"The Defendant the Lord of the said Manor insists, that th
A was such a Custom to renew for ninety-nine Years, but the Fines
always at the Will of the Lord, and such as the Plaintiffs could
agree with him, for there being no Benefit to come to the Lord
during the ninety-nine Years, so the Question is, whether the Lo
B shall be at Liberty to set what Fine he please, or be restraine
therein by this Court, it appearing that the Fines are arbitrary
It was held that the Lord of the Manor was not at liberty to
impose an arbitrary fine. There was no suggestion that such a
C lease could not be granted under the manorial system. A submis-
sion made by Sir Frederick Corfield at one stage in the argument
that terms of years were outside the manorial system, save so far
as carved out of the interest of a copyholder, is I think plainly
D mistaken and is contrary to what I find in the text books and t
authorities.

The arguments in favour of the leases being ordinary common
law leases are I think these. The 1778 and 1876 leases were ex-
E pressed as ordinary indentures. The tenant was not expressed to
hold the land by copy of Court Rolls. The leases were not there-
fore in a form appropriate to a copyhold tenement. It is true th
a surrender of a copyhold tenement in favour of a purchaser may t
F made out of court: See Scriven on Copyholds, 7th Edition, p. 129.
But such a surrender would normally be expressed to be made "out
of court"; See Prideaux's Precedents in Conveyancing, 5th Edition
1866, Volume 1, pages 197-198. Furthermore, a grant of land to
G be held according to the custom of the manor should be so
expressed; See Watkins Treatise, to which I have already referred
Volume 1, pages 57 and 58, and Prideaux's Precedents, Volume 1,
H p. 255.

On the other hand it is to be observed that the indenture by
implication describes the grantee as "a tenant of the Manor";

for the covenant to do suit and service at the Court Baron is t
be performed "in such manner as other the tenants of the said M
do and have heretofore been used and accustomed to do". If th
grantee had held under a common law lease it would not, I appre-
hend, have been accurate to describe him as a tenant of the Manc

It is, in my judgment, legitimate to construe the leases ir
the light of the surrounding circumstances as reflected in
contemporary documents, and these to my mind are consistent with
the proposition that the land comprised in the lease was customa:
land of the Manor and that the grantee was, in truth, a tenant
of the Manor. I start with an ancient undated document headed
"Manor of Broxhead, cottagers on the waste". /See Bundle A, p. 1
Four such cottagers and their predecessors are then described.
First, there is named "Woods late Grunsel"s". Secondly, "Jenning:
late Silvester, late Morers"; thirdly, "Shrubb formerly Huntingfo:
late Taylor's"; and fourthly, "Channel, formerly Morers, late
Mathews". Dates inserted on this page suggest that it was
compiled about 1772. The purpose of the document is apparent
from the details recorded in the margin, namely to set out the
estimated annual value of each holding. I turn next to a census
(Bundle A, p.118) taken by Nathaniel Bailey on 20th April 1773 of
the number of houses and inhabitants in the parish of Headley.
This sets out in four columns the name by which the house is known
the proprietor, the occupier, and the number of persons living
there. Under the heading "Broxhead" (page 125) one finds eleven
holdings followed by the cross-heading "Leaseholders". Under
this cross-heading one reads the same names as descriptive of the
houses "late Channel's", "late Shrub's", "late Silvesters" and
"late Grunsel's". The total population of both groups of houses
was 98, and this figure will be found against the entry "Broxhead
Manor" on page 126, which contains a summary, thus identifying

