeal manner. See also (xxiv) below.

(xviii) Government departments ought to be subject to the same constraints as other public bodies and private individuals so far as possible. The exemption of Government departments from requirements imposed on others may not necessarily lead to an abuse of power, but it leads to a fear in the public mind that it will do so. The armed forces should also be subject to such constraints.

(xix) Yes, not least in the interests of restoring overgrazed or overused common land to good condition. Any powers should be subject to appropriate safeguards to be used sparingly. A management committee could deal with the implementation of the powers.

(xx) The views expressed by the Working Party in chapter 3.12 are accepted.

(xxi) This is favoured. Although comparatively few cases occur each year, the present provisions enabling exchange of land do have advantages, and it may well be that they are little used because they are not widely known. That would be no reason for abolishing them.

(xxii) The changes envisaged are not a tightening up of the present law but a radical change, which is considered undesirable.

It is felt that a final registration of common land can only be conclusive as at the date of final registration. It cannot prove or be used to prove that nothing to affect its status can have occurred between the date of final registration and the current date, although it must be for the person alleging that something has happened since the date of final registration to adduce evidence with a view to variation of the register. The provisions relating to definitive

rights of way maps are analogous; they are conclusive evidence as at the relevant date but any subsequent order can override. However, if under the procedure suggested earlier in these replies a management scheme has been published and confirmed, the public rights of access thereunder would of course be in perpetuity and therefore the status of the land as common land would be permanently established.

(xxiii) There is already a statutory process in Section 13 of the Commons Registration Act 1965 and Regulation 27 of The Commons Registration (General) Regulations 1966 which is considered to be quite adequate. Any attempt at retrospective legislation will not be supported.

(xxiv) Undoubtedly Section 194 of the Law of Property Act 1925 needs to be updated since the problems referred to in chapter 3.22 of the Working Party report are considerable. The consent of the Secretary of State to works of various kinds may well be a suitable safeguard, but constraints of that kind should not be such as to inhibit works to make the land better for its proper use as common land in the interests of the commoners, whether or not the public have access to it. See also (xvii) above.

(xxv) No. If land is registered as common, or if the landowner or anybody else has registered ownership of a common, but no-one has registered any rights of common, it would be wrong for the Commons Commissioners to reopen the question of whether rights of common existed. If there had been rights of common which nobody registered, there is no reason why they should have the rights which they failed to register restored to them. The rights of common could hardly be given to any body else and it is submitted that the judgment in *C.E.G.B. v. Clwyd County Council* was right. If somebody has registered ownership of common land, but nobody has registered any rights of common, it is proper that the owner should be entitled to the freehold unencumbered. It could well be that he only registered ownership (if indeed it was the owner who registered ownership) because he feared that it might be common and not because he believed that it was. And there is no reason why he should be deprived of the benefit to him deriving from the failure of anyone to register rights of common, since it is quite conceivable that there were no rights of common to register anyhow. A closing date for registration must mean something and the issue should not be reopened by the Commons

Commissioners or anybody else. The logical sequel to the absence of common rights is that the owner should be entitled to treat his land as free from common rights; it is no reason for depriving him of his ownership of the land free of common rights. It is realised, of course, that there are areas of common land where there are no rights of common in existence and which are properly registered as waste of the manor within the definition in Section 22.

Except when land is properly registered as common land being waste of a Manor, it must be understood that where land is registered as common but no rights of common are registered, the land must be privately owned property and the rights of the private owner respected. The fact that one person has a private right of way over another's land is no reason for turning it into a public right of way, least of all if the dominant and servient tenements are merged. Similar principles should apply to commons.

(xxvi) The proposal that provision be made for removing from the register land registered mistakenly or erroneously is welcomed. Apart from the points raised in the Working Party report regarding genuinely aggrieved owners, there are also cases of land which is really village green but registered as common land, and also land registered as village green which is really highway verge. These latter cases give rise to considerable problems over the grant of vehicular access to adjacent property from the carriageway. Compulsory purchase is currently the only way of overcoming this.

It is imperative that any provisions of new legislation do not open the door to wider claims, thereby undermining the stability, such as it is, of the registers. Whilst appreciating the cautious attitude of the Working Party as set out in chapter 4.10 of their report, the costs of proceedings in the High Court might lead to a large number of cases being unresolved, and therefore a course such as that recommended in chapter 4.11 is to be preferred. But it would be much simpler for the registration authority of its own volition to refer a matter direct to the Commons Commissioner without the intervention of the Secretary of State. County Councils have existing machinery through the Commons Commissioner which would perhaps mitigate long delays.

(xxvii) Clearly there needs to be some procedure of the kind set out in this question. It is suggested that there should be some

procedure for advertising for the owner rather on the lines of compulsory acquisition of land in unknown ownership with a view to the land being vested in an appropriate public body. In some cases where a common is small it will be entirely appropriate for it to be the Parish Council. In others it may well be the case that the boundaries of a particular common far transcend parish boundaries and for that reason, and to secure unity of management, it would be desirable for the County Council to be the acquiring authority. In some places there will be much to be said for it being a National Park Authority, or the Nature Conservancy Council, or other specialist body to become the owner, whether or not public access were to be granted.

So far as village greens are concerned, however, clearly the Parish Council is the appropriate body.

At present there is no mandatory provision requiring changes of ownership to be notified to the Registration Authority for the Register to be amended. Such a provision would clearly be beneficial to the Authority and the public alike.

(xxviii) Method 1 as set out in chapter 5.10 of the Working Party report is to be preferred, although the owner of land might well be less aggrieved if a public body acquired land from him by adverse possession over twelve years, rather than following a comparatively short period for objection. There can undoubtedly be all sorts of circumstances in which an owner would not become aware that he must act quickly if he is to prevent being dispossessed, and if method 1 is to be adopted, it is suggested that there should be either a long period for objection or perhaps a second period for objection if no objection is raised during the first; so that if by any chance the owner is, for example, out of the country during the whole period first set aside for objections, there would be another chance.

(xxix) It is felt that village greens and common land should
(xxx) be kept separate. As far as practicalities are concerned the two entities are entirely different, and whilst it is a problem to inform the public of the difference where the difference is relevant, there are clear differences in what could or should be allowed on them and these differences would be difficult to preserve if the registers were merged. For example, it is suggested that on a village green the Parish Council should have modest powers to place

or remove trees, shrubs, plants, seats, shelters, noticeboards etc. and to enclose the green to prevent parking or other unlawful use. It would also be useful for the Parish Council to have power to construct buildings, for example a village hall, cricket pavilion or public lavatories, though this power should be subject to certain constraints, e.g. by making it subject to advance publicity and a poll with a specified percentage majority, or a reference to the Secretary of State. Furthermore, land may have been registered as village green for a variety of reasons, but if it was registered specifically because there was a customary right to play football and/or cricket upon it, it would be most unfortunate if it were now to be treated as common and perhaps made subject to public access. This would inhibit the exercise of the customary right which led to its becoming village green in the first instance. Village feuds are by no means obsolete and the present situation could easily lead to the possibility of friction between those wanting public access all over a village green, and those wanting to play a specific game at certain times in a specific part of the green, as they have been able to do for perhaps a century or more. Subject to these safeguards it is considered that the rights of access should be extended from the inhabitants of the locality to the general public. Merger of the two registers is more likely to enhance this problem than resolve it, and indeed even if village greens remain on a separate register there needs to be clarification on this issue.

There are also problems as mentioned above where highway verge has been registered as village green. For various reasons registration was not objected to by the Highway Authority, and in relation to such land there ought at least to be provision for those requiring access, with vehicles, between adjacent premises and the carriageway, to have such access. Whilst registration of highway verge as village green may not have been effected with a view to preventing the owners of property constructing a drive over the highway verge, if and when they get cars, it would be wrong for an authority to insist that the owner of property should not be able to keep his car on his own property. It is appreciated that the definition of Common Land in the 1965 Act specifically excludes any part of a highway, whereas this part of the definition is not repeated in the definition of Village Green. However, to resolve any ambiguity there ought to be specific provisions to enable access, if there cannot be provision to

adjust the situation and get land which is not really village green but merely highway verge, revested in either the highway authority or the frontager, as may be appropriate.

CONSULTATION DOCUMENT AND REPORT OF THE INTER-DEPARTMENTAL WORKING PARTY ON COMMONS.

Comments by the Commons, Open Spaces and Footpaths Preservation Society

Introduction

1. The Commons, Open Spaces and Footpaths Preservation Society was founded in 1865. Its objects are as follows:
 - to preserve commons, public open spaces and greens for public use in both town and country
 - to preserve existing footpaths for walkers and bridleways for walkers, horseriders and pedal cyclists
 - to secure the creation of new footpaths and bridleways for the benefit of the public
 - to protect the beauty and promote the fullest enjoyment by the public of the countryside, especially the immediate environment of commons, greens, open spaces and public paths
 - to obtain and preserve public access to open country
 - and in pursuance of the foregoing objects to advise and assist local authorities, commoners and interested members of the public on any matters arising, relating to these objects.
2. The Society welcomes the publication of the Consultation Document and Report of the Working Party while regretting that more than 20 years have passed since the Royal Commission on Common Land made the recommendations upon which they are based.
3. Nowhere in the Consultation Document or the Working Party Report is there any definition of "common land" or "rights of common". The Commons Registration Act 1965 contains limited definitions of both terms. Other Acts of Parliament, eg., the Inclosure Act 1845, have differently worded definitions. But what of the future?
4. Ultimately, all common land will be registered under the 1965 Act and the definitions in that Act will, in the absence of further legislation, supersede all other definitions. Reference is made below to the unsatisfactory judicial interpretation of part of the definition of "common land" (paragraph 48 below) and attention is drawn to the Bill presented to Parliament by Mr. Arthur Blenkinsop, MP. which seeks, inter alia, to rectify this, a copy of which is attached.
5. The 1965 Act definitions are not sufficient for incorporation tout court into new legislation arising from these consultations. It will be necessary to have some further definition which is not merely relevant to deciding whether or not land is registerable under the 1965 Act. A general definition on the following lines will be required: "'Common Land' means land which is for the time being registered under the Commons Registration Act 1965 and 'rights of common' means rights which are for the time being registered either provisionally or finally, under the said Act". A definition of this type would also embrace town or village greens if the proposals in Chapter V of the Working Party Report are enacted (see paragraphs 58 and 59 below).

