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THE ORIGINS OF SECTIONS 193 AND 194 OF THE LAW OF PROPERTY ACT 1925

by Bernard Selwyn

(References to (i) LCO 2/.... and MAF 48/.... are to files in the Public Record Office;
(ii) HL or HC Debates are to House of Lords or Commons Debates [Hansard] 5th Series volumes.)

Contents

1. Introduction

1.1 The Law of Property Act 1925 (15 & 16 Geo.5, c.20) is, with other Acts of that year, merely the consolidation of the law on this subject, which had been greatly amended by legislation of the previous few years and was to be brought into force on 1 January 1926.

1.2 Sections 193 and 194 of this Act replaced sections 102 and 103 of the Law of Property Act 1922 (12 & 13 Geo.5, c.16) and it is the origins of those sections which must be considered in detail.

1.3 There have been a few amendment of sections 193 and 194 in later years and these will be mentioned in section 6 of this paper but the only significant ones that need to be borne in mind are -

(a) the functions originally those of the Minister of Agriculture and Fisheries are now those of the Secretaries of State for the Environment and for Wales, and

(b) the functions given originally to particular local authorities are now those of different authorities and these are subject to further variation by current local government reorganisations.

2. Historical background

2.1 Before the 1925 Property legislation, the enjoyment of rights of common varied considerably according to the customs of the area. At one extreme, such as on Dartmoor, it might be by nearly all the inhabitants of the County. More usually, it was by those who derived their interest from a particular manor or group of manors: whether by owning particular freehold property within the manor or being copyholders.

2.2 Copyhold had originated in feudal tenure in villenage, under which the tenant held his house, land and common rights in return for military or labour services to the lord of the manor. In more modern times, these had been replaced by fines or other payments which had to be made to the lord before an heir could take possession of the interest after the death of the previous copyholder or if the copyholder wished to transfer it to another particular person. The transaction was recorded in the Court Roll and the newcomer was given a copy of the entry as proof of title.

2.3 The records of manors varied considerably. The most efficient included plans showing the boundaries of the properties concerned. These may have been based on their own estate surveys, or plans prepared for tithe apportionment or inclosure awards, but it was well into the second half of the nineteenth century before the country had been covered by the accurate comprehensive large scale plans of the Ordnance Survey and there was no compulsion to relate the information in court rolls to any plan. Many records could only refer to the traditional names of fields or the names of previous and adjoining owners.

2.4 A Royal Commission on Real Property in 1832 had favoured the abolition of copyhold because of its inconvenience and uncertainties but were unable to find an acceptable way of bringing it about. The Copyhold Act 1841 (4 & 5 Vict. c.35) permitted voluntary enfranchisement if both lord and tenant wished, and a proviso to section 81 of that Act stipulated -

> "that nothing herein contained shall operate to deprive any Tenant of any Commonable Right to which he may be entitled in respect of such lands, but such Right shall continue attached thereto notwithstanding the same shall become Freehold".

2.5 The Copyhold Act 1852 (15 & 16 Vict. c.51) was the first to allow enfranchisement compulsorily, at the instance of either the lord or the tenant. Section 45 provided similarly to the 1841 Act for the continuance of common rights. This was consolidated in section 22 of the Copyhold Act 1894 (57 & 58 Vict. c.46) and that, in turn, was a basis for a similar preservation in the Bills mentioned below, culminating in paragraph (4) of the Twelfth Schedule (Effect of Enfranchisement) to the Law of Property Act 1922, included in Appendix I to this paper.

2.6 Serious attempts to simplify the law of real property and conveyancing were begun, in 1895, by the Law Society which sponsored the drafting of a number of bills for that purpose. Nothing came of these, but the Report (1911) of the Royal Commission on the Land Transfer Acts and the appointment of Viscount Haldane as Lord Chancellor in 1912 led to the first major initiatives by the Government.

3. Progress 1913 - 1919

3.1 Haldane introduced into the House of Lords (on 10 July 1913) two separate Bills - the Real Property Bill and the Conveyancing Bill. Parts II and III of the Real Property Bill provided for the abolition of copyhold and other special tenures and the extinguishment of manorial incidents. These Bills were treated as drafts available for informal comment and no further Parliamentary progress was attempted.

