

The LAW of COMMONS

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Preface

This book has been researched and written during the run up period to comprehensive legislation intended to update the use and management of the common lands. But the approach to new legislation in this area of law tends to be slow and laborious. It is 10 years since an interdepartmental committee report announced governmental interest in planning for a new Act and next year sees the thirtieth anniversary of the Royal Commission report which laid down the guidelines for it. The *Royal Commission on Common Land 1955–1958 Report* recommended the establishment of statutory registers for all common land including a record of the rights exercisable over it and its ownership. It was also proposed that there should be new statutory schemes of management for, and a universal right of public access to, the land. In the event it was decided to proceed in two stages; first, registration and, secondly, management and access provisions. Registration was set in train with the enactment of the Commons Registration Act 1965 and now, some 20 years later, is approaching completion. Unfortunately, it is now widely recognised that the Act was not entirely adequate to effect its purposes. In the Court of Appeal in 1982, Lord Justice Oliver, on finding that the Act deemed land to be waste land of a manor when it was accepted by all the parties that it had never had that status, remarked that the case revealed “what I cannot but think is yet another most unsatisfactory state of affairs created by this Act which, if I may say so, is crying out for amendment . . .” It is now apparent that the second stage of legislation will also have to be concerned with amending the deficiencies, and resolving the anomalies and injustices which have arisen from registration. Thus, there is an additional dimension of complexity added to a subject which was already quite complicated enough. Existing statute law, directly concerned with commons, spans 600 years—the earliest Act still in force is concerned with inclosure of commons—and the common law, at the outset of its development in the twelfth century, dealt with rights of grazing over the land of a feudal lord as one of its main features. I have attempted to show that the common law, at least, is relatively free from ambiguity and that many of the features, which some have thought to be obscure and irrational, are sensible and logical. This is much as one might expect after some 700 years of development. That is not to say that the subject is not complex. The common lands are not one particular type of land but a series of interrelated classes with discrete rules applicable to each class. I hope that I have distinguished all the main classes of land and rights which exist today and described adequately the rules for each class, while at the same time warning against confusing the different classes and rules. The reader will find that some of the issues, which have become live in recent years, of which the permanent or temporary severance of appurtenant rights from the land to which they are attached are typical examples, are dealt with on the basis of principle rather than authority. This is because many of the new issues have not been

litigated directly and reference to principles seems the only realistic approach. Until there is statutory enactment or case authority affecting them these issues need to be treated with some caution.

It would be attractive to report that the statutes in force are models of clarity. Unfortunately this is by no means the case. Quite apart from the problems recently posed by the Registration Act of 1965 the earlier Acts are in many cases inconclusive in definition and purpose. Be that as it may, I have attempted to draw together, in outline at least, all the Acts which bear directly on common lands and describe, as best I can, their effects. I should perhaps enter one caveat: the massive Inclosure Act of 1845 is still in force but had its teeth drawn as an instrument for inclosure over a century ago. It is to all intents and purposes defunct and I, therefore, give it scant attention except where some of the subsidiary provisions are still in active use. Needless to say the Commons Registration Act 1965 is accorded pride of place among the statutes considered and I have recorded the major areas of difficulty in interpretation and practice. I am certain that I have not uncovered all the problems but at least those which are apparent from the decisions of the Commons Commissioners, who have been resolving registration disputes for over 15 years, are included. I have also been able to study somewhere between five and 10 per cent. of all the commons registers and the discrepancies which appear on the face of those records are noted. What cannot be discovered from this type of investigation is the scale of totally incorrect registrations. Only time will tell how many are in this category and, while everybody concerned with common land has his own particular horror story, there is no central record to bring them all together.

One direction which the book has taken might seem a little unusual for a text on the law of commons inasmuch as there is more than passing consideration of the liability for straying animals and the connected, and unusual, duty to fence against a common. However, those concerned in practical matters will know that the propensity for animals to stray from commons is a constant source of worry and, liability frequently depends upon the establishment of fencing obligations. I have thought it appropriate to identify and comment upon as many as possible of the practical legal difficulties in these more general areas of law, as well as a few others.

I have written with the intention of providing assistance to those who have to grapple with the various legal problems which occur on the common lands. Clearly most are legal practitioners but I am conscious that there is a wider audience among those with direct interests over the lands, whether public or private. Not all that wider audience is legally qualified and not all legal practitioners are well acquainted with agricultural practice. I have tried, therefore, to simplify the law for laymen and explain agricultural practice for the lawyer. If in so doing I have oversimplified for some readers I hope they will understand the reason. In particular my apologies go to those lawyers who may feel insulted at my apparent ready assumption that they do not understand Latin, Law French or even some of the simpler legal concepts!

I wish to thank all those persons who have helped me in the preparation of this book. In particular my thanks are due to Jack Ellis, of Swansea, whose extensive knowledge of the law and practice of commons inspired me to start my research, the National Farmers Union, and especially James May for providing all the earlier Commissioners' decisions for copying, the staff at the Welsh Office and the Department of the Environment for assist-

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