6. It is implicit in the Working Party Report that new legislation should not await completion of the registration process. The Society strongly endorses this. At the present rate of progress the existing complement of Commons Commissioners cannot hope to determine all outstanding disputed registrations for many years. The Society urges the Government to look carefully again at the suggestion by the Royal Commission on Common Land (paragraph 294 of their Report) that County Court Judges might act as part time Commissioners. Consideration should also be given to appointing part time Commissioners from barristers or solicitors with appropriate experience.

7. In this paper the following definitions apply -

- (a) "The Report" means the Report of the Interdepartmental Working Party;
- (b) "Local authority" means the council of a county, district, London Borough, parish or community, and the Greater London Council.
- (c) "RC Report" means the Report of the Royal Commission on Common Land (Cmd. 462, 1958).
- (d) "The 1965 Act" means the Commons Registration Act 1965.

8. Public Access to Commons.

The Society wholeheartedly supports the extension of a public right of access to all common land and concurs with the reasoning of the working party (Report paras. 1.6 to 1.9) and of the Royal Commission on Common Land (RC Report paras. 314 - 318)

9. Restriction on public access

The Society agrees that it should be possible to restrict or control the public right of access in some circumstances. In no case, however, should restrictions be imposed save under a statutory scheme of management.

10. The Society thus disagrees with para 1.11 of the Report. There is no logical reason why the armed forces should be placed in a privileged position in this respect. Since common land held for defence purposes will be subject to a statutory public right of access it is correct that the suspension of that right should be scrutinised publicly before it can take effect; such scrutiny would result from the procedure to be carried through for making a management scheme.
11. It should not be possible under a scheme to restrict public access permanently. If this was done, the land would cease to have one of the essential characteristics of common land (i.e. public access). If permanent restriction is desired it should be necessary to follow the appropriate statutory procedure for enclosing the land so that it ceases to be common.
12. Temporary restrictions of the sort mentioned in para 1.12 of the Report should be permitted under a scheme of management if they are for the benefit of the land or the public or the commoners (if any). A provision akin to section 69 of the National Parks and Access to the Countryside Act 1949 (suspension of public access to avoid exceptional risk of fire) would also be acceptable. If the restrictions involve the carrying out of works or the erection of fences, the Secretary of State's consent will be required under section 194 of the Law of Property Act 1925 (or its replacement). Where the works etc. are needed at the inception of the scheme, consent can be sought by the promoters at the same time as consent for the scheme itself, thus saving time and expense.

13. Small scale temporary fencing of dangerous areas or to permit re-generation of herbage could be permitted without Ministerial or other sanction, subject to limits both as to duration and area.
14. The rights of access should be expressed in the legislation in positive terms (as in section 193 of the Law of Property Act 1925) and the general restrictions in the Second Schedule to the National Parks and Access to the Countryside Act 1949 should be applied to the right of access in such a way that a breach of them would be a criminal offence (Report para.1.14). If necessary, a saving for those lawfully exercising common rights or rights of ownership should be added.
15. The Society favours retention of section 193 (1)(b) of the 1925 Act in cases where a formal scheme is unnecessary and the Second Schedule restrictions are not wide enough.
16. The Society does not favour the exclusion of the areas of common described in para.1.15 of the Report from the public right of access. Here a common is entirely surrounded by other land it would be better to seek ways of giving public access e.g. by means of a public path creation agreement or order.

Horse Riding

17. The Society favours the first recommendation in para.1.17 of the Report, namely that horse riding should be excluded from the universal right of public access but that it should be possible to provide under a scheme of management access for riders greater than that available on existing bridleways. This could take the form of marked horse rides, free access to designated areas or universal access to a whole common for limited periods, or a combination of these methods. If access is limited it will be easier to provide an adequate surface for areas where riders can go.

18. Occupiers Liability Act 1957

The Society is not opposed to the recommendation that the Occupiers' Liability Act should not apply to persons using common land and town/village greens as of right for air and exercise (para.1.19)

Statutory Schemes for Management

19. The Society is strongly of the opinion that fresh arrangements are needed for statutory management schemes. The deficiencies of much of the existing legislation are clearly described in Annex D to the Report, and further evidence can be found throughout the RC Report.
20. The Society is in broad agreement with the Report's conclusions -
 - (a) that the owner of a common, any of the common right holders or any local authority, acting either separately or in conjunction with other interests should be able to promote a scheme for the management and improvement of the common (Report para. 2.9);
 - (b) that there should be prior consultation with interested local bodies, regional representations of Government Departments and Agencies, and, where applicable, the National Park Authority (Report para. 2.19);
 - (c) that publicity should be given by the promoters to a proposed scheme and notification given to bodies like the Society (Report para. 2.19)
21. The Society does not favour approval of each scheme by Parliament (Report para.2.10). It agrees strongly with the Report (para. 2.15) that approval should be in the hands of the Secretary of State, for the following reasons -
 - (a) For more than a century the Department of the Environment and its predecessors have approved schemes of management for commons under statutory powers. The Society is not aware of any dissatisfaction with the Department's exercise of its powers and

feels that the expertise built up over the years should not be dissipated without good reason;

(b) if the Department is to prepare model schemes of management it will have to retain staff not only to draft the models but also to advise on their application; for the Department to retain its powers of approval would not entail a greater need for men or money.

(c) The fact that most commons management schemes are and will be of local concern is, perhaps paradoxically, a reason for approval to be vested in a disinterested body which has no local axe to grind.

(d) It is desirable that some uniformity of approach should be adopted towards management schemes but within a flexible framework. An analogy can be drawn with the procedure for the approval of local authorities' byelaws by the Home Secretary - his role is presumably to ensure that byelaws are reasonable and do not conflict with the general law.

(e) If a provision akin to section 194 of the Law of Property Act 1925 is retained, the Secretary of State will have a continuing role in the management of commons;

(f) County Councils do not, on the whole, have any experience in the management of commons and even less in the approving of schemes.

(g) On a practical level, there are undoubtedly commons which straddle local authority boundaries - who would approve a scheme in such circumstances?

22. At present, the State's statutory functions in relation to commons in Wales are exercised by the Secretary of State for Wales. Under the Wales Act 1978 most of these will ultimately be transferred to the Welsh Assembly (if and when established). It would be appropriate, therefore, that power to approve schemes of management in Wales should be vested in the Welsh Assembly.
23. County Councils should be required to review at 10 yearly intervals all common land for which no scheme of management exists (under present legislation or any new legislation) and consult other local authorities, local organisations, regional offices of Government agencies (e.g. Nature Conservancy Council, Countryside Commission) and relevant Government Departments as to the desirability of making schemes for any such land.
24. As well as consultations with national park authorities in National Parks, there should also be consultation with advisory committees or the like in Areas of Outstanding Natural Beauty.

Procedure and Consultation for Management Schemes.

25. The position of the owner of the soil of the common is special only in the sense that he is the owner and no-one else is. If one assumes that a public right of access is extended to all commons, the uses to which he will be able to put his common are necessarily limited to those which do not interfere with that right, let alone the rights of the commoners (if any). It follows that he should not have the right to veto a scheme of management but he should be consulted individually if he is not one of the promoters.
26. It should also be made clear in legislation that the rights of the owner of a common should be subject to the terms of a management scheme and only exercisable within it.

27. The Society is not opposed to the suggestion (Report para 2.20) that the agreement of the Nature Conservancy Council should be necessary to a management scheme for a common which is also wholly or partly a national nature reserve. The NCC should have the same powers in relation to Sites of Special Scientific Interest.

Contents of Schemes of Management and Improvement

28. The Society is, as mentioned above (paragraph 21), in favour of the Secretary of State carrying out the function of approving management schemes. It also thinks that his Department should draw up various model schemes of management, just as the Home Office have drawn up model byelaws. It is, too, both logical and desirable that the Secretary of State should provide model rules governing the powers and conduct of committees of management. (Report para 2.22). In drawing up the models, the Department should consult other relevant Ministries and outside bodies, for example, the Society and representatives of commoners and owners.
29. The most important matters which should be covered by a scheme of management are (not in order of importance) -
- (a) Regulation of grazing, including where necessary the adjustment of rights registered under the 1965 Act in accordance with the stock carrying capacity of the common. (Report para. 2.23).
 - (b) Provision for and regulation of improvements to the physical state of a common, eg. regeneration of grass, clearance of scrub, tree planting.
 - (c) Regulation of public access, eg. -
 - (i) Provision of car parks, public lavatories or the like.
 - (ii) Provision of areas for organised games;
 - (iii) Restrictions on access to sensitive areas, eg. SSSIs, nature reserves, areas of regeneration or planting.
 - (d) Provision for byelaws to regulate public behaviour where not covered by the second schedule to the National Parks etc. Act 1949 (see paragraph 14 above).

Afforestation Ploughing and Mineral Working

30. The physical appearance and public enjoyment of a common can be drastically altered by afforestation, ploughing and the extraction of minerals. The Society therefore recommends that these activities should be specifically controlled whether or not a common is regulated under a scheme of management.

- (a) Afforestation - In its evidence to the Royal Commission on Common Land (1956) The Society made the following statement.