3.2 On 6 August 1914, Haldane introduced a single Real Property and Conveyancing Bill. This included alterations in detail to meet criticisms and suggestions made on the earlier Bills and again was intended only to be the basis of further informal consultation with a view to the introduction of a new Bill in the following Session, but it was also two days after the commencement of the first World War.

3.3 In the following year, to help the War effort, Asquith transformed his Liberal administration into a coalition with the Conservatives. Haldane was superseded, for reasons which need not concern us, by Lord Buckmaster, also a Liberal, who was a keen supporter of what was then known as the Commons and Footpaths Preservation Society. Eighteen months later, Asquith gave way to Lloyd George who replaced Buckmaster with a Conservative Lord Chancellor who was succeeded, immediately after the end of the War (January 1919) by Lord Birkenhead, another Conservative.

3.4 In 1919, there was a further Report on the transfer of land from a Departmental Committee chaired by Sir Leslie Scott KC, a Conservative MP. He was to be appointed Solicitor-General in 1922, and later would become Lord Justice Scott, whose Committee's Report (1942 - Cmd 6378) on Land Utilisation in Rural Areas was influential in preparing for the post-Second World War legislation affecting the countryside.

3.5 Resulting from Sir Leslie's Report, the Lord Chancellor asked the eminent parliamentary draftsman, B.L. (later Sir Benjamin) Cherry to prepare a revised Law of Property Bill and the first draft of this was ready to be printed for limited circulation in May 1919. (LCO 2/443)

3.6 Not realising what was already in progress, in July 1919, Frank (later Sir Francis) Jones, Legal Adviser to the Board (from August 1919, the Ministry) of Agriculture and Fisheries and Solicitor to the Commissioners of Woods and Forests, sought the revival of the 1914 Bill. He wanted copyhold tenure to be abolished as it was a strong deterrent to good husbandry, the provision of sanitary dwellings for farm labourers and afforestation. He drew attention to the third Report of the Real Property Commissioners [of 1832, which he must have been keeping handy] page 15, where it was stated that "it is certain that in Sussex and other parts of England the boundaries of copyholds may be traced by the entire absence of trees on one side of the line, and their luxurient growth on the other". Many trees had been clear-felled for timber during the War and there was considerable anxiety to make good the shortage which had existed even before the War. For that purpose the Forestry Commission was created in 1919 but it was also necessary to remove any discouragement of private forestry. The Department was, therefore, relieved to discover that the Lord Chancellor was intending to revive the property legislation. (MAF 48/153)

3.7 In a letter of 11 November 1919, Sir Claud Schuster, Permanent Secretary in the Lord Chancellor's Department, wrote to Cherry -

> "I showed the Bill to Buckmaster this morning. He is in general agreement, but he pressed me to tell him what provision was made for the preservation of commons when the copyholders' rights were extinguished. Could you supply me with an answer to this question? It is quite likely that the Commons Preservation people who are very active may prick up their ears when the Bill comes on."

Two days later, he was able to draw Buckmaster's attention to subclause (4) in the Twelfth Schedule (see paragraph 2.5 above) which ensured that enfranchisement will not deprive a tenant of any commonable right, which will continue to attach to the land after it has become freehold. (LCO 2/443)

4. The Law of Property Bills 1920 - 1922

4.1 Birkenhead introduced his Law of Property Bill on 19 February 1920 and it received its Second Reading on 3 March (HL Debates vol.39, cols. 250-280). Birkenhead was anxious to assure the House that the Bill was not revolutionary, but no more than the end of an evolution which had been proceeding since the previous century. Nothing was said in the debate about commons.

4.2 The Bill was first, and unusually, referred to a Joint Select Committee of both Houses. Its members were - from the Lords - the Earl of Malmesbury, Viscount Haldane and Lords Buckmaster and Muir Mackenzie and - from the Commons - Conservatives Mr. Betterton and Major Hills, Liberal Mr Hayward and Labour Mr Hartshorn, the last a South Wales miners' union official.

