COMMONS REGISTRATION ACT 1965

Reference Nos.14/D/24-29

In the Matter of Broxhead Common,
Whitehill and Headley, Hampshire.

INTERIM DECISION

These disputes relate to the registration at Entries Nos.1-41 in the Rights Section of Register Unit No.CL.147 in the Register of Common Land maintained by the former Hampshire County Council and are respectively occasioned by Objection No.OB 274 made by Mr A.G.P.Whitfield and noted in the Register on 15th September 1970, Objection No.OB 392 made by Mr D.J.Hadfield and noted in the Register on 7th December 1970, Objection No.OB 230 made by Amey Gravel Ltd and noted in the Register on 19th October 1970, Objection No.OB 252 made by Mr A.G.Jeffree and noted in the Register on 2nd September 1970 and Objection No.OB 347 made by the Secretary of State for Defence and noted in the Register on 12th November 1970.

I held a hearing for the purpose of inquiring into the disputes at Winchester on 9th, 10th, and 11th April 1974 and at Watergate House, London, WC2N 6LB on 26th and 29th April, 7th, 8th, and 9th May, and 18th and 19th June 1974. The hearing was attended by Mr John Mills, Q.C. and Mr John Trenhail on behalf of the following applicants for the registration of rights of common: Mr E.A.Connell (No.1), Mrs C.B.W.Nicholson (No.2), Mrs L.E.Bicknell (No.7), Mrs F.R.D. Cooke (No.12), Kingsley Strawberries Ltd (No.14), Mr L.H.Atkins (No.16), Mrs P.M.E.Barnard (No.18), Mr and Mrs W.Grinsley (No.20), Mr J.H.Ellis and Mr P.G.Ellis (No.22), J.Ellis & Sons (Bordon) Ltd (No.24), Mrs J.H.Jackson (No.25), Mrs K.M.Blackwell (No.26), Mrs D.J.D.Youles (No.30), Miss M.Heather (No.35), Mr J.Conway (No.38), Commodore J.S.Rawlins, R.N. (No.39), and Mr W.H.Kerridge (No.40); by Sir Frederick Corfield, Q.C. and Mr R.Carnwath on behalf of Mr Whitfield; and by Mr Francis Barlow, of counsel, on behalf of the Secretary of State for Defence. Mr Hadfield and Mr Jeffree appeared in person. There was no appearance on behalf of Amey Gravel Ltd, and none of the other applicants for the registration of rights of common appeared or was represented.

Mr Jeffree has a house on a small plot of land at the northern extremity of the land comprised in the Register Unit. It was agreed by all parties that Mr Jeffree's property, although it appears from the Ordnance Survey map to have been at some time enclosed from the Common, ought not now to be included in the Register Unit.

At the opening of the hearing Mr Mills informed me that he did not propose to call any evidence in support of the claims of Mrs Jackson (No.25) and Mrs Youles (No.30).

The land the subject of the reference is crossed by a road leading from Sleaford in the north to Lindford in the south. The portion of the land to the west of this road has been registered in the Ownership Section of the Register Unit as being in the ownership of the Secretary of State for Defence.

On the first day of the hearing I was furnished with a document signed by Mr Trenhail and Mr Barlow on behalf of their respective clients, stating that it was agreed that seventeen of the applicants were entitled to rights of common over the land in the ownership of the Secretary of State. These rights were turbary, estovers, to dig and take sand, and to graze the numbers of cows and horses set out below:-

Name	Cows	Horses
Connell (No.1)	1	-
Nicholson (No.2)	-	1
Bicknell (No.7)	-	-
Cooke (No.12)	1	1
Kingsley Strawberries Ltd (No.14)	3	-
Atkins (No.16)	2	2
Barnard (No.18)	1	1
Grinsley (No.20)	-	-
J.H.Ellis and P.G.Ellis (No.22)	3	-
J.Ellis & Sons (Bordon) Ltd (No.24)	1	-
Blackwell (No.26)	1	1
Youles (No.30)	1	1
Heather (No.35)	-	1
Conway (No.38)	1	-
Rawlins (No.39)	-	-
Kerridge (No.40)	3	-

There was a similar document signed by Mr Watt (No.4) in respect of turbar estovers, digging and taking sand, and grazing 1 horse.

The fact that this settlement has been arrived at is not, of course, evidence against the other Objectors and, in particular, is not evidence in relation to the question of the existence of rights of common over the land to the east of the Sleaford-Lindford road.

So far as the land to the east of the road is concerned, I was informed by Mr Mills that his clients accepted that an enclosed area near to the road, known as "Wildman's Plat", was not subject to rights of common.

The land on both sides of the Sleaford-Lindford road has been known as Broxhead Common for many centuries. The court rolls of the manor of Broxhead for 5th April 1632 contain a survey of the waste or commons of the manor. Any ambiguities in this verbal description are made clear by a "geometrical survey" of Alice Holt and Woolmer Forests made by order of the Commissioners of the Land Revenue in 1787, which shows all the land comprised in the Registe

Unit, with the exception of Wildman's Plat, as part of ~~the~~ Broxhead Common.