"The problem remains in judging, on its merits, the proper use of each common, just as it has done in the past - to balance the traditional uses of common land with other interests without real detriment to the farmer. The solution of such a problem cannot be left to the whim of the owner of the soil of the common as it is left in the case of ordinary freehold land. If the owner is to be permitted to plant on a common, he automatically excludes the public from access to the plantations, and no amendment in the law to enable him thus to exclude the public from parts of commons in connection with his afforestation activities would be tolerated by the Society, unless it provided reasonable machinery for objection and the imposition of safeguards for the interests of the commoners and the public" This remains the Society's view - it is not opposed to tree planting as such, only to too much tree planting. It thinks, therefore, that planting should normally be permitted only within the terms of a scheme of management. Planting outside the terms of a scheme should only

be allowed with the consent of the Secretary of State. Subject to these reservations, the Society is not opposed to adapting the Forestry Commission's Dedication Scheme and Small Woods Scheme so that they can assist tree planting on Commons.

(b) Ploughing - Again, the Society thinks that a proposal to plough up common land as part of a scheme to improve grazing or for any other reason, should require the specific approval of the Secretary of State. The Government has already accepted that ploughing of moorland in National Parks needs to be controlled, as evidenced by their endorsement of the main recommendations of Lord Porchester's report on Exmoor; much common land of course comes within the category of moorland. The Society also notes that under the Dartmoor Commons Bill, at present before Parliament, improvement of pasture by ploughing will not be within the powers of the Dartmoor Commoners' Council.

(c) Mineral workings - Section 194 of the Law of Property Act 1925 does not apply to any buildings etc. lawfully erected in connection with the taking or working of minerals; and section 193 (5) provides that the public's right of access to any common land by virtue of section 193 (1) or (2) shall not prejudice the right of any person to get and remove minerals from the land. The Society sees no reason for retaining these exceptions and therefore would like to see mineral extraction (and any associated works) made subject to the specific consent of the Secretary of State under Section 194, in addition to any planning consent which might be required.

31. Consent in any case referred to in paragraph 30 above could be part and parcel of a scheme of management and no doubt this would normally be the case.

Financial assistance and compensation.

32. The Society is not in favour of compensation payments to the owner of a common merely because a right of public access exists over the common. No compensation was paid in 1926 when a public right of access to many thousands of acres of common was granted by Parliament and, so far as the Society is aware, none has been sought by owners as a condition of granting a right of access by Deed under section 193 of the Law of Property Act 1925. No provision for compensation appears in the Dartmoor Commons Bill consequent upon the extension of public access to all the Dartmoor Commons.
33. The RC Report recommended (paragraph 344) that the suspension of private rights (including common rights) or their acquisition by a public authority under a scheme of management should be compensated. Provisions already exist for the compensation of commoners under Acts of Parliament authorising the compulsory acquisition of land (eg. under the Opencast Coal Act 1958) and it seems to the Society right that the suspension or extinction of rights of common under a scheme of management should be compensated. Similarly, the rights of owners adversely affected by a scheme of management should attract compensation.
34. Compensation should be paid by the promoters of the scheme who should also pay the costs of making the scheme. However, the Secretary of State should not charge for giving his approval, nor for arranging any public inquiry.
35. Apart from agricultural improvement grants, powers should be available for local authorities and the Countryside Commission to provide financial assistance for commons management schemes. In Wales similar powers should also be given to the Welsh Assembly and the Countryside Commission for Wales.

The Safeguarding of Common Land.
Physical Inclosure.

36. The Society has already indicated (paragraph 30 above) that

special controls over certain types of activity on commons are needed. The Society therefore supports retention of the powers of the Secretary of State at present to be found in section 194 (1) of the Law of Property Act 1925. Certain amendments of the section are desirable to clarify and modernise it -

(a) The scope of the section should be widened to cover afforestation, ploughing and mineral extraction (see paragraph 30 above);

(b) The considerations to which the Secretary of State must have regard should be (i) the interests of persons with legal interests in the land (as at present);
(ii) the benefit of the general public;
(iii) the general desirability of conserving natural beauty and amenity (cf. section 11 of the Countryside Act 1968).

37. The administrative procedures for obtaining consent under section 194 should be carried over into new legislation.

Legal Inclosures

38. The procedures for legal inclosures by compulsory purchase described in paras. 3.6 to 3.8 of the Report are satisfactory and should be retained.
39. The Society supports the recommendation (Report para.3.9) that the exemption of Government Departments from obtaining consent from the Secretary of State to inclose Common Land should be removed.
40. The Society also favours the Report's suggestion (paras.3.5 and 3.10) that it should be easier for exchange land or additional land to be provided where works are carried out on common land or such land is inclosed by agreement.
41. The Society does not understand why it would be necessary, for constitutional reasons, to subject Government Departments to section 22 of The Commons Act 1899 by administrative rather than legislative action. There are many Acts of Parliament which, either wholly or in part, bind the Crown and the Society sees no reason why the Crown should not be bound by any legislation which arises from the Consultation Document and Report. It is wrong that Government Departments should be put in a privileged position vis-a-vis the inclosure of common land in that exemption from section 22 could be granted at the whim of the Executive without any control by Parliament.
42. Schedule 1 to the 1899 Act lists a number of Acts relating to inclosure subject to the restrictions of section 22. The schedule should be repealed (perhaps some of the Acts listed therein have themselves been repealed already) and not replaced. The restriction on inclosure without authorisation of the Secretary of State or a special Act of Parliament should apply to an inclosure of common land purporting to be made under any Act of Parliament whenever passed.

Suspension of Common Rights

43. The Society agrees with the recommendations (Report para.3.11) that it should be possible to suspend rights of common for a temporary period. Suspension of public rights of way for a limited period is possible under the Mineral Working Act 1951 and the Coal Industry Act 1975 so precedents exist.
44. The Society supports the recommendation in the Report (para 3.12) that the general inclosure legislation, including the Commons Act 1876, should be repealed and that the right of "improvement" should be abolished. Inclosure would then only be possible through a statutory procedure based on a re-enacted section 22 of the Commons Act 1899.

45. The Society also supports the recommendation for retention of an exchange procedure (Report para. 3.13)

The Registration System

46. Paras 3.16 to 3.23 of the Report set out clearly the weaknesses of the registration system for common land and how Parliament's intentions expressed in the 1965 Act have been frustrated by judicial decisions.

47. The remedies proposed in para. 3.24 of the Report are generally acceptable to the Society but there are some additional points that need to be made. -

(a) the final registration of land or rights of common should be conclusive until the register is amended as a result of a change in the status of the land or a change in the rights. All parts of the register should be conclusive, the effect of which would be to place a duty on anyone who acquires common land to register his ownership. There should also be a formal requirement that any changes in ownership must be registered. It would too, have the effect of requiring changes in the ownership or quantification of common rights to be registered, thus widening the scope of regulation 29 of the Commons Registration (General Regulations) 1966.

(b) All land (i.e., commons and village/town greens) and rights of common should be registered under the 1965 Act (or any replacement of it) whether or not they are registered under the Land Registration Acts. The registers maintained under the 1965 Act are open to public inspection but those maintained under the Land Registration Acts are private. The Society would not like to see an incomplete public register of commons and greens since the public will have a right of access to all of them.

(c) The Register of Commons should show whether or not a management scheme is in force (both under existing and new legislation) and a copy of the appropriate document should be attached to the register.

(d) Removal of land from the register should be an administrative formality which would follow a statutory process for changing its status, thus relieving county councils of their present quasi-judicial functions under section 13 of the 1965 Act. The Society firmly supports the recommendation in the RC Report (paragraph 230) that land should only cease to be common if it is compulsorily acquired for other purposes or if it is exchanged for other land of equal suitability, or its status is changed by special Act of Parliament.

(e) Section 194 (1) and (2) of the Law of Property should be extended to all land on the register, whether the registration is final or provisional.

(f) The remedial powers in section 194 (2) should be given to local authorities, owners of the soil, commoners, and those whose access would be affected, i.e., the general public.

(g) The remedial powers themselves need revision. It should be incumbent upon a county court judge to whom an application is made either (a) to order the removal of the offending works and/or restoration of the land to its original state or (b) to require the offender to apply for consent to the Secretary of State for the works etc. to remain. In both cases, the necessary action should be required to be taken within a limited time.

(h) Local authorities should also be empowered to remove any works etc. and/or restore the land to its original condition and charge the cost to the offender.

48. Reversal of the decisions in Central Electricity Generating Board v. Clwyd County Council (1976 1 ALL ER 251) and Box Parish Council v. Lacey ("The Times" 26 May 1978) are urgently necessary. The CEGB case is especially unsatisfactory in that the residents (Clwyd CC) did not appear and no arguments contrary to those of the appellant were put forward. In particular, the attention of the judge was not drawn to the decision by the Chief Commons Commissioner in the Matter of Kingsley Moss, Norley, Cheshire, (Reference No. 5/D/3 dated 25 June 1973) a copy of which is attached.

Mistaken Registration of Land

49. The Society is extremely dubious about the proposals in paras. 4.9 to 4.11 of the Report. The number of "mistaken" registrations appears to be very small and it does not seem worth prejudicing the finality of registration on their account. As the Report points out (para 4.5) the registration/objection procedures were fully publicised - what more could have been done? Sanctions for failing to adhere to time limits are widespread in our legal system (e.g. the Limitation Acts). There may be arguments about the appropriate length of a registration period (why did Parliament decide on three years in the 1965 Act when the RC Report recommended eight?) but there must ultimately be a final date - "sit finis rerum" to quote Lord Crewe.
50. If it becomes possible to remove from the register land "mistakenly" registered, both logic and natural justice demand that the applications to register land or rights "mistakenly" not made before 2 January 1970 should be allowed. The Society has been told of cases where common rights which unquestionably existed prior to that date have been lost through ignorance of the need to register. Re. Turnworth Down, Turnworth, Dorset. (1977 33 P & C.R. 192) is also a case in point.
51. The Society does not favour a reopening of the register to receive new applications and it therefore thinks that special provision to rectify "mistaken" registrations would be wrong.
52. In practical terms, it may be possible to iron out irregularities in boundaries by means of the exchange procedure (see paragraph 45 above). In other cases it may be possible (under the present law and before new legislation is passed, for rights of common to be surrendered over the pieces of land in question followed by an application to remove them from the register.
53. There have been cases where land has been provisionally registered as a common where the evidence shows that it ought to have been registered as a village green (and vice versa). The 1965 Act does not provide for a transfer from one section of the register to another and the Commons Commissioners have taken the view that they cannot fill this gap in the Act by "judicial legislation". It is desirable therefore, that having heard the evidence, they should be empowered to determine the correct status of any provisionally registered land.