all 15 holdings as part of Broxhead Manor. Finally, there is what is described as "Particular papers and accounts of the ancient state of the Headley premises called Fauntleroys with th copy of the Inquisition of Partition and other useful anecdotes relating thereto; Thomas Gatehouse 1779". It will be remember that Thomas Gatehouse was the owner of the Fauntleroy two-twelft of the Manor. There are then twelve numbered pages, one of whi is missing. Page 1 summarises "The Brocas's title to ten-twelf parts of the Manor of Broxhead taken from Mr. Fauntleroy's memorandums". Page 3 deals with the Fauntleroy's title. Page lists part of the estate of William Cleare or Clears, who we know from Bundle A, page 30, to have been Lord of the Manor of Broxhea and owner of the ten-twelfths until his death in 1770. On page (Bundle A, p. 68), we have the sub-heading "Customary Land of the same Manor". There are then set out the four holdings to which have already referred, Woods, Jennings, Shrubb and Channel, with their predecessors also named. An important footnote is added which reads as follows: "The above lands are held by lease for (blank) years at a fine certain (viz. three years full rent of th premises) and a quit rent of three shillings and four pence each payable to the Lord of the Manor". The 1678 lease required that on renewal a fine of "three years rent" should be paid. The fine actually paid was £12 so that the rent which had to be trebl as the price of renewal in 1778 was clearly not the quit rent of 3s.4d. but the full rental value. Similarly the fine payable on the renewal which took place in 1876 was £40 against a quit rent of 3s.4d. It is therefore plain that the fines payable on renewal in the case with which I am concerned were three years f rent as in the footnote. The quit rent, mentioned in the footn is exactly the same as the quit rent in the leases of 1678, 1778

and 1876. The fact that the leases of these four holdings prov for payment of a fine certain indicated the renewable nature of such leases. Putting these ancient documents together I find i easy to infer that the property comprised in the 1678, 1778 and 1886 leases, was one of the four tenements which had been carved out of the waste of the Manor of Broxhead and then leased as customary land of the Manor. It seems to me likely, having reg to the general description and almost identical measurements, that the premises demised by the three leases were in fact those described in Bundle A, p. 125, as "William Jennings, late Silvester's, his house garden and homestead 1 rood, two meadows 1 acre, a paddock and small piece of pasture, ½ acre".

The 1778 and 1876 leases are not drawn in words which would create a right of perpetual renewal as a matter of legal interpretation. But it seems to me unlikely that such leases would have contained the same right of renewal as is to be foun in the 1678 lease, and that the lease would have been twice renewed, unless it had been the custom of the Manor of Broxhead to renew such leases upon the same terms upon each and every occasion that the lease came to an end. I therefore conclude t the lease of Lindford Bridge House was perpetually renewable by custom.

I see no reason to depart from the conclusion of the Chief Commons Commissioner that rights of common were vested in Jasper Morer, Richard Newman and the Fullicks, their respective success and assigns, as tenants of the Manor. It follows that such rig of common were appurtenant to Lindford Bridge House and passed t Gamlen by virtue of section 62(1) of the Law of Property Act 192

For the reasons which I have indicated I dismiss Mr. Whitfi appeal in the case of Mr. Connell and I now turn to the claim of Mrs. Cooke.

Mrs. Cooke is the owner of Trottsford Farm and claims a r
A of common of pasture over part C of the Common. The Chief
Commons Commissioner found that the farm was part of the Manor o
Broxhead but that it was not clear and could not be inferred
whether the farm belonged to the Brocas ten-twelfths as did part
B of the Common, or to the Fauntleroy two-twelfths. He concluded
that there was insufficient evidence to support Mrs. Cooke's cla
to have succeeded to any manorial rights of common. There is no
appeal from that finding. He nevertheless decided in her favour
C for a reason which I will explain after narrating the facts.

In the early years of this century the farm was occupied by
John Lewe who used to turn out about two dozen cattle onto the
? Common. By two conveyances dated 4th January 1906 Charles Willia
D McAndrew acquired parts C and D of the Common. By a conveyance
dated the 31st July 1912 C.W. McAndrew acquired Trottsford Farm.
? There is no copy of this conveyance with the papers but the fact
is not challenged. Accordingly, in 1912 the farm and parts C
E and D of the Common were in the same ownership. In or before
1914, C.W. McAndrew let the farm to Mrs. Hicks. There is
evidence from her grandson, Mr. White, who lived on the farm from
F 1914 to 1926, that cattle from Trottsford Farm grazed on the
Common. The evidence is not very satisfactory. It is brief. It
consists only of an affidavit by him which leaves a number of loose
ends. He was not able to be cross-examined on his affidavit.
G Mrs. Hick's tenancy ended in 1926 or 1927. Thereupon C.W. McAndre
resumed possession of the farm and did not thereafter let it.
In 1927 he installed Percival Stonnard in the farm as his bailiff.
In 1931 Gerald Alexander McAndrew and his wife (who later became
H Mrs. Barnard) farmed Trottsford Farm. Stonnard remained on as
their bailiff. Mr. and Mrs. G.A. McAndrew farmed it as a single