4.3 On Sunday 14 March, Cherry wrote to Sir Frank Liddell, the Chief Parliamentary Counsel (LCO 2/443 and MAF 48/155 Pt.1):-

> "Ld Buckmaster fears that tho commonable rights are preserved by the Law of Property Bill, we shall by enfranchising copyholds obliterate the evidence of the existence of the rights of common for the Court Rolls will no longer be kept up. I have talked the matter over with him & Ld Haldane & under their instructions have prepared the accompanying amendment. This relates to your part of the Bill & I shd be grateful if you wd consider whether it wd do or what alterations should be made. Ought it to be shewn to any department?
>
> The idea is that unless something on these lines is enacted the lord will buy up the rights of the commoners & then be able to enclose without obtaining any order under the Inclosure Acts."

4.4 Cherry proposed adding to subclause(4) of the Twelfth Schedule to the Bill:-

> "and, after the commencement of this Act, members of the public shall have rights of user (not being profits a prendre) and access in respect of the surface of all commons and commonable land, not inclosed at the commencement of this Act, corresponding to the rights hitherto enjoyed (whether under custom or otherwise) by the commoners and members of the public or any of them in respect of the land, but without prejudice to the beneficial rights hitherto respectively enjoyed by the lord and the commoners, and subject to any rules prescribed by any authority having power, in the interests of the public, to regulate the user of the land."

4.5 Liddell referred this to Frank Jones for his Department's views (MAF 48/155 Pt.1) observing, "If the difficulty is that the abolition of the court rolls will destroy the evidence of user I don't see how it will be cured by the proposed amendt."

4.6 Jones replied, 17 March 1920 (MAF 48/155 Pt.1):-

> "The Ministry of Agriculture and Fisheries would be glad of any legislation which would, without injustice, preserve commons as open spaces for the enjoyment of the public but I am afraid that the proposed amendment would arouse considerable opposition and it appears to be at any rate doubtful whether it comes within the long title of the Bill.
>
> As you know, the public have as a rule no right in law to enter upon a common except along a public way and then only for a right of passage, and the difficulty which has arisen when proposals have been made to legalise generally a public right of access to commons is the possibility of such right being used in such a way as to damage the sporting value of the commons. In this connection you might refer to Harrison v Duke of Rutland (1893).
>
> An enfranchisement under the Bill will, as under the Copyhold Act, 1894, leave the existence of common rights unaffected and the plea that enfranchisements may lead to uncertainty as to the lands to which common rights attach seems rather a slender basis for a proposal that the public shall have a statutory right of access to all commons although possibly not one copyhold exists now for enfranchisement under the Bill.
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> Further, the Court Rolls will be kept at the Public Record Office and show the former copyhold lands, and the absence of any subsequent record of transmission of the land does not seem to make the proof of commonable rights more difficult.
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> Prima Facie the freehold tenants of a Manor are also entitled to rights of common, and it is generally their rights that prove fatal to any scheme for an enclosure by agreement on account of their number.
>
> Have commoners any rights of access or user in respect of a common except such as are necessary or proper for the exercise of their profits a prendre, and would it not therefore be better that the provision, if inserted, should state directly that all persons should have a right of access to a common or any part thereof except any part which has been lawfully enclosed [?]"

4.7 Cherry wrote direct to Jones, 19 March 1920 (MAF 48/155 Pt.1):-

> "Both Haldane and Buckmaster are anxious to move the amendment and Malmesbury he tells me is equally willing.
>
> Buckmaster recognises that the Bill does not destroy rights of common but although I pointed out to him that the Court Rolls would be kept at the Record Office he is firmly of the opinion that the effect of enfranchisement will be to obliterate evidence of the ownership of rights of common.