Vesting of Common Land

54. The Society has already commented in paragraph 47 (b) above on the matter of the Land Registration Acts referred to in para.5.2. of the Report. It is not sufficient that local authorities have powers to obtain the name of the owner of common land registered under these Acts.

55. The Society considers that normally the appropriate body in which unclaimed common land should be vested is the Parish Council (in Wales, the Community Council) for the area in which the common (or its greater part) lies. However, there may be cases where it would be appropriate for ownership to be vested in the District Council (e.g. where the common is remote from a village centre or extends to more than one parish). Where there is no local council, the common should be vested in the District or London Borough Council but with power for ownership to be transferred to a local council if one subsequently is created in the area.
56. The Society agrees that, by way of exception, unclaimed common land in National Parks should be vested in the national park authority (who could be empowered to delegate management to the appropriate district or local council.)
57. In the interests of speedy finality, the Society favours the first method of vesting proposed in the Report (para.5.10) without any provision for compensation.

Town or Village Greens.

58. The Society supports the proposals (Report paras. 6.4 to 6.7) that the legal status of village greens should be merged with that of common land and that a public right of access should be granted to all village greens.
59. It is thought that the summary ^{powers} in the Inclosure Act 1857 and the Commons Act 1876 are useful and could be incorporated in the restrictions in the Second Schedule to the National Parks etc. Act 1949. At the same time, the power to prosecute under all three Acts or their replacement should be extended to individual members of the public

Conclusion

60. The enactment of legislation on the lines suggested by the Report (as modified in the ways the Society has indicated above) would complete the process of opening the commons of England and Wales to the people which began over 100 years ago with the regulation of the commons in the London metropolis.
61. It will consequently be very important that the public knows where the commons are and that the information is readily available. The Society would therefore like to see common land and village greens depicted on Ordnance Survey maps and has given evidence to that effect to the Ordnance Survey Review Committee as follows -

"Common Land

The Commons Registration Act 1965 provides for the registration of common land on a county basis. In many cases the registrations have become final and the status of the lands in question is thus settled. A large acreage (some 400,000 acres in England and Wales) is subject to a public right of access. The relevant Act of Parliament or Scheme under which access is granted is normally noted on the Register of Common Land. It should therefore be feasible for the registration authorities (county councils) to provide the O.S. with the appropriate information for recording on maps. By identifying National Trust land, the O.S. is already depicting areas of common land to which the public have a right of access under the National Trust Act of 1907 - the Trust owns well over 50,000 acres of common. The Society's proposal would not therefore amount to a new departure for the O.S. and the necessary information could be easily supplied.

The 1965 Act also provided for the registration of village and town greens. By definition, these are areas to which there is public access as of right. We would like these to be shown on the 1:50,000 and 1:25,000 maps as well. Many greens are very small and we appreciate that it may not be possible to show these except perhaps by a symbol."

62. By analogy with the Definitive Maps of public paths, district councils, and perhaps parish/community councils, should have copies of the registers relating to their areas.

Consultation Document on Commons and Report of
the Interdepartmental Working Party

Comments by the Council for the Protection of Rural England

1. The Council for the Protection of Rural England, which was founded in 1926, is a voluntary body of over 30,000 members with branches in nearly every English county.
2. CPRE has an interest in commons as important elements in the rural landscape and as a significant resource for public recreation. Commons have a value for amenity which is complementary to their potential for productive land use, but should not be subordinated to it. The relatively small (and still diminishing) acreage of common land should remain substantially 'unimproved'. Although there is some scope for the improvement of common pasture and for small scale tree planting, commons should no longer be seen as a potential reserve of land for building, intensive agriculture, mining or afforestation.
3. We therefore welcome the prospect of legislation to prevent further losses. Not only should commons in the future enjoy stronger safeguards from encroachment by building or intensive agriculture, but, as the Working Party states, there should also be the fullest possible access rights for the public, and improved arrangements for multiple use.
4. Comprehensive legislation will be necessary to achieve these aims and it must be enacted at the earliest opportunity. An environmental policy for commons has been lacking too long. Second-stage legislation should not await completion of commons registration. The provisions should follow broadly the lines set out by the Working Party. Their report offers useful clarification of a complex subject, and shows a full awareness of commons' value for amenity as well as for more potentially productive uses. We appreciate this opportunity to comment upon some of their main findings and recommendations, and we do so below by way of answers to selected questions in the consultation document.

PUBLIC ACCESS

(1) Should there be a universal right of public access to all common land?

5. Yes (subject to 6 below) this would be a most significant step forward in improving opportunities for public recreation in the countryside. We agree fully with the reasoning of the Royal Commission on Common Land, and of the Working Party, which gave rise to this recommendation. A universal right of public access would be the most important innovation of second-stage legislation. CPRE is pleased to note that the Working Party did not find the more limited approach in the Report's paragraph 1.8 sufficiently persuasive, and that it recognised that 'the amenity movement can be expected to be content with nothing short of the adoption of the Royal Commission's recommendation for universal access'.

(ii) If there is to be such a right, should it be capable of being restricted either permanently or temporarily?

(iii) If so, under what circumstances should such restrictions be applied?

6. CRRS recognises that local circumstances will make it necessary, from time to time and for short periods, to restrict public access. We do not think however that there should be any permanent restrictions, or restrictions covering extensive areas, with the important exception of the general restrictions described in the Working Party's Report paragraph 1.14. These include a general prohibition on the use of vehicles. We regard this as essential for the proper use of common land for public recreation. It is clear that the type of access recommended by the Royal Commission was that covered by the access provisions of the National Parks and Access to the Countryside Act, 1949 - and it is this, and only this, right of access for which we seek to establish a universal right.
7. It is of great importance that no scheme of agricultural improvement or afforestation should be allowed significantly to interfere with the general access right recommended by the Working Party. 'Expensive schemes of land reclamation or afforestation' (para 1.10) have prejudiced public access and have been detrimental to landscapes in many parts of the country; they should certainly not be given carte blanche under the proposed commons management schemes. The needs of nature conservation, where a common or part of one is of scientific importance, can more easily be married to a right of public access than can agricultural improvement, although we acknowledge that there will be circumstances in which generalised access to an entire site will be inappropriate. What restrictions shall apply in the interests of nature conservation will need to be worked out in detail site by site and in the light of the flora and fauna concerned and the anticipated extent of public usage.
8. Afforestation (whether or not grant-aided) should only be practised on a small scale, and there should be no ploughing and fencing of commons for agriculture even though limited methods of pasture improvement may be desirable in the interests of increased productivity.
9. Any restrictions on access should arise only from management schemes (apart from those general ones analogous to Schedule 2 of the 1949 Act) and should be for the benefit of the land or the public or the commoners. We are not convinced that the Armed Services should be exempt, as suggested in paragraph 1.11.
10. We agree with the Working Party (1.13) that it would be unrealistic to expect the promoters of a management scheme to forecast all future needs to restrict access. But management committees should not be permitted to make ad hoc restrictions at their sole discretion (except perhaps in the limited circumstances outlined at the end of 1.13). The Secretary of State should arbitrate most access restrictions, aided where necessary by inspectors at public inquiries.

(iv) What provision, if any, should be made for horse-riding?

11. We appreciate that, compared with walkers, horse-riders have a relatively small network of routes for their exclusive use. However, we believe that few riders would argue that they should be allowed to use public footpaths. To grant riders a general right of access to commons would, we feel, inevitably result in the deterioration of many routes passable on foot. On balance we recommend the first alternative posed by the Working Party (1.17): that

horse-riding be excluded from the universal right of public access, but that special provision be made for riders under commons management schemes.

MANAGEMENT, REGULATION AND IMPROVEMENT

(vi) Are fresh arrangements required for statutory schemes for the management and improvement of common land?

(vii) If so, should they be promotable by the owners of the land, any of the common-right holders or any local authority, acting either separately or in conjunction with other interests?

2. Yes, CIRE finds the Working Party's proposals (summarised in paras. 1 - 5 in Annex A) a sensible approach to the future management of commons. In the interests of all concerned, the maximum feasible local consultations are desirable at an early stage. Indeed, we believe that there is a good case for including representatives of conservation and amenity bodies on committees of management. This is particularly important where proposals for agriculture and forestry improvements are contemplated, or where the commons concerned cover large areas.

13. CFRE welcomes the suggestions in para. 2.19 that there should be provision for publicity for scheme proposals, and for objections to be made to the Secretary of State who would have a discretionary power (2.11) to hold a public inquiry.

(viii) Should such schemes require the approval of a public authority? If so, should this be the Secretary of State or a local authority (eg. the County Council)?

4. There are several advantages to the proposal that schemes should require the approval of the Secretary of State for the Environment. These are recognised by the Working Party; particularly, that the Secretary of State is removed (and seen to be removed) from local pressures. In addition, there would be administrative advantages in the Department's approving schemes, drafting model schemes and advising on their application. We accept that there are a number of arguments (2.14) against giving county councils a formal role in the approval of schemes. However we note with approval that there are a number of functions (2.15) that could usefully be performed by them, including, where appropriate, the promotion of schemes where other interests fail to act.

(xi) Should the Nature Conservancy Council have the right to veto any management scheme relating to common land within a National Nature Reserve?

15. Yes, but the Secretary of State should retain a right to override the veto if he considers it unduly restricts the principle of public access.

(xii) Should the Government prepare model forms of scheme and/or model rules governing the powers and conduct of committees of management?