A survey of the manor made in 1636 divided the Common into two parts, one enjoyed by the tenants without denial and the other denied them by the Keepers of Alice Holt and Woolmer Forests. Where the line of demarcation between these parts of the Common lay does not precisely appear, for, according to elderly witnesses giving evidence in 1619, the bounds of the manor of Broxhead went so far beyond Bordon Lodge as the lord of the manor could spit and stride, lay his line three times, and throw his horn. Fortunately it is not necessary for the purposes of these proceedings to attempt to translate this system of mensuration into more familiar units of measurement. All that is material is that the tenants were entitled as against the lords of the manor to rights over the whole Common, however far it extended. However, merely to show in a general way that the tenants of the manor were at some time in the past entitled to rights of common over the Common does not ensure the success of any of the applicants for the registrations the subject of these disputes. It must be shown in respect of each applicant either that he has succeeded to such a right or that he or one of his predecessors in title has acquired a right of common either by prescription or by a lost modern grant.

Before turning to the evidence relating to the individual applicants it is necessary to consider the history of the manor of Broxhead, in the context of which that evidence has to be considered.

The history of the manor has been somewhat complicated since Sir Richard Pexall, Master of the Buckhounds to Queen Elizabeth I and lord of the manor of Broxhead, died in 1571, leaving four daughters and no son. Anne, the eldest daughter, married Bernard Brocas; Margery, the second, married Oliver Beckett; Elizabeth, the third, married John Jobson; and Barbara, the youngest, married Sir John Savage.

Since Sir Richard Pexall held land as a tenant in chief, his power to dispose of his land by will was limited by section 4 of the statute 32 Hen.VIII, c.1 to two parts in three. This led to the manor of Broxhead being held in undivided twelfths. Bernard Brocas ultimately obtained ten of the twelfths, eight of them under the will of Sir Richard Pexall, one in the right of his wife, and another by purchase from one of his brothers-in-law, though the evidence as to which one of the three sold his twelfth to Brocas is conflicting. The remaining two twelfths were purchased in 1626 by John Fauntleroy from the successors in title of the other two of Pexall's sons-in-law. This account of the devolution of Pexall's property, derived from the documents adduced in evidence from the Hampshire County Record Office, differs somewhat from that given in the Victoria County History of Hampshire and the Isle of Wight, iii.53, the authors of which do not appear to have had access to the documents now in the County Record Office and seem to have attempted to make good the deficiency from the account of the devolution of the Beaurepaire estate given in Montagu Burrows's The Family of Brocas of Beaurepaire, pp.208-9. The result is misleadi since the twelfths of the Beaurepaire estate were not dealt with by the Pexall heirs in the same way as the twelfths of the Broxhead estate.

After the division of the manor into twelfths the owners of the several parts kept courts and granted copyhold and other estates in their parts. This must have been extremely inconvenient, for each tenant held his tenement under two lords and in some cases did not hold from both lords on the same terms. Nevertheless, the manor continued to be operated in this way until 1637. By that time Bernard Brocas's ten twelfths had descended to Thomas Brocas. On 26th July 1637 the Sheriff of Hampshire sat with a jury under a writ of partitione facienda (as to which see Co.Litt.,167a-168b) to partition the hitherto undivided manor.

Instead of merely making an allotment to Brocas and an allotment to Fauntleroy proportionate to their respective ten and two twelfths, the verdict of the jury divided the manor into twelve separate parts, ten to go to Brocas and two to Fauntleroy. This involved dividing some of the tenements mentioned in the 1636 survey, so that the tenant held each part of his tenement separately from either Brocas or Fauntleroy, instead of the whole tenement from both of them. The partition was, however, confined to the copyhold and leasehold tenements. There is no mention in the partition of the freehold lands described in the 1636 survey.

The Common was not dealt with in exactly the same way in all the twelfths. Each of the two twelfths allotted to Fauntleroy contained a defined parcel of "Common Pasture in the Open Heath", but this course was not followed in respect of the ten twelfths allotted to Brocas. Each of the Brocas twelfths was allotted "cum equali parte Communae cum eisdem (i.e. so many acres of land) usitata".

One of the Fauntleroy twelfths included a part of the Common having an area of 50 acres and the other a part having an area of 60 acres. Professor D.R.Denham, who gave evidence on behalf of Mr Whitfield, was of the opinion that these two parts together formed what is now the eastern part of the Common. I do not accept this view, for the description of the 60 acre part shows that it lay near Oxney Corner. Since Oxney lies to the west of the Common, this part cannot have lain to the east of the Sleaford-Lindford road. I identify the Fauntleroy allotments of the Common as being at the south-west and north-east ends of the original Common. Both were subsequently enclosed and were known as "Free Pieces", but this probably means that they were free of forest rights. The land comprised in the Register Unit I identify as that referred to in the allotments of Brocas's ten twelfths and as containing nothing included in the Fauntleroy allotments.

Although the respective allotments continued to be known as twelfth parts of the manor of Broxhead, the effect in law of such a partition was to create twelve separate manors: see Scriven on Copyholds (7th edn), p.10, and the authorities there cited.