> He cited to me a case (in which he was engaged) in which a public common was only saved by reason of there being one copyhold tenant left on the Rolls. He tells me that it was quite impossible in that case to trace the freehold commoners.
>
> So far as regards the Joint Committee of the two Houses I am satisfied that the amendment would not arouse opposition, but whether this would materialise in the House of Commons is ofcourse quite another story.
>
> As regards the damage to sporting rights you will see that the amendment proposes to give the rights of access without prejudice to the beneficial rights hitherto enjoyed by the lord; thus I take it that his keepers could still prevent a common being used in such a way as to damage such rights.
>
> .....
>
> I am engaged to discuss the Bill with Haldane on Monday at lunch, and on Tuesday and Wednesday at 11 o'clock the Joint Committee are to sit & I must attend. From what I can gather this Committee propose to sit so far as possible from day to day in order to get through the immense amount of work that has to be done. It will probably be found necessary to postpone the operation of the Bill till January 1922. ....."

4.8 Jones replied, 22 March (MAF 48/155 Pt.1) that he was unable to understand how enfranchisement could obliterate evidence of the ownership of rights of common. It was more likely to lead to the identification of copyhold land.

> "I am afraid that the words you insert "without prejudice to the beneficial rights" etc. would not prevent members of the public enjoying in the most proper manner their right of access conferred by the proposed clause and thereby destroying the quietude which is essential at certain periods of the year, if the shooting of the moor is to be enjoyed to the best advantage."

4.9 He pointed out he is not raising any objections to the proposed amendment on the part of the Ministry but it must be regarded as a very substantial amendment of the law relating to commons and could not fall within the scope of the Bill.

> "The Ministry have under consideration legislation as to Commons regulation, eliminating the necessity of the consent of the lord, but such legislation contemplates consideration of the position of the lord and of his protection, if necessary, by the insertion of special provisions."

4.10 Cherry reported, 23 March 1920 (MAF 48/155 Pt.1) that he had laid Jones' letters before Haldane and Buckmaster but the latter was not very pleased. He thought he had got them to agree not to insert the amendment in Committee but he believed they had determined to recommend it in a report for insertion when the Bill comes before the House.

4.11 In fact, the Joint Select Committee inserted Cherry's amendment (paragraph 4.4 above) as the following new clause (numbered 101):-

> "From and after the commencement of this Act members of the public shall have rights of user (not being *profits a prendre*) and access in respect of the surface of all commons and commonable land, not inclosed at the commencement of this Act, corresponding to the rights hitherto enjoyed (whether under custom or otherwise) by the commoners and members of the public or any of them in respect of the land, but without prejudice to the beneficial rights (including sporting rights) hitherto respectively enjoyed by the lord and the commoners, and subject to any rules prescribed by any authority having power, in the interests of the public, to regulate the user of the land."

4.12 The Joint Select Committee explained in Appendix no.1 of their report of 30 June 1920 (HC 1920-131):-

> "Under the Bill all copyholds will be converted into freeholds, thus the records of copyholders who may be entitled to rights of common will no longer be kept.
>
> The Bill, following the practice of the Copyhold Acts, reserves the existing commonable rights for the benefit of the owners of the enfranchised land, but after the land has been enfranchised it is common knowledge that it becomes more and more difficult to ascertain who are the commoners.
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> It is true that, in the past, land has in many cases been enfranchised at common law without preserving the rights of common to the commoners, and the common has been closed. Where a right of common exists the new clause will give rights to the public in regard to land whether or not enfranchised under the Copyhold Act or by the Bill. If the lord bought up any existing rights of common he would, if the clause is not passed, be able to close the common.
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> The object of the clause is to secure that commons, particularly those near large towns, shall not be inclosed to the prejudice of the public.
>
> It should be noticed that the clause is to take effect without prejudice to the beneficial rights (including the sporting rights) hitherto enjoyed by the lord or the commoners.
>
> The clause in effect gives to the public, in regard to commons which have not been inclosed, the same rights it is generally, though inaccurately, supposed that they possess at the present time.
>
> The title to the Bill has been extended so as to refer expressly to commonable land."

4.13 The long title was now -

> An Act to assimilate and amend the law of Real and Personal Estate, to abolish copyhold and other special tenures, to amend the law relating to commonable lands and of intestacy, and to amend the Wills Act, 1837, the Settled Land Acts, 1882 to 1890, the Conveyancing Acts, 1881 to 1911, the Trustee Act, 1893, and the Land Transfer Acts, 1875 and 1897.