unit with Picketts Hill Farm and Headley Wood Farm. C.W. McAnd
A died in 1934. Mr. and Mrs. G.A. McAndrew continued their farmin
operations. Stonnard remained as bailiff for them until 1944
when he gave up the position and vacated the farm. In 1948
G.A. McAndrew sold the farm and part D of the Common to Sotnick
B but retained for the time being part C of the Common. Mrs. Coo
is the successor in title of Sotnick. The conveyance to Sotni
is dated 5th February, 1948. It does not in terms grant any
grazing rights over part C of the Common. The only question is
C whether such rights passed to Sotnick by virtue of section 62(1)
of the Law of Property Act 1925.

Mrs. Barnard gave evidence at the Inquiry. She stated that
she could recall only one occasion upon which her cattle had
D grazed on the Common. That was during the war. The cattle in
question had not come from Trottsford Farm but from Picketts Hill
Farm. The Stated Case records that the only evidence of cattle
being grazed by an occupier of Trottsford Farm after 1912 was tha
E of White, whose evidence was confined to the period ending in
1926. It is common ground that there was no evidence of the
exercise of such rights during the 22 years prior to the conveyan
F to Sotnick.

After dismissing Mrs. Cooke's claim to manorial rights of common the Chief Commons Commissioner continued as follows:

> "Mr. Mills, however, based an alternative argument in
> support of Mrs. Cooke's claim upon the fact that her
> G 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
> H 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. 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.

"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 occupier of Trottsford Farm continued to graze cattle on the Common until the farm was sold to Mr. Sotnick.

"This is sufficient for Mrs. Cooke's purpose, for on the severance of land in common ownership the quasi-easements de facto enjoyed in respect of it by one part of the land over another will pass by virtue of section 62(1) of the Act of 1925, which is not confined to rights which, as a matter of law, were so annexed or appurtenant to the property conveyed at the time of the conveyance as to make them actually legally enforceable rights: see Wright v. Macadam, (1949) 2 K.B. 744, per Jenkins, L.J. at p. 748.

"I have therefore come to the conclusion that Mr. Sotnick acquired by virtue of the general 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."

Section 62, when analysed, provides as follows: A conveyanc of land shall be deemed to include all liberties, privileges, easements, rights and advantages whatsoever answering any of the following four descriptions:-

(1) Appertaining to the land;

(2) Reputed to appertain to the land;

(3) At the time of the conveyance enjoyed with the land;

(4) At the time of the conveyance reputed or known as part or parcel of or appurtenant to the land.

It is not in dispute that a right of grazing can fall within this sub-section.

The Chief Commons Commissioner decided in favour of Mrs. Cooke's claim on the footing that it came within the third or fourth description. He did not consider that such rights appertained or were reputed to appertain to Trottsford Farm. Indeed, such a conclusion would scarcely have been possible. In White v. Taylor (No. 2) (1969) 1 Ch. 160, at page 185, Mr. Justice Buckley said this: "Enjoyment of grazing facilities on the down by tenants of the lord of the manor holding under leases or tenancy agreements could not, in my judgment, establis a reputation of rights appurtenant to the lands comprised in thei holdings. The implication would be that they so grazed the dow by the consent of the lord or possibly under contractual rights or grants limited in their operation at the most to the periods o their tenancies. This could found no reputation of any kind of right capable of surviving those tenancies". The decision of th Chief Commons Commissioner was founded on the supposition that such rights were at the time of the conveyance enjoyed with or reputed or known as part or parcel of or appurtenant to Trottsford Farm.

In re: Yately Common ((1977) 1 A.E.R. 505) Mr. Justice Foster decided that "enjoyment" was not synonymous with user, and that section 62(1) did not require actual proof of user at the date of the conveyance. I adopt this approach. It was not, however, of importance to the reasoning of the Chief Commons Commissioner because, in fact, he inferred that the occupier of Trottsford Farm used the Common for grazing right down to the conveyance to Sotnic He said: "In the absence of evidence to the contrary I draw the inference that the occupier of Trottsford Farm continued to graze cattle on the Common until the farm was sold to Mr. Sotnick."