The nature of the rights which the tenants enjoyed in the Common is indicated by two kinds of evidence, one positive and the other negative. The positive evidence is that when in 1753 and 1763 the successors in title of Fauntleroy enclosed parts of the Common they obtained releases from tenants claiming rights to the soil and pasturage; the negative evidence is that at a court baron of Thomas Brocas held on 5th April 1632 the jury presented that no tenant of the

manor should cut turf and heath in the Common without the licence of the lord or paying the lord for the same in accordance with ancient custom. It therefore appears that tenants of the manor had rights of common in the soil and rights of pasturage, but no rights of turbary or of estovers.

The history of the Common after the partition is obscure until the middle of the nineteenth century, when the part to the west of the Sleaford-Lindford road was in the possession of John, Lord Sherborne, who died 19th October 1862. It can, however, be inferred from a series of deeds relating to Mr.Connell's property, to which further reference will have to be made, that Lord Sherborne's predecessors in title were in 1778 the Hon.Henry Stawell Bilson Legge and in 1678 William Knight and William Viccary. Lord Sherborne was stated to be lord of the manor of Broxhead, but at the most he can only have had the ten twelfth parts previously owned by Thomas Brocas. How the ownership of the part of the Common to the east of the road came to be separated from the Brocas ten twelfths of the manor does not appear, but such division of the ownership could not have affected the rights of the tenants over the land on both sides of the road. Lord Sherborne's part of the Common was sub-divided in 1890, but the sub-division became reunited in the hands of the Secretary of State for War by virtue of conveyances made in 1902 and 1903.

The devolution of the Fauntleroy twelfths of the manor is traceable through a succession of owners until the 1860's, when it was owned by a yeoman named William Langrish. In 1870 Langrish sold one of his two twelfths of the lordship of the manor with a quantity of land, known collectively as the Headley Park Estate, to Sir Henry Keating, a Judge of the Court of Common Pleas. In 1874 Langrish sold his other twelfth part of the lordship of the manor to George Trimmer, and this twelfth part passed by divers mesne assignments to the Secretary of State for War in 1902. Keating J. died in 1888, having mortgaged his estate to his brother judge, Sir Robert Wright. Wright J. died in 1904, and on 4th January 1906 his executors sold the property to Charles William McAndrew.

The 1906 conveyance contains the earliest specific reference to the part of the Common to the east of the Sleaford-Lindford road. The parcels contain (inter alia) the twelfth part of the manor of Broxhead and "all the estate and interest" of the testator of and in that part of the Common. One of the schedules to this conveyance contains a reference to a statutory declaration made by William Langrish on 28th February 1870. It may be that this statutory declaration threw some light on the then recent history of the eastern part of the Common, but it is not among the documents adduced in evidence.

The one twelfth part of the manor and the estate and interest in the part of the Common formerly held by Wright J. passed to Gerald Alexander McAndrew by an assent of 29th December 1947. On 5th February 1948 Mr G.A.McAndrew sold 15.908 acres of his part of the Common to Mr Sotnick. Mr Sotnick sold to Mr Day, who in turn sold a part to Mr Hadfield and the remainder of his holding to Amey Gravel Ltd. By an assent and conveyance made 25th October 1962 the remainder of the eastern part of the Common was (with other land) conveyed by trustees under the will of Mr G.A.McAndrew to Sefton Siegmund Myers. The one twelfth part of the manor was not included in the parcels of this assent and conveyance. Mr Myers was Mr Whitfield's immediate predecessor in title.

With one possible exception in 1828, to which further detailed reference will have to be made in connection with Mr Connell's claim, there is no evidence relating to the use of the Common between the tenants' consents to inclosures of parts of the Fauntleroy twelfths in 1753 and 1763 until the early years of the present century. It would not, however, be right to deduce from this that no rights of common were being exercised during the interval. The silence is as consistent with the exercise as with the non-exercise of such rights.

The matter seems first to have become the subject of discussion in 1902, when the purchase of the western part of the Common by the Secretary of State for War was under negotiation. On 15th January 1902 the Clerk of the Headley Parish Council wrote to the C.R.E. at Aldershot about the likelihood of damage to the surface, gorse, broom, etc. To this the C.R.E. replied that the War Department had no knowledge of what rights the commoners might have had. In 1903 requisitions on title were made in connection with the sale of part of the western half of the Common to the Secretary of State for War by Mr Henry John Dutton and others. The question was: "Can the Vendor or his Solicitors give any particulars or information as to who have rights over Broxhead Common and what those rights are?". The answer was: "No".

In 1907 one of the War Department warders ordered two farmers off the Common, when they were cutting bracken. This led to a demonstration. Messrs. Caine, Courtnage, Fullick, Harding, Hellier and Lovegrove came with horses and carts to carry away bracken, whilst Messrs Laws and Piggott had their cows out for grazing, and Messrs Lee and Whiting gathered the dry furze branches for firewood, and others, whose names are not recorded, cut turf. This expedition ended peacefully when a letter was handed to Mr Harding in which it was stated: "The War Department do not contest the right of the Commoners to exercise their ancient rights over Broxhead Common".