4.14 The Bill now returned to the Lords who considered it in Committee, 26 July 1920. Viscount Cave, sought the omission of the new clause (HL Debates vol.41, cols. 496 - 510). He and other speakers were severely critical of the restrictions it placed on the owners of commons and there were particular worries about the possible encouragement of gipsies. Birkenhead pointed out that the new clause had been accepted unanimously by the Joint Committee and Buckmaster had expressed willingness to consider amendments to overcome the criticisms. The Committee therefore approved the clause by 42 votes to 29 votes. However, because the Committee removed (temporarily) an earlier Part of the Bill, the clause became renumbered 67.

4.15 In a letter (28 July 1920) to Lord Middleton (LCO 2/445) Sir Claud Schuster wrote:-

> "..... very privately and confidentially I may say that I do not think that the Commons clause in its present form can possibly stand. The Chancellor offered Cave to consider the matter before Report if Cave would withdraw his motion to omit the Clause. Cave very foolishly refused to accept the offer and went to a division and this wipes out the Lord Chancellor's undertaking, but all the same we are trying to see what can be done and the Lord Chancellor will almost certainly himself put down amendments to the clause or suggest them to somebody else. It is really a very great pity that the Clause was ever put in at all. It forms no part of the original Bill. Now that it is in, I think for tactical reasons we must preserve something on the same lines for if we do not it seems certain that the Commons [interests] will, having once been put on the track, reinsert the Clause as it now stands. The subject is extraordinarily difficult in itself.".

4.16 An attack on the new clause now came from a different quarter. (LCO 2/445) Mr. Justice (Sir Reginald More) Bray wrote (4 August 1920) to the Lord Chancellor from The Manor House, Shere, Guildford, enclosing a copy of a long letter he had written (presumably for reasons of protocol) to the [Lord] Chief Justice criticising the clause as dangerously vague and ambiguous, unnecessary and prejudicial to the interests of such of the public as now use the commons, of the commoners and of the lord of the manor. He wrote as a lawyer and as lord of several manors in Surrey containing commons to the extent of 1800 acres.

> "Now from my experience I say no legislation is required. The public are and have been ever since I have known the commons allowed to walk and ride over them just as they pleased so long as they behaved themselves."

His chief problem was with gipsies and incendiaries. He was afraid that -

> "If the public have rights on the commons we shall have parties of beanfeasters and charabancs down from London who will go all over the common to the great annoyance not only to those who are using the common but to those who live on the borders of it and to the commoners who may be pasturing their sheep and cattle."

He was also concerned about the effect on afforestation and that it could be impossible to enclose portions for churches, schools and similar public purposes.

4.17 But Frank Jones had already prepared a revised draft of the offending clause for discussion with the Commons and Footpaths Preservation Society. Its Secretary, Lawrence Chubb, obtained the approval of his Chairman, Lord Eversley and agreed other amendments. He also sought a daily penalty not exceeding 20 shillings after conviction for bringing a vehicle onto, or camping or lighting a fire on a common and, having been advised by the Society's Standing Counsel, Randolph Glen, proposed a further amendment:-

> "Such right of access shall be deemed to be a public right of way for the purpose of section 26 of the Local Government Act 1894."

4.18 These suggestions appear to have been ignored or refused but (9 August 1920) Schuster wrote to Chubb that there was no prospect of further progress before the recess and further discussion should resume in the Autumn "with interested Peers as necessary and desirable to proceed upon a basis of general agreement." Chubb thanked Schuster, reporting that he was already in touch with Lord Salisbury's legal adviser. (LCO 2/454(1) and MAF 48/155 Pt.1)

4.19 Frank Jones at the Ministry of Agriculture sent Schuster (15 November 1920) the following revised clause which, Jones said, he and the Society had "concocted", asking that it be sent to Mr Freeland [the legal adviser to the Marquess of Salisbury and other lords and stewards of manors] for observations:-