16. Yes, for the reasons set out by the Working Party in para 2.22. It would

also be advantageous for the Department of the Environment to be able to advise upon the application of model schemes to suit particular circumstances and on the composition of management committees.

(xiii) If so, what are the most important matters to be covered?

17. We feel that the following should be considered in all circumstances: The regulation of grazing and of public access; Provision for and limitations on physical improvements and vegetation changes; Provision of facilities for public access (eg. car parking areas, warden services); Restrictions on improvements and access to sensitive areas, such as areas for wildlife conservation, or eroded areas; Byelaws to regulate public behaviour.

(xvi) Should the Forestry Commission's Dedication Scheme and Small Woods Scheme be adapted to permit assistance to be granted for the afforestation of common land?

18. CIRE recognises that tree-planting is likely to be an integral part of the general tendency to make fuller use of commons under the proposed management schemes. However, as we have already stated, we would not wish to see any large scale afforestation of commons because of the effects this would have upon their traditional appearance and on public access. Thus there should be an effective mechanism to prevent the afforestation of unsuitably large areas. This could be achieved by permitting tree-planting only within the terms of a management scheme, which would require approval by the Secretary of State. Subject to these safeguards, we see no objection in principle to the extension of grant-aid.

THE SAFEGUARDING OF COMMON LAND

(xvii) Should the provision of Section 194 of the Law of Property Act 1925, modified as suggested by the Working Party, be retained?

19. Yes. Physical inclosures (such as fencing) should continue to be subject to the Secretary of State's approval.

(xviii) Should Government Departments continue to be exempted from obtaining Ministerial consent?

20. No. CIRE agrees with the Working Party (para. 3.9) that this exemption should cease. More importantly, we agree with both the Royal Commission and the Working Party that the facility for effecting a legal inclosure of common land should continue to be limited to public authorities.

(xxii) Should a final registration of land or of rights of common be evidence of the matter registered at any current date and not merely at the date of registration, as at the present?

¹ There is confusion in the mind of some local authorities about whether or not the Law of Property Act S193 prevents use of the commons which it governs for certain kinds of organised spectator or vehicular use. We suggest that this is a point which should be clarified by legislation if the law is indeed unclear.

(xxiii) Should land be removable from the register only following statutory process for changing its status?

(xxiv) Should all land on the register be protected from the construction of works or fences without the consent of Parliament or the appropriate Secretary of State?

(xxv) Should provision be made that for the purpose of deciding whether or not to confirm a registration, the Commons Commission must consider whether or not rights of common existed over the land immediately before its registration?

21. The answer to all these questions is yes. The Working Party's Report explains the reasons why all these measures need to be taken 'if posterity is to inherit meaningful registers of practical value, if the registers are not to be progressively eroded, and if the land is to be protected from encroachments and undesirable inclosures'. CPRE wholeheartedly accepts all of these aims. The measures suggested are of the utmost importance and urgency. Indeed, there is a good case for introducing the necessary legislation forthwith.

MISTAKEN REGISTRATION OF LAND

(xxvi) Should there be provision for removing from the register land registered mistakenly or in error?

22. We are concerned about the dangers inherent in the Working Party's proposals for cancelling mistaken registrations. Paragraph 4.9 of the Report states clearly the major difficulty - that of giving a second chance to a wide range of owners of commons and greens to have their land removed from the register. The suggestions in 4.10 and 4.11 do not entirely remove our doubts about this undesirable possibility. We feel that there should not be any new legal provision for removing land registered mistakenly, particularly in view of what the Working Party estimates to be the very small number of relevant cases. We would add that the Working Party has not proposed that registrations 'mistakenly' not made during the relevant period should now be permitted.

THE VESTING OF UNCLAIMED COMMON LAND

(xxvii) Should common land in unknown ownership be vested in Parish Councils or in District Councils where there is no Parish Council?

23. CPRE feels that the Working Party's proposals for vesting unclaimed common land are sensible and practicable. Parish Councils are the appropriate bodies in which ownership should be vested, and District Councils in the absence of the former. We see no objection in principle to national park authorities being owners of common land, but we suspect that the areas of such land in parks are likely to be so small and fragmented as to make them inappropriate for ownership by a single body covering a wide area. We would not therefore wish to see the national park authorities given an exclusive right in this respect.

(xxviii) Which of the methods of voting suggested by the Working Party is preferable?

24. Method 1 would appear the more expeditious, and therefore preferable for this purpose.

TOWN OR VILLAGE GREENS

(xxix) Should town and village greens be brought under the same legal code as that suggested for common land and should the greens register be merged with that for commons?

25. CIRE sees no reason to disagree with the Working Party's conclusions and recommendations on town and village greens. The merging of the two separate registers would be a useful simplification, and the adoption of a common legal code for commons and greens would have a similar effect without exposing the latter to new risks of inclosure.

February 1979

COMMON LAND

Report of the Interdepartmental Working Party and Department of the
Environment/Welsh Office Consultation Document

1. The National Farmers' Union welcomes the opportunity to comment on the report of the Working Party and the consultation document. Many of our members hold common rights and will therefore have a direct interest in ensuring the efficient management and utilisation of common land.
2. The Union accepts the importance of some commons as a potential source of land for public access and for purposes of open-air recreation. However it should always be borne in mind that land is common land because of the rights that exist or once existed over that land for a number of purposes, particularly grazing, for the benefit of residents of the village. Historically therefore the land is only common land to the village, entitling those with rights to undertake activities which are normally connected with the use of the land for agricultural purposes and which they hold in perpetuity. Those rights run with the ownership of property and do not and never have conferred rights on the general public. To that extent therefore the term "common land" is a misnomer.
3. Many commons, particularly in lowland Britain, no longer have any rights attached to them or such rights as do exist may not be used. These commons are of little agricultural importance and tend to be those where the public have taken a de facto access, even though they may have no legal right. However other common land is of very considerable agricultural importance, particularly in upland areas where it is often the open hill vital for summer grazing for hill farms. The relationship between hill grazing and in-bye, or enclosed, land is of fundamental importance in maintaining the viability of hill farms. If legal or practical restrictions are placed upon the utilisation of those grazing rights it would lead to the farmer having to rely more on in-bye land for summer grazing, thereby reducing the forage that he can conserve for winter and adversely affecting the stock carrying capacity of the farm. The viability of many hill farms is so finely balanced that anything which jeopardises it must be avoided if healthy hill farming communities are to be maintained.
4. Whilst the law draws no distinction between common land that is subject to

fully utilised common rights and is playing a productive part in the agriculture of the area, and the typical gorse bush common used for little other than recreational purposes (whether as of right or not), the Union believes that the needs of the two may be very different. There might in practice therefore be merit in trying to draw a distinction between commons that are of agricultural importance and those that are not, but we accept that the legislative problems involved would be such that it is unlikely to be feasible.

5. However great the need for open land for recreational purposes it is essential that any legislation concerned with common land should preserve the rights of the commoners. It is a long established principle that neither the Lord of the Manor nor the Secretary of State should do anything which substantially interferes with those rights and with the commoner's peaceful enjoyment of them. In the Union's view this is still the fundamental criterion and questions of public access and the use of common land for recreational purposes must be considered in this light.

6. Our comments on the issues raised in paragraph 6 of the consultation document are as follows:-

(i) The Union is strongly opposed to the suggestion that there should be a universal right of public access to all common land, and is disappointed that the Working Party failed to look more carefully into the implications of this proposal. We fully support the fears expressed by the Forestry Commission in paragraph 1.9 of the Working Party's report and have no doubt whatsoever that these fears are well founded. What the public have been granted they are naturally reluctant to give up and if a general right of public access to all common land was provided by legislation it would be extremely difficult effectively to restrict that access by a subsequent management plan. The Union therefore supports the proposals in paragraph 1.8 of the report and believes that this is the sensible and practical way to increase public access without giving rise to unnecessary conflict. To grant a general right of public access and then restrict it would in our view be bad legislation leading to just those uncertainties and conflicts that we would like to see avoided. Common land is land held in private ownership and subject to rights held only by those living close to it. Some of it may be ploughed, some of it will be fenced and there will be much that the public are unaware is common land, because it is far removed from the commonly accepted concept of "a common". General access to all this land is completely inappropriate. The Union accepts that public access to much common land could be increased but this must be done in such a way that it

is complementary with and not detrimental to the other uses of the common and therefore as part of a management scheme. Where no common rights exist then access over the whole common would seem appropriate, subject to any possible restrictions for nature conservation reasons, but where the common land is utilised for agricultural purposes then access must be consistent with safeguarding the commoners' rights, and tailored accordingly. We cannot agree with the suggestion in paragraph 1.8 that a management scheme "would not be confirmed unless it made adequate provision for public access to the whole or part of the common". This is not something that can be pre-judged. There may be circumstances when access to any part of the common, except long-existing rights of way, would be inappropriate and every case should be considered on the circumstances of that common. We would however accept that management committees should be under an obligation to give proper consideration to public access when drawing up management schemes. The Union accepts the principle of increased public access to common land but believes that this must be introduced as part of the overall pattern for the proper management of that land.

- (ii) If, against the interests of the commoners and the freehold owners, a universal right of public access was introduced it must be capable of being restricted both permanently and temporarily. The means of imposing such restrictions should be either through schemes of management or by by-laws and to prevent the problems we foresee in para.(i) above arising we believe that either the enabling legislation must itself impose restrictions on public access to agriculturally important commons, or that its implementation must be delayed until management schemes have been introduced under which the access can be controlled to adequately protect the rights of the commoners.
- (iii) These restrictions would be necessary to protect common rights and allow agricultural improvement, as well as taking account of other issues such as fire prevention, conservation, erosion, animal health, protection of game and the need to keep dogs off the land during the lambing period.
- (iv) Because of the damage that can be done by horse-riding, the Union believes that the right to ride on common land must be restricted to bridlepaths, though again we believe that schemes of management could look carefully at the possibility of providing new bridlepaths, and to improving the existing network of bridlepaths.
- (v) The Union fully supports the Working Party's recommendation that there should be an exclusion under Section 1(4) of the Occupiers Liability Act 1957 in

respect of persons using common land for air and exercise.