During the next few years there were complaints about various acts by the military authorities on the western part of the Common, but it does not seem necessary to deal with them in detail, since it was never denied by the War Department that there were rights of common exerciseable over this part of the Common. This is, of course, in no way binding on the other Objectors, and I propose therefore to disregard the admissions made by the War Department and to confine my attention to the evidence relating to the use of the Common.

So far as the eastern part of the Common is concerned, peace seems to have reigned until Mr Myers fenced in a section of that part in 1963. Mr Myers fenced in further sections in the following years. On 29th July 1973 the fences were forcibly removed by some of those, led by Mr J.H.Ellis, claiming to be entitled to rights of common.

On the evidence so far reviewed I am satisfied that there was a right of common in the soil and a right of common of pasture over the whole of the Common attached to all the tenements, whether freehold, copyhold, or leasehold, mentioned in the survey of the still unpartitioned manor made in 1636. I interpret the partition made in 1637 as having the effect of attaching to the tenements in each of Fauntleroy's two twelfths the like rights of common over

the part of the Common forming part of that twelfth, while the tenements in each of Brocas's ten twelfths had the like rights of common over the whole of the Common with the exception of the areas which formed parts of Fauntleroy's two twelfths. There being no mention of the freehold lands in the partition, the rights of the freehold tenants would continue over the whole of the original Common, save only that one of the freehold tenements belonged to Fauntleroy before the partition, so that the partition by vesting two parts of the Common in Fauntleroy would extinguish the rights of common over those two parts attached to his freehold tenement, leaving him with rights in respect of that tenement over the remainder of the Common which went with the Brocas ten twelfths.

I now turn to consider whether the property of any of the applicants can be identified as part of the manor of Broxhead and, if so, whether the rights attached to such property after the partition in 1637 have since been extinguishe

Although it cannot be clearly identified as forming part of any one of the ten Brocas twelfths, Mr Connell's property (Claim No.1: Lindford Bridge House) must have formed part of one of those ten twelfths. This, in my view, is clearly shown by the documents which Mr Connell received when he purchased his property in 1958.

Mr Connell's earliest document is a lease dated 23rd December 1778 from the Hon.Henry Stawell Bilson Legge, described as lord of the manor of Broxhead, to Richard Newman for a term of 99 years, but this recites an earlier lease for 99 years granted on 1st October 1678 by William Knight and William Viccary to Jasper Moorer. The lease of 1778 does not contain any reference to rights of common, and the only document in Mr Connell's possession which does refer to such rights is the will of John Fullick, dated 22nd January 1828, which refers to his leasehold messuage, cottage or tenement situate at Headley, together with the commonable and other rights thereto belonging. Sir Frederick Corfield submitted that the reference to commonable rights in this will did not necessaril relate to Broxhead Common, since John Fullick's property could have had appurtenant to it rights of common in Alice Holt or Woolmer Forests. Fullick may well have had rights in the Forests, but since the lease of 1778 shows that he held what is now Mr Connell's property as a tenant of the owner of ten twelfth of the manor, his will in no way contradicts the inference to be drawn from the other evidence that rights of common in the soil and of pasture over the land comprised in the Register Unit were appurtenant to his property.

A new lease for 99 years was granted on 15th July 1876 by the Hon.John Thomas Dutton to Edward Fullick and Walter Fullick, and on 30th November 1929 Henry John Dutton conveyed the freehold reversion to Henry George Gamblen, the then leaseholder. In my view, this conveyance, by virtue of section 62(1) of the Law of Property Act 1925 passed to Mr Gamblen the rights over the Common to which he had previously been entitled as tenant: see Crow v. Wood, [1971] 1 Q.B.77 Sir Frederick Corfield made the point that in 1929 Mr Dutton did not own any part of the Common and so could not grant any rights over it. It seems to me, however, that the dispositions of the Common made by previous lords of the Brocas ten twelfths of the manor cannot have affected the rights of the manorial tenants, and that it is those rights which were impliedly included in the 1929

conveyance by virtue of section 62(1) of the Act of 1925.

Although Mr Connell has never grazed animals on the Common since he purchas his property in 1958, there is, in my view, nothing in the evidence to indicate that these rights have been extinguished by abandonment or otherwise.

This does not deal completely with Mr Connell's claim, since he also claims to be entitled to rights of turbary and estovers. If this part of his claim is well-founded, it can only be on the basis of prescription or lost modern gran which will be dealt with later.

Another claimant's property which I find myself able clearly to identify as part of the manor is that of Mrs Barnard (Claim No.18: Picketts Hill Farm). One of the freehold tenements mentioned in the 1636 survey was "Mr Bull his hous[illegible]n ground called Picketts Hill". Bull also held another house with some land at Picketts Hill by copyhold tenure. Bull derived his title from Sir Richard Pexal by a grant dated 7th May 1562. This was Matthew Bull, who appears as a free tenant of the manor in the records of the court baron of Thomas Brocas held on 5th April 1632 and 5th April 1633. On 2nd May 1642 Matthew Bull released "Pigottshill Farm" and his copyhold adjoining to Moore Fauntleroy, the son of John Fauntleroy.