When an appeal lies only upon a question of law it is open to the appellant to challenge a finding of fact which is based

purely upon inference, if that inference is not properly to be drawn: See Armstrong Whitworth Rolls Ltd. v. Mustard ((1971) 1 A.E.R. 598). In my judgment the inference drawn by the Chief Commons Commissioner was not justified. The form of the Stated Case was agreed by the parties as stated in paragraph 9 thereof. The Case records that there was no evidence of any occupier of Trottsford Farm grazing any cattle on the Common later than 1911 except the evidence of Mr. White which speaks only down to 1926. It follows that there was no evidence of any such grazing during the whole 21 or 22 years immediately prior to the conveyance to Sotnick. Mrs. Barnard, who farmed Trottsford Farm with her husband from 1931 onwards, could not recall a single exercise of such rights. It seems to me that in such circumstances it is not possible to infer that the occupier of Trottsford Farm continued to graze the Common between 1926 and 1948.

If that inference is discarded I am bound to assume that the occupier of Trottsford Farm made no use of part C for grazing purposes during the period in question. In such circumstances it seems to me quite impossible to assert that such grazing rights were enjoyed with the farm at the time of the conveyance or were reputed or known at the time of the conveyance as part or parcel of or appurtenant to the farm. I accordingly reach the conclusion that Section 62 does not avail Mrs. Cooke and that the Chief Commons Commissioner erred in law in finding in her favour that Sotnick acquired by virtue of Section 62 a right of grazing over part C of the Common.

In the result the appeal of Mr. Whitfield fails against Mr. Connell but succeeds against Mrs. Cooke.

MR. MILLS: Your Lordship dismisses the appeal, but I am not quite what happens with Mrs. Cooke, whether your Lordship alters the A ister or whether it goes back to the Commissioner. However, having, I would say, substantially succeeded by getting Mr. Connell home, I would ask for the costs of the Case Stated.

MR. JUSTICE BRIGHTMAN: Why should not they be shared, if that submission is made by Sir Frederick, because one party has lost and the other party has won?

B MR. MILLS: Shared, my Lord?

MR. JUSTICE BRIGHTMAN: Well, borne equally.

MR. MILLS: Equally between whom, my Lord?

MR. JUSTICE BRIGHTMAN: If you like, that each side pay their own C costs, or you take the total costs and divide them in half. I do not think I would mind which, but I do not quite see why Mr. Connell should get the whole costs.

MR. MILLS: If the costs were apportioned in one way or another, I would accept that. Did I understand that your Lordship has suggested no order as to costs at all?

D MR. JUSTICE BRIGHTMAN: Either no order as to costs, or the matter can be treated, I suppose, as costs incurred by both sides in a very long and complicated matter and they could be cut in half.

MR. MILLS: My Lord, we have had this in commons cases already and one has sought to avoid that complicated situation. May I just take instructions, and then I may be able to help. (A pause) In my submission, the no order for costs or the equal division E of the costs would not be quite right because the real substantive contest in this case was the Connell claim, which took much longer and is much more involved. The Cooke case was really rather ancillary and peripheral and I would suggest, therefore, that the costs ought to be divided two-thirds/one-third in my favour.

F MR. JUSTICE BRIGHTMAN: How would that be done?

MR. MILLS: I would say that I should have two-thirds of the costs of the Case Stated.

MR. JUSTICE BRIGHTMAN: Two-thirds of your own costs?

MR. MILLS: Yes. I am asking for an order against Mr. Whitfield G for a proportion of my costs and I put the proportion at two-thirds. I hope that is right.

MR. JUSTICE BRIGHTMAN: What do you say, Sir Frederick?

SIR FREDERICK CORFIELD: My Lord, I should have thought it was fairer simply to let the costs of each side be borne by each side, but certainly, although the Connell argument took a lot H longer, there is no doubt that the whole of the Cooke case was based on the same background, which had to be gone through.

MR. JUSTICE BRIGHTMAN: Is that right, because there was no app on the manorial part of the Cooke case?

SIR FREDERICK CORFIELD: That is correct.