> "(1) From and after the commencement of this Act members of the public shall, subject as hereinafter provided, have the right of access for air and exercise to any land which at the commencement of this Act is waste land of any manor or subject at all times to rights of common.
>
> Provided that
>
> (a) such right of access shall be subject to any scheme or provisional order for the regulation of the land and to any byelaw or regulation made thereunder; and
>
> (b) the Minister of Agriculture and Fisheries may on the application of any person entitled as lord of the manor or otherwise to the soil of the land or entitled to any commonable rights affecting the land impose such limitations on and conditions as to the exercise of the right of access as in the opinion of the Minister are necessary or desirable for preventing any estate right or interest of a profitable or beneficial nature in over or affecting the the land being injuriously affected or for protecting any object of historical interest and, where any such limitations or conditions are imposed, the right of access shall be subject thereto; and
>
> (c) such right of access shall not include any right to draw upon the land a carriage cart caravan truck or other vehicle or to camp or to light any fire thereon; and
>
> (d) the right of access shall cease to apply to any land over which the commonable rights are extinguished under any statutory provision.

(2) Where limitations or conditions are imposed by the Minister under this section they shall be published in such manner as the Minister shall direct.

(3) Any person who without lawful authority shall draw upon any land to which this section applies any carriage cart caravan truck or other vehicle or shall camp or light any fire thereon or who shall fail to observe any limitations or conditions imposed by the Minister under this section shall be liable on summary conviction to a fine not exceeding forty shillings."

4.20 Schuster thought the clause pretty hopeless and reported to Cherry (16 November 1920) (LCO 2/454/1) that Jones was preparing a new proposal which the Lord Chancellor would try to persuade Buckmaster to accept.

4.21 Freeland wrote to Cherry that his clients were prepared to accept the concocted clause provided that, for the words (in subclause (1)) "or subject at all times to rights of common" there were substituted "including all land hitherto used and enjoyed for the purposes of a village green". Jones wrote to Schuster, 22 November (MAF 48/155 Pt.1):-

"The words proposed by Mr Freeland to be omitted were inserted at the request of the Commons Preservation Society to cover the case of a waste which has become severed from the manor, but is still subject to rights of pasturage at all times and in consequence open for all practicable purposes to access by the public. It should not be impossible for the promoters of this clause to arrive at a settlement on this comparatively small point".

4.22 But Cherry, while agreeing that a compromise ought to be possible, wrote to Schuster, 24 November 1920 (LCO 2/454 Pt 1) that "Freeland's point was that commonable land is too wide as it might include moor land or land which, when the commoner's rights are bought out, might be properly used for building purposes. If, however, the land has in fact been used for a public purpose such as a village green no objection would be taken."

4.23 Freeland had also reported that Lord Salisbury and others would regard it as an insult if (under another section of the Bill) an order were made directing the rolls deposited in their muniment rooms be given up. These were required to prove their own title.

4.24 Cherry, writing to Schuster, 22 November (MAF 48/155 Pt 1), was anxious to ensure that Freeland's proposed amendment was sent to Buckmaster:-

"Haldane does not I think take much interest in the point but thought it politic to support Buckmaster to get him whole heartedly in favour of other parts of the Bill."

However, Schuster was not at all happy with the situation and wrote to Cherry (15 December 1920) (LCO 2/454 Pt 1) the difficulties "really are in the House of our friends for we cannot go on without Buckmaster and Haldane, and I do not know how far we can persuade them to be reasonable."

4.25 The Bill had fallen at the end of that Parliamentary Session but it was reintroduced into the Lords the following year (15 February 1921) and now included (as clause 102) the clause mainly as concocted by Frank Jones and the Commons Society (paragraph 4.19 above) but with additions which would have enabled the Minister (after receiving, within a year of the commencement of the Act, an application for the purpose and it being proved to his satisfaction) to certify that the public have been habitually excluded from access over the land either absolutely or during any part of the year. But these provisions were soon replaced by others (see paragraph 4.33 below).

4.26 The new Bill also omitted the provision for depositing the Court Rolls in the Public Record Office and left them in the custody of the lords of the manor who had to make them available for inspection and production.