The effect of Bull's release of 1642 was to extinguish the rights of common attached to his freehold over the parts of the Common included in the Fauntleroy two twelfths of the manor, but to leave such rights over the rest of the Common unaffected. So far as the copyhold tenement was concerned, the rights over the Brocas part of the Common had been extinguished by the partition and the rights over the Fauntleroy parts were extinguished by the release. It is impossible from the evidence to determine whether Mrs Barnard's property is the former freehold tenement or the former copyhold tenement. If it is the former freehold tenement, the freeholder's rights were further curtailed by the common ownership of the tenement and the part of the Common to the east of the Sleaford-Lindford road. When this common ownership came about is not apparent from the eviden[illegible] but both the eastern part of the Common and Pickett's Hill Farm were included in the property purchased by the late Mr C.W.McAndrew in 1906. I find myself unable to hold that there are any manorial rights of common attached to Mrs Barnard's property. Her claim cannot, however, be finally disposed of without considering the much more recent history of her property.

The modern evidence as to the use made of the Common by the occupiers of Picketts Hill Farm begins with a statutory declaration made by the late Mr.F.J.Hellier of Lindford on 4th July 1969. Mr Hellier was then 89 years of age and he remembered that the occupier of this property used to graze his animals on the Common about 65 years ago. Mrs Barnard married Mr G.A.McAndrew in 1930, and she remembers that since then cows from this property have been turned out on the Common. In so far as Mrs Barnard's claim related to grazing, it was for 40 cows and 6 horses, but when giving evidence Mrs Barnard reduced it to 12 cows and 6 horses. Mrs Barnard has also taken bracken from the Common every year to make compost. She has not taken turf during the last ten years because she found that Hampshire turf did not burn. Although the claim includes

a right of piscary, Mrs Barnard said that she was not pursuing that part of the claim because there is no water on the Common.

When the major part of the Headley Park Estate was sold to Mr S.S.Myers in 1962 Picketts Hill Farm was retained by the vendors and the conveyance excepted and reserved to the vendors in fee simple "all rights of way (whether public or private) water light air drainage and other easements or quasi-easements rights and privileges at present enjoyed by or in connection with any property retained". Any rights of common to which Mrs Barnard may be entitled must be sought in these words, since section 62(1) of the Law of Property Act 1925 does not operate to imply in a conveyance of land any words in favour of a vendor.

Strictly speaking, there were at the time of the conveyance no rights of any kind over the property sold attached to the property retained, for the common ownership had extinguished any such rights. However, a provision such a that quoted can be construed as a statement by the common owner that at the time of the conveyance there existed rights of some kind in favour of the property retained over the property sold: see May v. Belleville, [1905] 2 Ch.60 Had the draftsman of the 1962 conveyance chosen to incorporate at length or, as is sometimes done, by reference the long series of appurtenances to be implied in a conveyance of land by virtue of section 62(1) of the Act of 1925, there could have been no doubt that the conveyance would have operated to give to the vendors a right to continue to enjoy anything in the nature of a right of commo over the eastern part of the Common which was in fact being enjoyed by or in connection with Picketts Hill Farm at the date of the conveyance. Unfortunatel from Mrs Barnard's point of view, the conveyance only included a few of the words set out in section 62(1) of the Act of 1925. Among the words not include was the all-important word "commons". Therefore, if the claim is to succeed, it can only be by construing the words "easements or quasi-easements rights and privileges" in the conveyance as including rights of common. A right of common is a profit à prendre so does not fall within the words "easements or quasi-easements". If either the word "rights" or the word "privileges" fell to be construed in vacuo, each might be said to be wide enough to include a right of common, but these words have to be construed in their context. That context is a conveyance and in construing a conveyance regard may be had to the practic of conveyancers. A conveyancer who had, as he must be deemed to have had, in mind the provisions of section 62(1) of the Act of 1925 would be unlikely to have omitted the word "commons" when drafting a reservation in favour of the vendor if there was at the time anything in the nature of a right of common being enjoyed by or in connection with the property retained and it was desired that the vendor should continue such enjoyment after the conveyance as of right A conveyance containing almost identical words was the subject of consideration in Tehidy Minerals v. Norman, [1971] 2 Q.B.528, 537, but in that case it was stated on the plan annexed to the conveyance that rights of pasturage were claimed by certain adjoining tenements, which was an indication to the purchase that common rights were claimed. The conveyance of 25th October 1962 contains no such indication.

I have come to the conclusion that Mrs Barnard is not entitled to rights of grazing and taking bracken from the eastern part of the Common by virtue of the reservation from the conveyance to Mr Myers. Had I taken the contrary view on the law, I would have felt bound to hold on Mrs Barnard's evidence that she

has abandoned any right of turbary which might have been included in the reservation.