MR. JUSTICE BRIGHTMAN: And, therefore, if only Mrs. Cooke's clai had been in issue it would not have been necessary, I think, have had any documentary matter whatever prior to, was it, 190

SIR FREDERICK CORFIELD: I think that is correct, my Lord. I wit draw that. I think we could have started with the first Whitf conveyance to the first McAndrew. I think that would have bee sufficient. I do not know whether any fraction is to some extent arbitrary, but I would have thought that certainly I hav counter claim for costs in relation to Mrs. Cooke. I do not think it is very easy to fix an arbitrary figure but, of cours I accept that the Connell case was more complicated and did tak longer. I do not think I could argue otherwise.

MR. JUSTICE BRIGHTMAN: Do you wish to add anything, Mr. Mills?

MR. MILLS: My Lord, only just to make clear that what I am asking for is some order for costs against my learned friend, and I mus necessarily leave the proportion to your Lordship, within whose discretion it is.

SIR FREDERICK CORFIELD: My Lord, there is one other point I would like to make. The adjournment, which undoubtedly prolonged the proceedings because inevitably we had to do a certain amount of recapitulating, was the result of my learned friend indicating that he was going to rely on Yateley, and clearly, on that supposition I could not have dealt with Yateley without seeing the judgment. But, in fact, when the Yateley judgment was available, it was not really particularly relevant to the proceedings, and I would suggest, my Lord, that there were possibly two or three days extra as a result of that.

MR. JUSTICE BRIGHTMAN: Was any of the ground covered a second time? If no ground was covered a second time, it would not really matter, would it?

SIR FREDERICK CORFIELD: Indeed it was, my Lord. If your Lordship recalls, when we finished the first section, so to speak - I think we had about four days then - both my learned friend and myself, and indeed your Lordship, did have to go back quite a bit over, for instance, Baring v. Abingdon, and many of the cases.

MR. JUSTICE BRIGHTMAN: I did not think any of the cases had been re-read. You think there were?

SIR FREDERICK CORFIELD: Yes, indeed, I am sure they were. I could check up from my notes, but I am fairly certain they were.

MR. JUSTICE BRIGHTMAN: Very well.

MR. MILLS: My Lord, I would say that the Yateley decision actually shortened this case. My clients in this case, of course, cannot be blamed for how the Yateley case went. But the Yateley case did render it unnecessary in this case, for instance, to consider the point about nemo dat qui non habet and the perpetual nature of rights of common, and so on. There were points that

the Yateley case decided which, therefore, did not have to be decided in this case. The reason the Yateley case did not figu very largely in the argument before your Lordship was because it rendered unnecessary some arguments that might otherwise hav had to be addressed to you.

MR. JUSTICE BRIGHTMAN: Mr. Mills, there is a slight procedural problem here, is there not? This is one appeal, is it not, not two appeals?

MR. MILLS: It does seem to be one appeal, yes.

MR. JUSTICE BRIGHTMAN: Can I make separate orders in respect of Mr. Connell and Mrs. Cooke, because they are both appellants?

MR. MILLS: No, my Lord: this is the difficulty and this is why, actually, in the Yateley case before the Commons Commissioner we arrived at the conclusion that the only sensible thing to do, when one has, as I have of course, a lot of clients who have failed and a lot of clients who have succeeded, and so on, is simply to make some proportionate order which is within what is seen to be fair.

MR. JUSTICE BRIGHTMAN: I cannot make any order, can I, as between Mr. Connell and Mrs. Cooke because you appear for both and, therefore, you can make no submissions whatever to me . I can only make an order which affects the appellants jointly, and they have to sort it out between themselves, do they not?

MR. MILLS: I think that is one of the difficulties, and that is why the simple way to deal with it is to have an order just simply for a proportion of costs to be paid one way or the other. That is certainly the point at which in practice in these commons cases we have at the moment arrived, but your Lordship's discretion, of course, is immensely wide and I would not waste time submitting that it was not. I do not want to repeat myself, but I still say that the convenient way to deal with this is to make an order that my friend pay some proportion of my one lot of costs.

MR. JUSTICE BRIGHTMAN: I shall order that the appellants are to pay to the respondents two-thirds of their costs of the appeal.

SIR FREDERICK CORFIELD: My Lord, there is the question of the consequences of your Lordship's judgment. I think it is sufficient if you make an order that the Register be amended by striking out the registration ——

MR. JUSTICE BRIGHTMAN: Is that so? I do not have the Commons Registration Act with me. Under what section does that jurisdiction arise?