- (vi) Whilst many schemes of management have been implemented the Union believes that there is a clear need to simplify the introduction of schemes covering all aspects of the management and regulation of common land, including the question of public access. We therefore believe that fresh arrangements are required for statutory management schemes.
- (vii) The Union believes that management schemes should be promoted by a local or management committee. That committee must have a majority representation of holders of common rights, together with the owner, the local authority and parish councils. Depending upon the size of the common and the use made of it for recreational purposes it may be appropriate to have a representative of the recreational interests, but fundamentally the management of the common should be a local issue and in the hands of those who use it. If there is no management committee then either the owner of the land or any of the common right holders should be able to promote a scheme and in the event of there being no common right holders the owner of the land or the local authority.
- (viii) The Union accepts the need for proper consultation in the drawing up of management schemes and that advice should be given on this in any notes of guidance prepared. However the Union would not want to see the County Council becoming involved in advertising the proposals and receiving objections, etc. We believe that this would be an unwelcome and an unnecessary increase in bureaucracy which would only delay the implementation of schemes. As the report makes very clear commons are an issue of local concern and their management should be determined by locals. Because of the importance of much common land for agriculture the Union believes there is a strong case that the Ministry of Agriculture, Fisheries and Food should be the appropriate national authority for the approval of management schemes, particularly in view of their wide experience of land management and the wider role envisaged for them under the Strutt Report. Whilst there may be a case for the National Park Authority being the appropriate body in National Parks we believe that the Ministry of Agriculture or the Department of the Environment acting in consultation with the Ministry should be the appropriate authority to approve schemes.
- (ix) The Union believes that on balance the Working Party are right in rejecting the suggestion that county councils should have a duty to examine all commons in their area at intervals of not less than ten years. The Union

is not convinced that a statutory duty to do this would have any direct benefits, and it is likely that many county councils would fail to comply with it.

- (x) The Union believes that the owner of the common land should certainly be entitled to be represented on any management committee and to be consulted on all matters to do with the common. Though we believe that the power of veto may be used to block improvements of the common we feel that the owner should perhaps be entitled to something more than merely a voice in the management of the common. We would therefore suggest that further consideration be given to the Working Party's suggestion that the owner might be able to demand a public local inquiry, or alternatively that he should be able to veto management schemes unless there were, say, a 75% majority of the Management Committee in favour of the scheme.
- (xi) So far as we are aware a national nature reserve can only be established if the land has been purchased by the NCC or is subject to a nature reserve lease or agreement. In the latter event we would assume that the terms of the lease or agreement would ensure management of the land in a manner compatible with the natural history interest and we cannot therefore see that management schemes could be introduced which would be harmful to that interest. However if this is not in fact the situation we would certainly agree that the NCC should be represented on any management committee.
- (xii) The Union believes there may be considerable merit in the Secretary of State preparing guidance on schemes of management and the conduct of Management Committees, but because the circumstances of every common are likely to be different we doubt whether model forms of scheme would be found very appropriate. If they were introduced they should certainly be for guidance only and it should not be mandatory that they are followed in detail.
- (xiii) If advisory model forms of scheme are produced the Union believes they could cover such issues as the control of access and bye-laws to cover such access, the management of stocking or cultivation and the composition and procedural rules for management committees.
- (xiv) The Union believes that there is a very definite need to be able to adjust the rights of grazing so that they may be geared to the stock-carrying capacity of the common. Commons suffer from problems of under-grazing as well as over-grazing and where the total of the stints is less than the carrying capacity of the common it should be possible to add to the stints. Problems may well arise where certain stints are not used and further

thought may need to be given to the problems of under-grazing for this reason. The Union would however point out that common rights are a valuable asset to many farms that will affect the capital value of the holding and may be allowed for in the terms of the tenancy agreement. Following the registration procedures under the Commons Registration Act 1965, the rights now have a legislative standing and to reduce them could reduce the value of the farmer's interest in the land. Reductions to grazing rights should therefore only be by decision of a management committee on which commoners have a majority, and they should be on a pro rata basis amongst all right holders.

- (xv) The Union believes that management schemes should provide for the payment of compensation to common right holders if the operation of the scheme will adversely affect their rights in the interests of the general public. For example, if the scheme results in part of the common being set aside for public recreation, or an increase in general public access which necessitates a reduction in the stints, there must on grounds of equity be provision for compensation and we would suggest that this would help to reduce conflict over schemes that seek to increase public usage of commons at the expense of the commoners.
- (xvi) The Union believes that the question of afforestation should be considered as part of a management scheme by the management committee. We therefore believe that the Forestry Commission's dedication schemes and small woods scheme should be adapted to permit assistance to be granted for the afforestation of common land, but that such afforestation should only be with the approval of the management committee.
- (xvii) The Union agrees that Section 194 of the Law of Property Act 1925 should be retained and modified as suggested by the working party.
- (xviii) The Union can see no reason why the Government should be exempt from obtaining Ministerial consent under Section 22 of the Commons Act 1899 and we agree with the recommendation of the working party that this exemption should be removed.
- (xix) The Union accepts that circumstances may arise where the ability temporarily to suspend common rights would be of benefit and therefore accepts this recommendation. We would suggest that consideration should also be given to enabling management committees temporarily to suspend common rights for management purposes and subject to adequate safeguards.

- (xx) We can see no reason for the retention of the enclosure provisions of the Commons Act 1876 and of "improvement" and agree with the working party that these should be abolished.
- (xxi) The Union agrees that provision on similar lines to Section 147 of the Inclosure Act 1845 should be retained.
- (xxii) The Union accepts that the Commons Registration Act 1965 was deficient in a number of respects and has led to certain anomalies and practical difficulties that need to be rectified. If it was the intention of the Act that all land registered as common land under it would remain common land unless removed by one of the recognised legal processes, then it would seem to us that it is the definition of common land within the Act that is at fault and not whether the registration relates to the current date or merely the date of registration. It is illogical that a registration of, for example, grazing rights should still be relevant if those grazing rights no longer exist. We cannot see how that could be a "meaningful register of practical value" as is sought by the working party. In the same way we would doubt the value of having the land registered as common land if it is no longer common land within the definition of the Act, though we would point out that the result of the Goff judgment would only seem to apply to cases where the original registration was objected to and there would seem to be no practical means under the Act of removing land from the register that does not come within the terms of the definition of common land in the Act if an objection was not lodged as prescribed. This is one of the anomalies that we believe should be dealt with. If it is thought necessary to give greater protection to land registered as common land then we believe that this should be a policy decision either to amend the definition of common land or by the proposal in para. xxiii below. We have considerable doubts as to the merits of the working party's recommendation that the final registration should be evidence of the matter registered at any current date and believe that this could add to confusion. However there might be merit in distinguishing between the registration of land and the registration of rights of common with the former being evidence of the matter registered at any current date and the latter being subject to up-dating. This would overcome the problem of land being removed from the register as a result of the Goff judgment, but would enable registers of common rights to be kept up-to-date and we believe there is a very substantial practical advantage if this could be done. The register of rights is the legislative record of the rights that existed at the relevant date, but these rights will change over the years by purchase, and possibly also under management schemes if the proposal in para. xiv above is adopted. There is

a need for an up-to-date register to be maintained for obvious management purposes and we therefore believe that a simple procedure should be introduced to enable the registers of common rights to be kept correct.

- (xxiii) The Union accepts the proposal that land should only be removable from the register following a statutory process for changing its status. This process should be subject to the approval of the Secretary of State.
- (xxiv) The Union accepts that Section 194 of the Law of Property Act 1925 should apply to all land on the register.
- (xxv) The Union agrees that when dealing with the registration of land the Commons Commissioners should consider whether or not rights of common existed over the land immediately before its registration.
- (xxvi) The Union is aware of a number of cases where land has been registered that it is believed never has been common land or ever subject to circumstances which might genuinely have led to a belief that it was common land. Usually these registrations were not objected to because the land owner had no reason for even considering that part of his land might be registered and therefore did not check the registrations. The Act allows for land to be removed from the registers if it ceases to be common land, but no provision is made for its removal in circumstances where it is claimed that it is not and never has been common land, and no objection was lodged. The Union believes strongly that provision must be made for such registrations to be properly considered and to be removed from the register if it is not established that it is common land. However, we fully support the working party's concern that this should be done in such a manner that it does not present the opportunity to re-open the question of registration on a wider scale and whatever administrative means are used to achieve the rectification of these registrations must be very carefully drafted. On balance the Union supports the proposal in para. 4.10 of the working party report that this should be dealt with in the High Court.
- (xxvii) The Union is strongly of the opinion that common land in unknown ownership should be vested in the Parish Council or the Community Council in Wales. We believe this should apply even in National Parks.
- (xxviii) The Union prefers method 2 for the vesting of this land as set out in para. 5.11 of the report.
- (xxix) The Union does not believe it would be appropriate for town and village greens to be brought under the same legal code as that suggested for common

land as it is thought that there is a substantial difference between village greens and commons.

- (xxx) On balance it is felt that the general public should have a right of access for air and exercise over all town and village greens, though again this should be subject to the control of any management scheme.

7. The Union would like to make a number of additional general points:-

- (a) On a review of parish boundaries the Union believes that wherever possible the boundaries of commons should remain within a single Parish. The management of a common within a single Parish is normally simpler than one split between two or more Parishes and there are therefore advantages in maintaining a common within a Parish.
- (b) We believe further consideration needs to be given to roadside waste and highway verges where common rights have been claimed in order to clear up any anomalies.
- (c) We would point out that the Dartmoor Bill, if enacted, may well give guidance on the effectiveness of a number of the proposals made in the working party report and that careful monitoring of the working of the Bill would be very helpful in drawing up future national legislation on commons.
- (d) In the Union's view there is no doubt that Schedule 2 to the National Parks and Access to the Countryside Act 1949 is largely ineffective in controlling public access. Public access means all things to all people and there can be no doubt that what the public do on common land needs to be subject to an effective right of restriction. This must carry a criminal sanction as suggested by the working party and perhaps this could be best achieved by bye-laws made by the District Council in consultation with the management committee.
- (e) The Union is most concerned that the Interdepartmental Working Party established to identify the various issues and review the arguments for and against alternative courses of action was so unrepresentative of the interests of those with rights to use common land. In view of the agricultural importance of commons we believe that the Working Party should have had a much better balance between the interests of those who use

common land as of historical right and those who use it, or who would like to use for recreational and other purposes.