Another claimant's property which can be clearly identified as part of the manor of Broxhead is Trottsford Farm (Mrs Cooke: Claim No.12). In the 1636 survey there were two copyhold estates, called Upper Trottsworth (or Croxford), with an area of 21a.2r.20p., and Lower Trottsworth, with an area of 26a.3r.39p., each held from Brocas and Fauntleroy. The partition of 1637 divided Upper Trottsworth into three unequal parts. One of these parts was included in each of Fauntleroy's twelfths and a very small part was included in the ninth of Brocas's twelfths. Lower Trottsworth was divided into two unequal parts, one being included in the fifth of Brocas's twelfths and the other in the sixth of his twelfths.

As a result of the partition the tenant of one part of Upper Trottsworth became entitled to rights of common in the 50a. of the Common allotted to Fauntleroy's first twelfth and the tenant of the other part became entitled to such rights in the 60a. of the Common allotted to Fauntleroy's second twelfth. These rights disappeared when Fauntleroy's successors in title enclosed their parts of the Common with the consent of their tenants. The tenants of the parts of Upper and Lower Trottsworth included in Brocas's fifth, sixth, and ninth twelfths became entitled to rights of common in the remainder of the Common which was not allotted to either of Fauntleroy's twelfths.

It is not possible to ascertain whether these rights are attached to Mrs Cooke's property, since there is no evidence to identify that property with any of the parts of Upper or Lower Trottsworth included in Brocas's twelfths. Furthermore, it is not possible to draw any inference as to this matter from such evidence as there is. The property purchased by Mr C.W.McAndrew in 1906, which seems to have included most of the land in the two Fauntleroy twelfths, did not include what is now Mrs Cooke's property, which he appears to have purchased from the Capital and Counties Bank Ltd on 31st July 1912. The conveyance from the Bank is referred to in a schedule to Mr G.A.McAndrew's conveyance to Mr H.Sotnick, a predecessor in title of Mrs Cooke, dated 5th February 1948, but there is nothing to indicate whether the Bank's title was derived from the ten Brocas or the two Fauntleroy twelfths.

The situation is further complicated by the fact that in the eighteenth century there was a freehold estate called "Upper Trotsford or Trotsworth Farm", which, according to a survey made in 1772, consisted of 17 acres which had forme part of Upper Sleaford in the 1636 survey and had been included in the seventh of the Brocas twelfths, together with 4 acres which had formed part of Lower Sleaford in the 1636 survey and had been included in the eighth of the Brocas twelfths, and 1½ acres which had formed the part of the original Upper Trottswor included in the ninth of the Brocas twelfths. Thus only about 5% of the propert known as Upper Trotsford or Trotsworth Farm in 1772 had formed part of what had been known as Upper Trottsworth in 1636. It is true that 1772 Upper Trotsford or Trotsworth had attached to it rights of common over the land comprised in the Register Unit, because the whole of it formed parts of the Brocas twelfths, but there is no evidence to show that what is now known as Trottsford Farm formed part of what was known as Upper Trotsford or Trotsworth

Farm in 1772. It could equally well have been one or both of the parts of Upper Trottsworth allotted to Fauntleroy in 1637. I am therefore unable for lack of evidence to confirm Mrs Cooke's claim that she has succeeded to any manorial rights of common.

Mr Mills, however, based an alternative argument in support of Mrs Cooke's claim upon the fact that her property and the eastern part of the Common were in common ownership between 1912 and 1948. By virtue of section 62(1) of the Law of Property Act 1925 the conveyance of 5th January 1948 to Mr Sotnick would be deemed to include all rights (including commons) enjoyed with, or reputed or known as part or parcel of or appurtenant to the land conveyed. In the early years of the present century what is now called Trottsford Farm was occupied by a Mr John Lowe, who used to turn out about two dozen "cattle and bullocks" on the Common. After Mr Lowe's time Trottsford Farm was let by Mr C.W.McAndrew to a Mrs Hicks. Mrs Hicks had a grandson, Mr E.N.White, who lived at Trottsford Farm from 1914 to 1926. Mr White is still alive and remembers minding about 12 cattle from Trottsford Farm on the Common.

Although there seems to be no specific evidence that this practice continued between when Mr White left Trottsford Farm in 1927 and when Mr McAndrew sold the farm in 1948, in the absence of evidence to the contrary I draw the inference that the tenant at Trottsford Farm continued to graze cattle on the Common until the farm was sold to Mr Sotnick.

A conveyance of a farm by the owner of the farm and a common, which does not in terms convey any right of grazing on the common will carry with it a right to graze the number of animals which the tenant had been entitled to graze under his tenancy agreement. This proposition was conceded and the concession was referred to with approval by Lord Denning, M.R. in Crow v. Wood, [1971] 1 Q.B.77, at p.82.

In the present case there is no evidence as to the terms upon which the tenant of Trottsford Farm held under Mr C.W.McAndrew, but Mr White's evidence is that Mr McAndrew knew about the cattle from Trottsford Farm grazing on the Common and did not object. This is sufficient for Mrs Cooke's purpose, for a right in fact enjoyed by a tenant will pass by virtue of section 62(1) of the Act of 1925 even though down to the date of the conveyance it was exercised by permission: see Wright v. Macadam, [1949] 2 K.B.744, per Jenkins L.J. at p.758.