SIR FREDERICK CORFIELD: I am informed that has been done in previous cases.

MR. JUSTICE BRIGHTMAN: I think I would like to see the authority for it. I would have thought it was more appropriate for the Chief Commons Commissioner to direct that the appropriate change be made.

MR. MILLS: This is the first time that I have known it happen exactly like this, but I do not think your Lordship really has any jurisdiction under the statute to alter the Register at all. On the other hand, in the Yateley case there was an obvious mistake on the Register: I submitted to Mr. Justice Foster that he could not correct it but he made an order correcting it, and there the matter rests.

MR. JUSTICE BRIGHTMAN: Who is in charge of the Register?

MR. MILLS: There is a Registration Authority which, in this case, is the Hampshire County Council. In fact, they would have been here except that they are not interested in the Case Stated, because I appeared for them myself. If I may try to assist your Lordship, it has seemed to me that, for the rectification of the Register, the decision your Lordship has made on the law goes back to the Commissioner and he then, putting his law right deals with the register.

MR. JUSTICE BRIGHTMAN: In a case under, for example, the Land Charges Act, or anything of that sort, the order by the court, I imagine, is not that the register be altered but is an order on a party to vacate his charge.

MR. MILLS: Yes.

MR. JUSTICE BRIGHTMAN: That sort of thing cannot be done here, presumably.

MR. MILLS: No, it cannot.

MR. JUSTICE BRIGHTMAN: These are provisional registrations, are they not?

MR. MILLS: Yes. The jurisdiction, under the statute, is in the Commissioner, either to confirm it with or without modifications, or whatever it is, and then we get a Case Stated, and the law is revealed to have been wrongly applied by your Lordship's decision in Mrs. Cooke's case, and so it then simply goes back for the Chief Commissioner either to confirm the registration or not confirm it, or whatever may be. But let me make it quite clear, we shall make no difficulty about this. We shall be entirely co-operative.

MR. JUSTICE BRIGHTMAN: What I propose to do is to make no order altering the registration and changing the contents of the Register in any way, because I doubt whether I ought to do that, but if any problem arises the matter could be mentioned by junior counsel at some convenient moment, and I will then make whatever order is found to be necessary. Is that satisfactory?

MR. MILLS: I think it extremely unlikely there will be any difficulty, but as your Lordship has pointed out, the Register is a very complicated sort of thing: it has all kinds of registrations on it and I think we should have to tell your Lordship all about it before we could ask your Lordship to alter it. The consequential amendments might be very considerable.

MR. JUSTICE BRIGHTMAN: Very well. The matter can be mentioned, then.

SIR FREDERICK CORFIELD: My Lord, there is one other point. Do I take it that the corollary of your Lordship's order on costs is that we have one-third of our costs paid by the other side?

MR. JUSTICE BRIGHTMAN: No, it was not. I made no order as regar your costs at all. I have left Mr. Whitfield to bear his own costs and pay the appellants two-thirds of their costs. I have not made cross orders.

SIR FREDERICK CORFIELD: I took it, my Lord, on that principle, that the costs of Mrs. Cooke's share of it - whether it is one-third, or one-quarter, whatever it is - would go the other way.

MR. JUSTICE BRIGHTMAN: She is not a separate appellant. There are two appellants here ---

SIR FREDERICK CORFIELD: Yes, that is true.

MR. JUSTICE BRIGHTMAN: --- and there is no way, I think, of separating her costs - that I know of.

SIR FREDERICK CORFIELD: In that event, my Lord, then I would submit that two-thirds is on the high side.

MR. JUSTICE BRIGHTMAN: I have considered all the submissions made to me. I took a few moments, as you may have observed, to think out what I ought to do, and that is the order I have made. If there is a large sum of money here I would certainly consider an application for leave (which I think is what you require) to appeal on the costs, if you so wish. I do not know whether you want to. Would you like to take instructions as to whether to make such an application? I think you cannot appeal on costs without getting leave.

SIR FREDERICK CORFIELD: Yes, I would like to make that application, my Lord.

MR. JUSTICE BRIGHTMAN: Can you refer me to the Annual Practice?