8. In conclusion we would reiterate our basic opposition to the proposal of a universal right of public access to all common land and our view that increased access to commons that are subject to common rights should only be as part of a management scheme which has been drawn up by a management committee on which the holders of those common rights have a majority.

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COMMON LAND LEGISLATION

Observations on the Report of the Inter-Departmental Working Party

Introduction

The Ramblers' Association is a voluntary organisation and was established as a national body in 1935. Our objects are summarised at the top of this page. The Association has 29,000 individual members and 430 affiliated organisations.

The Association has a long-standing interest in common land. We gave written and oral evidence to the Royal Commission in May 1956; many provisional registrations of common land were made in the name of the Association; and we have on several occasions pressed the Government to introduce second-stage legislation giving effect to the Royal Commission's recommendations (in particular their recommendation made without dissent, to grant a universal right of public access).

We very much welcome the Working Party's Report, and we congratulate the Chairman and his colleagues on producing a clear and thorough analysis of the various issues involved. In general, we are in sympathy with the recommendations. We particularly welcome, of course, the firm recommendation for a universal right of public access.

We urge the Government to introduce legislation at the earliest opportunity. It is over 20 years since the Royal Commission reported and it is over 13 years since the Commons Registration Act 1965. Action on common land has proceeded at a snail's pace in recent decades, and it is essential that the new impetus provided by the Working Party's Report is not allowed to fade away. In particular, we urge the Government to discard the notion that second-stage legislation should await the completion of the hearings into disputed registrations.

These observations follow the structure of the Consultation Document issued along with the Working Party's Report. The questions listed in paragraph 6 of the Document are used as headings for the various points which we offer for consideration. We have confined our comments to the subject of common land; no observations are offered on the questions relating to village greens.

Public Access

(i) Should there be a universal right of public access to all common land?

Yes - without any doubt there should be. It is widely acknowledged that pressure for access to the countryside is growing, and that there is an urgent need to provide more facilities for it. The Countryside Commission have shown in a recent poll that approximately 50% of the population make regular trips into the countryside, and 20% take regular country walks of 2 miles or more. The Country Landowners'

Association have recently prepared a report on public access which acknowledges the growing demand and which offers advice to its members on how best to provide access to their land without diminishing its productive capacity. The remaining areas of common land offer a splendid resource for helping to meet the growing demand for public access. Apart from the obvious benefit to the public, the granting of a right of access to common land will help to relieve pressure on other, more intensively farmed parts of the countryside.

We welcome the fact that there was no dissent to the idea of a universal right of access from the Ministry of Agriculture's representative on the Working Party. On the other hand, we are puzzled by the reservations from the Forestry Commission, recorded in para 1.9. The Commission now allow access on foot to nearly all their own land, and we are not aware that they have encountered any fundamental difficulties as a result. It is contrary to the tenor of their own (enlightened) policy of allowing public access to their forests to be arguing against a universal right of access to common land.

We are very pleased that the Working Party did not adopt the alternative approach to public access outlined in paragraph 1.8 ("the piecemeal extension of public access as and when new schemes of management are formulated".) On the basis of local authorities' poor record in looking after public rights of way, we doubt very much whether "the adoption of this procedure would be likely to act as a spur" to them. There is also the point that the general restrictions on access envisaged by the Royal Commission (and listed in Annex C of the Working Party's Report) would not come into effect until a management scheme were made. Thus, on those commons where problems arise from de facto access at the moment, the owners and commoners would continue to suffer until such time as a special scheme were introduced. It is therefore in their interests, as well as the public's, to have a universal right of access in the form proposed by the Royal Commission. Overall, the Working Party is quite correct to assume that "this alternative for a gradual extension of public rights would be unlikely to commend itself to the amenity movement". The public has already had to wait too long for the implementation of the Royal Commission's recommendation on public access, and if there is any likelihood of its being lost or watered-down we shall do everything possible to generate public and Parliamentary support for a campaign against the alternative being put forward.

- (ii) If there is to be such a right, should it be capable of being restricted permanently or temporarily?
- (iii) If so, under what circumstances should such restrictions be applied?

Restrictions on access will be necessary in a limited range of circumstances, but it is essential to establish first the following two principles:

- (a) That limitations on public access should be very much the exception rather than the rule; and that they should only be applied over very limited areas and/or periods of time. The type of restrictions which we envisage would include, for example: restrictions on the grounds of national security, danger, emergency (e.g., fire), and the restoration of badly-eroded land.

- (b) That common land should be subjected neither to large-scale agricultural intensification nor to extensive conifer afforestation. Such developments would lead to considerable restrictions on access. The open, "unimproved" aspect of most commons is also of great importance to the maintenance of a pleasing and varied landscape, and these characteristics should therefore be retained as far as possible.

We note with alarm the reference in paragraph 1.10 to "expensive schemes of land reclamation or afforestation". The landscape and nature conservation aspects of the countryside have already suffered a great deal as a result of afforestation and extensive "improvement". Common land should be regarded as a reserve of land to be protected against the adverse effects of such developments instead of as land into which these developments can next be extended.

We judge the Working Party's proposals for restrictions on public access (1.11-1.15) in the light of these general observations. Some of the Working Party's proposals are unexceptionable, but we have the following reservations:

- (a) Afforestation (1.12(i)) - we would hope that this would normally take the form of shelter belts* (of hardwood trees wherever possible) and amenity planting only.
- (b) Improvement of land (1.12(ii)) - only if this does not involve extensive fencing, ploughing and transformation of the landscape.
- (c) Organised games and nature conservation (1.12 (iv)) - except in a very few cases, such restrictions should only affect relatively small areas of the commons involved.
- (d) The setting aside "of part of a common for the exclusive use of the public, leaving the remainder for agricultural development or afforestation" (1.12) - we are extremely worried that schemes along these lines will proliferate and the public will find themselves confined to unduly limited parts of each area of common land involved.

With regard to restrictions on access made after a scheme is submitted to and approved by the Secretary of State, we are in agreement with the Working Party in paragraph 1.13. It would be dangerous, from the public's point of view, to empower the management committee (which will, in most cases, consist mainly of those having an interest in the productive aspects of the land) to make restrictions at their sole discretion. Nor would it be appropriate to give this role to the County Council, since it would have been the Secretary of State, and not the Council, who gave approval for the original scheme. All restrictions on access should be approved by the Secretary of State, who should consult organisations with an interest in public access, and who, in important cases, should appoint an Inspector to hold a public inquiry.

We agree with the proposals in paragraph 1.14 whereby "the primary legislation would prescribe restrictions, similar in type to those in the 1949 Act, and there would be further provision to enable limitations to be made by order to suit local needs." Again, we hope the Secretary of State would consult amenity organisations on such matters in the normal way and, where appropriate, hold a public inquiry (this would be necessary in any case if bye-laws were made, as suggested towards the end of paragraph 1.14).

The proposals in paragraph 1.15 regarding "surrounded" common land seem superfluous. There are probably few areas of common in this category and there can be very few indeed that cannot be reached by public footpath or bridleway. To exclude a particular category of common land from the general right of access would be to set an unwelcome precedent, and farmers with an interest in both the common and the adjoining land might seek to "enclose" the common in this way, thus bringing it into the category of "surrounded" common land, exempted from public access. This problem would be aggravated if there were any provision for denying access to common land that is fenced against all roads (such a provision is hinted at in the final sentence of paragraph 1.15 and it is one which we are strongly opposed to). Fencing against roads may increase in extent (the North York Moors National Park Committee is considering the possibility of assisting local farmers in this) and such a provision could therefore lead to loss of public access over very wide areas.

(iv) What provision, if any, should be made for horse riding?

We are naturally concerned about the damage being done to the vegetation, soil and drainage of certain areas of common land by horse riders, and we feel that it would be unwise to include equestrians in the universal right of access (which should therefore be a universal right of access on foot only). On the other hand, we have sympathy for the horse-riders insofar as there is a lamentable lack of bridleways and suitable areas for riding in many parts of the country. We tend to favour the first of the two alternatives suggested by the Working Party in paragraph 1.17, that is, "to exclude horse-riders from the universal right of public access but to enable provision to be made under a scheme of management for the setting out of additional horse rides to augment any existing bridleways". It is of great importance that both new rides and existing bridleways on common land should be properly surfaced, as has successfully been done in, for example, Epping Forest and the Trent Park country park in Enfield. This can be costly, but local authorities (who should be responsible for this work) should be able to apply for grant-aid from the Countryside Commission and should be empowered to obtain further revenue from any local riding stables making heavy use of the common.

(v) Should there be an exclusion under Section 1(4) of the Occupier's Liability Act 1957 in respect of persons using common land for air and exercise?

Yes, we agree with this proposal.

Management, Regulation and Improvement

(vi) Are fresh arrangements required for statutory schemes for the management and improvement of common land?

and:

(vii) If so, should they be promotable by the owner of the land, any of the common right holders or any Local Authority, acting either separately or in conjunction with other interests?

Yes, we broadly agree with the Working Party's proposals, as summarised in Annex A. It is particularly important that local amenity bodies, the Countryside Commission and National Park Authorities (where appropriate) should be involved in the preparation of a management scheme before it is submitted to the Secretary of State. This will increase the likelihood of the scheme being agreed and welcomed by everyone with an

(viii) Should such schemes require the approval of a public authority? If so, should this be a national authority (viz the Secretary of State) or a local authority (e.g., the County Council)? And if the former, should schemes be submitted to him direct or via the County Council?