I have therefore come to the conclusion that Mr Sotnick acquired by virtue of the several words implied in the conveyance of 1948 by section 62(1) of the Law of Property Act 1925 a right of grazing over the part of the Common retained by Mr G.A.McAndrew and later sold to Mr Myers. So far as the part of the Common which was sold to Mr Sotnick with Trottsford Farm is concerned, it and the farm were sold by Mr Sotnick to a Mr Day in 1949. In 1963 Mr Day severed the farm from his part of the Common by selling the farm to a Mr Henderson, who in 1965 sold it to Mrs Cooke. There is no evidence that at the time of the 1963 conveyance Mr Day's part of the Common was being used for the grazing of cattle from the farm. When Mr Hadfield purchased part of Mr Day's part of the Common, also in 1963, it was in temporary grass. In my view Mr Henderson did not acquire any right of common over the part of the Common retained by Mr Day

and now owned partly by Mr Hadfield and partly by Amey Gravel Ltd, who purchased in 1964.

The only other property which seems to be identifiable as part of the manor of Broxhead is that of Mrs Blackwell (Claim No.26: Laundry Farm). The evidence for this is the Woolmer Forest Inclosure Award of 27th January 1866 in which this property, then owned by Lord Sherborne, is one of several described as part of the manor of Broxhead, each with a right of turbary. This right of turbary was not a right in Broxhead Common, but in the Woolmer Forest land, but the fact that the property was in the manor of Broxhead means that it had rights to the soil and pasturage. However, there is no clear evidence as there is in the case of Mr Connell's property, to show how the title passed from Lord Sherborne to Mrs Blackwell. It may be that somewhere along the line there was a conveyance which contained an express reference to rights of common or in which a reference to such rights was to be implied either by virtue of section 6 of the Conveyancing and Law of Property Act 1881 or section 62 of the Law of Property Act 1925, but it is not possible to construe and give effect to a document which has not been adduced in evidence.

Of the other properties in respect of which claims have to be considered, four (Nos.14, 22, 24, and 40) are described in a poor rate assessment of 1768 as being in the manor of Bishop's Sutton and one (No.38) was described as being in that manor in conditions of sale prepared in 1950. The remaining properties could have been in the manor of Broxhead, but there is no identifying evidence, so they must be considered on the same footing as the five which were certainly not in the manor of Broxhead. The registrations in respect of them can only be confirmed if there is evidence of the acquisition of rights of common by prescription or by lost modern grant.

There was a large volume of evidence directed to the proof of prescription or of lost modern grant. Some of the witnesses dealt with one property and some of them with many, including properties in respect of which there is no claim to be considered. Mr Mills very helpfully summarized the evidence relating to the property of each of his clients and invited me to consider the case in respect of each property separately. Sir Frederick Corfield, on the other hand, contended that this was the wrong approach and invited me to take a broad view of all the cases. While I accept Mr Mill's contention that each claim is separate from the rest, it seems to me that it would be unrealistic for me to attempt to banish from my mind those parts of the totality of the evidence about the use of the Common not relating to the claim under consideration.

The most comprehensive piece of evidence is the statutory declaration by the late Mr F.T.Hellier, already referred to in connection with Mrs Barnard's claim. Mr Hellier, who had lived in the Lindford area for seventy-nine years when he made his declaration, stated that about sixty years previously most of the occupiers of the old cottages round the Common kept a few pigs, cows, horses, geese, and goats. These animals were grazed in the meadows adjacent to the houses in the winter or kept in the byres, but in summer the owners grazed them on the Common, not turning out more animals on the Common in summer than he could feed at home in winter. Mr Hellier attached to his

statutory declaration the names of 41 holdings with the names of their former occupants and the approximate number of animals kept by each one. Mr Hellier also added notes that some of the occupants took bracken, turf, and smuts (i.e. the charred remains of gorse bushes) from the Common.

The time of which Mr Hellier was speaking was approximately coeval with the acquisition of the western part of the Common by the War Department and the discussions about the rights of commoners to which it gave rise. In order to obtain guidance on the matter, the War Department instructed Mr A.F.M.Downie, an Alton solicitor, to make inquiries. Mr Downie interviewed a number of local residents and prepared two reports, one in 1910 and the other in 1913. Mr Downie found that the manorial organisation had become non-existent. He could not find any court rolls. There had been no caretaker or haywarden of the Common for many years past. The last person who had exercised control over the Common for an earlier Lord Sherborne was a Mr Oliver, who had lived at Lindford adjacent to the Common, but he had been dead for many years and his son had no books or other records.

It appeared to Mr Downie that many people who claimed rights over Broxhead Common were people who had had rights over Lindford and Headley Commons and who had lost those rights when those Commons were enclosed in the nineteenth century. He found that people had been in the habit of exercising rights on the Common in what he called "a very promiscuous manner".

Mr Downie was unable to identify any persons who were entitled to rights of common, though he seemed to be in no doubt that such persons existed. As already stated, I am satisfied that Mr Connell's then predecessor in title was such a person, but the importance of Mr Downie's reports lies in the facts that there was by his time no local knowledge of who the commoners were, that former commoners of Lindford and Headley had taken to using Broxhead Common, and that Broxhead Common was used in "a very promiscuous manner".