SIR FREDERICK CORFIELD: It is page 842 in the White Book: paragraph 3, Orders as to costs only. It says that no appeal lies without the leave of the court or judge making the order from an order of the High Court or any judge thereof as to costs only - as my Lord has explained.

MR. JUSTICE BRIGHTMAN: Sir Frederick, I thought there was a rule which dealt expressly with appeals as to costs in so many words. There is a note on page 908, at the bottom, "Appeals as to costs", if you could just read that. It is the last paragraph.

SIR FREDERICK CORFIELD: "No appeal shall lie without the leave of the Court o Judge making the order, from an order of the High Court or any Judge thereof made ... as to costs only which by law are left to the discretion of the Court'. In view of the above section, no appeal against a decision on Costs can be entertained unless the trial Judge by taking into account some matter wholly unconnected with the cause of action or by being without material on which to exercise his discretion had not in law exercised his discretion at all ... If, however, the appellants' complaint is

"genuinely about other matters as well as about costs the Court of Appeal has jurisdiction to deal with the issue of costs even if the appellant failed on those other matters".

MR. JUSTICE BRIGHTMAN: My impression was that if I refused leave to appeal you are not entitled to get that leave from the Court of Appeal. That is why I am rather hesitating before I make up my mind.

SIR FREDERICK CORFIELD: As I read this, my Lord, it appears that in order to get consent from the Court of Appeal, one would have to raise other matters.

MR. JUSTICE BRIGHTMAN: Yes: the statute seems to say that there is no appeal without leave of the Court or Judge making the order.

SIR FREDERICK CORFIELD: Yes: that is what I understand, my Lord.

MR. JUSTICE BRIGHTMAN: Can you give me any indication what you think the costs are - or is that a matter which you would not wish to mention?

SIR FREDERICK CORFIELD: I am told that between £5,000 and £6,000 is a very rough estimate.

MR. JUSTICE BRIGHTMAN: That is on one side only, of course?

SIR FREDERICK CORFIELD: Yes. I am perfectly prepared to accept that the Connell case took a good deal longer than the Cooke case and two-thirds/one-third is a fair proportion - it is bound to be a bit arbitrary, and I do not think one can argue about it - but it does seem to me that if one takes into account that had there been two appeals we would have had our costs against Mrs. Cooke, that there should be, so to speak, a reduction of our costs.

MR. JUSTICE BRIGHTMAN: It would not have taken, one would think, perhaps more than a day, at most, to argue Mrs. Cooke's claim, and there would be practically no documents to look at at all.

SIR FREDERICK CORFIELD: My recollection was that we took two days. I had started on Mrs. Cooke just before the adjournment: we had to do a certain amount of recapulating and I think we were the best part of the day on the second stretch.

MR. JUSTICE BRIGHTMAN: Mr. Mills, what do you say about this application for leave to appeal? There is a very big sum involved.

MR. MILLS: I would prefer to say nothing except this, that the order which your Lordship has made is an order which I did suggest to your Lordship as my second suggestion: it is, in my submission, plainly a light order, and I would oppose leave to appeal on that very simple ground.

MR. JUSTICE BRIGHTMAN: Sir Frederick, I do not think it would occupy the Court of Appeal very long to form a decision about this - at least, I imagine not - if you went there, and it is a very big sum. I shall give you leave to appeal.

SIR FREDERICK CORFIELD: I am much obliged, my Lord.

MR. MILLS: That is on costs?

MR. JUSTICE BRIGHTMAN: On costs. I do not think he requires leave does he ——

MR. MILLS: Yes, he does, my Lord. He requires leave to appeal on any subtantia matter under the Commons Registration Act. It is section 18(1), or something like that - no appeal lies to the Court of Appeal. I was surprised that he did not consider an appeal ——

MR. JUSTICE BRIGHTMAN: If he applies for leave to appeal on the substantive issue, Mr. Mills, do you object to that?

MR. MILLS: No.

MR. JUSTICE BRIGHTMAN: Do you apply, Sir Frederick?

SIR FREDERICK CORFIELD: I do, yes, indeed.

MR. JUSTICE BRIGHTMAN: Very well, I will give you leave to appeal generally, and I will also give you leave to appeal if you so wish on the question of costs.

SIR FREDERICK CORFIELD: I am much obliged, my Lord.