We regard it as very important that schemes should require the approval of the Secretary of State for the Environment (or of Wales). The approval of the Secretary of State will still be necessary for fencing of common land. This is an important safeguard which has stood the test of time and the principle behind it should be applied to the granting of permission for management schemes generally.

We do not regard it as essential that schemes should be submitted to the Secretary of State through County Councils. The important things are extensive consultation, notices in the press, etc and a right of public objection (with a public inquiry if necessary).

(ix) Are the Working Party right in rejecting the Royal Commission's recommendation that it should be the duty of each County Council to examine all commons in its area at intervals of not less than 10 years?

No. This could usefully be combined with a review of all "open country" in the county (or, in the case of a National Park Authority, in the National Park).

(x) Should the owner of the soil have any special rights?

A right to demand a public inquiry, as recommended by the Working Party, but not to veto a scheme, nor to impose any further restrictions on public access.

(xi) Should the Nature Conservancy Council have the right to veto any management scheme relating to common land within a National Nature Reserve?

Yes, and the Countryside Commission should have a right to veto any scheme if they consider that it would be unduly detrimental to the landscape or public access.

(xii)

and

(xiii) Should the Government prepare model forms of schemes, etc?

Yes, and interested organisations should be asked for their views before the draft schemes, etc, are finalised and published.

(xiv) Should there be provision to adjust rights of common of grazing?

Yes,

(xv) Should there be any right of compensation under schemes of management?

Not arising from the granting of a public right of access, nor from any amendments made to a draft scheme in the interests of landscape or access.

- (xvi) Should the Forestry Commission's Dedication Scheme and Small Woods Scheme be adapted to permit assistance to be granted for the afforestation of common land?

Not unless - (a) the Secretary of State adopts as policy that large-scale conifer afforestation of common land is inappropriate and, (b) he is given a power of veto in respect of Dedication Scheme agreements of this kind.

The Safeguarding of Common Land

- (xvii) Should the provisions of Section 194 of the Law of Property Act 1925, modified as suggested by the Working Party, be retained?

Yes. The fencing of common land should continue to be subject to the approval of the Secretary of State, and the application of Section 194 should be extended to cover afforestation, ploughing and mineral workings.

- (xviii) Should Government Departments continue to be exempted from obtaining Ministerial Consent under Section 22 of the Commons Act 1899?

No. We agree with the Working Party that there is no justification for this.

- (xix) Should there be provision for the temporary suspension of common rights?

Yes, but the grounds for temporarily suspending rights should be clearly defined and limited in scope.

- (xx) Is there any reason why the provisions for inclosure under the Commons Act 1876 and "approvement" should not be abolished?

and:

- (xxi) Should a provision on similar lines to Section 147 of the Inclosure Act 1845 be retained?

We agree with the Working Party on these points.

- (xxii) Should a final registration of land or of rights of common be evidence of the matter registered at any current date and not merely at the date of registration, as at present?

Yes this is extremely important. As the Working Party suggest, the registers will lose their value over time unless they are taken as evidence of current status of the land. There is an analogy here with the definitive maps of rights of way. If a path appears on the definitive map, it is conclusive evidence that a right of way exists along the line shown. This applies for as long as the path is shown on the definitive map (or until the path is closed by statutory process, i.e., an order), and does not simply mean that the path was a public right of way on the date when it was placed on the definitive map (a provision which would obviously be absurd and of little use).

- 7 -

(xxiii) Should land be removable from the register only following statutory process for changing its status?

Yes, this is also extremely important and should follow the analogy of paths on the definitive map, referred to in the paragraph above. If the loss of many areas of common land is to be avoided, legislation on this point must be introduced at an early date and must, as the Working Party suggest in paragraph 3.17, be made retrospective in effect.

(xxiv) Should all land on the register be protected from the construction of works or fences without the consent of Parliament or the appropriate Secretary of State?

Yes. This is also of great urgency. Many areas of land on the register are without associated registered rights and therefore stand as manorial waste. Until legislation along the lines proposed by the Working Party is introduced, they are at risk of being enclosed and their future value for public access therefore lost altogether.

(xxv) Should provision be made that for the purpose of deciding whether or not to confirm the registration, the Commons Commissioners must consider whether or not rights of common existed over the land immediately before its registration - thus undoing the High Court ruling in CEBG v. Clwyd County Council?

Yes. The decision by the High Court in this case caused us much concern. If common land generally is to be given the degree of protection proposed by the Working Party this proposal is also necessary to complement the other measures referred to above.

Mistaken registrations of land

(xxvi) Should there be provision for removing from the register land registered mistakenly or in error; and, if so, should either of the suggestions made by the Working Party be followed or is there any better solution?

No. We regard it as dangerous and unwise to make such provisions. We have the unhappy precedent of the provision introduced in the Countryside Act 1968 for removing from the definitive map a right of way on grounds of "new evidence", and this has led to much confusion and controversy. It would be very difficult to draft a provision for the removal of land from the registers on the grounds referred to by the Working Party, and there would be a serious danger of creating a legal loop-hole which could be used to undermine many of the Working Party's other intentions with regard to the improvement and public enjoyment of common land.

The vesting of Unclaimed Common Land

(xxvii) Should common land in unknown ownership be vested in the Parish Council or in the District Council where there is no Parish Council, except in the National Parks where it should be vested in the National Park Authority?

Yes. The most important point here from our point of view is that, in national parks, such land should be vested in the National Park Authority rather than any local authority.

(xxviii) Which of the methods of vesting suggested by the Working Party is preferable?

We consider that Method 1 is the better. It would remove uncertainty much more quickly. Legislation should be introduced to protect local authorities in such cases from being required to pay compensation.

Ordnance Survey Maps

There is one final point that is not taken up in the Working Party's Report and which concerns action that could be taken without further legislation. If, as we hope, the public is to be given a right of access to all common land, it is obviously important that they should be able to find out where this land is. One of the simplest and most effective ways of making this information available is by depicting it on small-scale Ordnance Survey maps. We ask the Government to endorse the need for this and to encourage the Ordnance Survey and local authorities to work together with a view to showing the information contained in the common land registers on OS maps.

February 1979

APPENDIX VIII

List of restrictions under the National Parks and Access to the Countryside Act 1949.

ANNEX C

(Reference: Chapter I -
paragraphs 1.3, 1.6 and 1.14)

NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT 1949

Second Schedule

General restrictions to be observed by persons having access to open country or waterways by virtue of Part V of Act*.

1. Subsection (1) of section 60 of this Act shall not apply to a person who, in or upon the land in question -
 - (a) drives or rides any vehicle;
 - (b) lights any fire or does any act which is likely to cause a fire;
 - (c) takes, or allows to enter or remain, any dog not under proper control;
 - (d) wilfully kills, takes, molests or disturbs any animal, bird or fish or takes or injures any eggs or nests;
 - (e) bathes in any non-tidal water in contravention of a notice displayed near the water prohibiting bathing, being a notice displayed, and purporting to be displayed, with the approval of the local planning authority;
 - (f) engages in any operations of or connected with hunting, shooting, fishing, snaring, taking or destroying of animals, birds or fish, or brings or has any engine, instrument or apparatus used for hunting, shooting, fishing, snaring, taking or destroying animals, birds or fish;
 - (g) wilfully damages the land or anything thereon or therein;
 - (h) wilfully injures, removes or destroys any plant, shrub, tree or root or any part thereof;
 - (i) obstructs the flow of any drain or watercourse, opens, shuts or otherwise interferes with any sluice-gate or other apparatus, breaks through any hedge, fence or wall, or neglects to shut any gate or to fasten it if any means of so doing is provided;
 - (j) affixes or writes any advertisement, bill, placard or notice;

* Part V of the Act includes the provisions relating to "access agreements" and "access orders".

- (k) deposits any rubbish or leaves any litter;
- (l) engages in riotous, disorderly or indecent conduct;
- (m) wantonly disturbs, annoys or obstructs any person engaged in any lawful occupation;
- (n) holds any political meeting or delivers any political address; or
- (o) hinders or obstructs any person interested in the land, or any person acting under his authority, in the exercise of any right or power vested in him.

2. In the application of the foregoing provisions of this Schedule to waterways -

- (a) for references to land there shall be substituted references to a waterway;
- (b) sub-paragraphs (a) and (b) of paragraph 1 of this Schedule shall not apply; and
- (c) sub-paragraph (f) of the said paragraph 1 shall have effect as if the words from 'or brings' to the end of the sub-paragraph were omitted.

BIBLIOGRAPHY

Agrarian History of England and Wales Vol 1 Ed Finberg Cambridge University Press

An Economic and Social History of England and Wales 1066 - 1939

Butterworths Annotated Legislation Service Statutes Supplement No 156

Cartulary and Survey of Bilsington, Kent

Common Land Preparations for Comprehensive Legislation 1975/77

Domesday Book and Beyond F W Maitland 1960 Fontana

English Commons and Forests Rt Hon G Shaw Lefevre MP 1894 Cassell & Co Ltd

Essays in Agrarian History Vol 1

The Origins of the Manor in Britain T H Aston David & Charles 1968

Halsbury's Laws 4th Edition Vol 6

Halsbury's Statutory Instruments 3rd Re-Issue Vol 10

Hansard

Historical Foundations of the Common Law Milsom

Journal of Planning and Environmental Law

Law Gazette

Law Relating to Common Land Harris and Ryan

Land and Order Simon Roberts Penguin 1st Edition

Publications of the Dartmoor Preservation Association Plymouth 1980

Reformation to Industrial Revolution Christopher Hill 1967

Registered Conveyancing Ruoff and Roper 4th Edition

Royal Commission Report

Solicitors Journal

The Common Lands of England and Wales L Dudley Stamp and W G Hoskins

The Price of Amenity Gregory 1971