The position as Mr Hellier and Mr Downie found it sixty years ago seems to have continued down to the present time. There was a considerable body of evidence about what people living in the neighbourhood have done on the Common during the present century. Some have grazed cattle, horses, donkeys, pigs, goats and geese, some have taken turf, peat, bracken, sand (some of it for repairs and some for new building), the charred stems of gorse bushes after fires, known as "smuts", and fallen wood, and cut pea-sticks and clothes props, and some have done many of these things. Others have gathered blackberries, and rabbits were "free for all", as Mrs Barnard put it. At least two people used the Common for breaking horses and for a time one had a manure heap on it. Some of the witnesses said in general terms that they got what they wanted from the Common and did what they liked on it.

There were other witnesses who said that they had known the Common well and had not seen these things being done. From this I conclude that during the period of living memory there has been no regular use of the Common by anybody for any purpose, but that there have been occasional acts of a variety of kinds which did not attract particular attention. So far as grazing is concerned this was borne out by Mrs Barnard and by Mr S.E.Tullett, a witness

on behalf of Mr Whitfield, who both said that the only person to graze his cattle regularly on the east part of the Common was a Mr Suter, who was a tenant of Mr C.W.McAndrew, the then owner of that part of the Common.

Some witnesses spoke of acts done on the western part of the Common, but denied having seen them on the eastern part. I do not believe this evidence, but whether it is to be attributed to faulty observation or recollection or to an over-enthusiastic desire to help Mr Whitfield's cause seems to be a matter on which it is unnecessary for me to express an opinion.

While some of the evidence relating to some of the applicants' properties might, if considered separately and in isolation, justify a finding that some rights of common had been acquired by prescription or lost modern grant, a consideration of the evidence as a whole precludes such a conclusion.

The evidence ranged far and wide. It was not confined to what had been done by the applicants, but covered the actions of a large number of other persons, some named and others described in such vague terms as "people from the village of Lindford", "all the cottagers", "a lot of people", "plenty of people", "dozens of people in the village", "local people", and "anybody", and it extended to matters which were not the subject of the registrations.

To my mind, this is a case like Hammerton v. Honey (1876), 24 W.R.603, in which the claim failed because the evidence proved a user far more extensive than was requisite to support the claim. As was pointed out in that case, it is not permissible to pick out the items in the evidence which support the claim and reject the rest. This is not a case where there have been occasional acts going beyond the rights claimed. What has been proved is totally different, an intermittent, ~~or~~ sporadic and promiscuous use by the general body of inhabitants which does not support the individual claims at all.

Acts done as of right are essential for the foundation of a claim by prescription. The doctrine of lost modern grant does not involve any belief in the existence of an actual grant which the grantee has mislaid. It is but a legal fiction which furnishes an explanation for a state of affairs which would otherwise be inexplicable. In my view, what has happened during the period of living memory can be explained by the break-down of the manorial system and its replacement by the notion, acquiesced in by the owners until Mr Myers began to erect his fences in 1963, that a common is open to anyone to use as he pleases. Such use is not the use as of right related to the needs or capacity of a dominant tenement, which is essential where a claim to a right of common is based on prescription or lost modern grant.

I have identified, at least to my own satisfaction, two properties to which rights of common are attached, but the evidence relating to the others leads me to the conclusion that the acts of their owners or occupiers in relation to the Common have been those of inhabitants of the neighbourhood enjoying the Common as they pleased with the good-natured toleration of the owners rather than those of the owners or occupiers of particular properties enjoying rights attached to their properties.

In expressing this view in this way I am not unmindful of the adverse criticism of the deputy county court judge in Tehidy Minerals v. Norman, supra, at p.543 for omitting in his judgment to consider separately the facts relating to each defendant. In that case, however, the deputy county court judge found in favour of all the defendants. This was, in effect, a series of findings, each of which must have been based on the evidence relating to each defendant and that defendant alone. The members of the Court of Appeal complained that they were left entirely uninformed about what facts the deputy judge considered to justify his conclusion, or what his reasons were for arriving at his conclusion. My rejection of all the claims depending on prescription or lost modern grant is based on the totality of the evidence, which related not only to the applicants, but to many other persons as well. To state what I regard as the relevant evidence in respect of each applicant would be to repeat the preceding summary of the evidence as to the use made of the Common by the inhabitants of the neighbourhood as many times as there are applicants.

For these reasons I propose to confirm the registration by Mr Connell (No.1) in so far as it relates to common in the soil and common of pasture over the whole of the land comprised in the Register Unit, with the exception of Mr Jeffree's property and "Wildman's Plat", and the registration by Mrs Cooke (No.12) in so far as it relates to common of pasture over the part owned by Mr Whitfield, but as requested at the conclusion of the hearing, I shall not give my final decision until the parties have had an opportunity of considering this interim decision and addressing me as to the form of my decision in relation to the whole of the Common, including the classes and numbers of animals to be registered.

I shall also defer my decision as to costs until I have heard such submissions on the subject as the parties may desire to make in the light of this interim decision.

Dated this 26th day of August 1974

Chief Commons Commissioner