4.27 This Bill was given a Second Reading on 17 March 1921, Birkenhead having explained the changes incorporated in the new clause 102 which, he believed, were satisfactory to the Commons Preservation Society and commended for acceptance. (HL Debates, vol.44, cols. 652-3)

4.28 Sir Leslie Scott now received a letter from Mr Justice Bray which he sent to Schuster, 18 March 1921 (LCO 2/454 Pt 2). Bray observed:-

> "Clause 102 of the Property Bill is intended and will prevent all inclosures. It is quite a common thing for a lord of the manor to be asked to grant a piece of waste for some special purpose such as a church, chapel, school, allotment, cricket ground, making or widening a road &c. That he can no longer do although it would be of great advantage to the neighbourhood. He ought still to have this power....."

Bray submitted a suggested amendment.

4.29 Cherry proposed the following alternative:-

> "(5) If the Minister shall, having regard to the interests of the public, certify that an intended inclosure for any special purpose, of any part of the waste, by the lord of the manor, will, subject or not to any conditions imposed by the certificate, be for the benefit of the parish or district in which the waste is situated, then, notwithstand anything in this section, such inclosure may be effected in accordance with the certificate."

The amendment was not used but it is noteworthy that the replacement (paragraph 4.33 below) which followed extensive consultations, forgets the suggestion in Cherry's original proposal, that a certificate include conditions - a lapse now to be regretted.

4.30 The subject matter of Bray's letter was raised during the Committee stage, 14 April 1921 (HL Debates vol.44, cols. 1000 - 1008) by Lord Phillimore. While agreeing that his own proposed amendment was inadequate, he was unable to agree with Buckmaster's argument that acceptable inclosures for public benefit could be dealt with under provisional order under proviso (a) to subclause (1). Eventually the Committee accepted clause 102 as introduced in accordance with paragraph 4.25 above (subject to a minor amendment) on the understanding that it would be reconsidered on Report.

4.31 On Report, 24 May 1921 (HL Debates, vol.45, cols. 320 - 322) Birkenhead indicated that negotiations were then in progress but put forward amendments to the clause in its then form which he thought were agreed by all parties, but without prejudice to the discussions that were proceeding.

4.32 The Lords agreed, in subsection (1) -

> to leave out "waste land of any manor or subject at all times to rights of common" and insert "a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or a suburban common as defined by the Commons Act, 1876, and to any other land subject to rights of common to which this section may for the time being be applied".

4.33 They also agreed to replace the insertions mentioned in paragraph 4.25 above by adding at the end of subclause (1) proviso (d) -

> "or in any case where it is proved to the satisfaction of the Minister that those commonable rights have been otherwise extinguished and the Minister consents to the exemption of the land from the operation of this section; but the Minister in giving or withholding his consent shall have regard to the same considerations, and shall, if necessary, hold the same inquiries, as are directed by the Commons Act, 1876, to be taken into consideration and held by the Minister before forming an opinion whether the application under the Inclosure Acts, 1845 to 1882, shall be acceded to or not.
>
> (2) The lord of the manor or other person entitled to the soil of any land subject to rights of common (not being a metropolitan or suburban common) may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies."

4.34 Lord Dynevor now put forward a total replacement of clause 102 on behalf of the Land Union, a right-wing breakaway from the Central (now Country) Landowners' Association (History of the CLA [CLA, 1957] p.xii). The most radical provision was to enable a county or county borough council to declare, if all common rights have been or are about to be extinguished, that it would be in the public interest that the land should be made available for development and the land should be inclosed if and when the rights of common are extinguished. This was particularly opposed by Lords Haldane and Parmoor, but Dynevor was prepared to withdraw the amendment on assurance from Birkenhead that the Land Union would be able to take part in the facilities given to other interested persons and bodies to meet and try agree a final clause (HL Debates, vol.45, cols. 322 - 329).

4.35 Indeed they had already met. Jones reported to Schuster (23 May 1921) (LCO 2/ 454 Pt 1) that there had been a long discussion with Lord Dynevor, Mr Yardley of the Land Union and Chubb in which they had nearly agreed possible amendments of clause 102 but required a short time to thrash out details and they hoped to agree a clause before third reading. In view of what happens next, it appears that they were considering that the clause was becoming too unwieldy and it would be better for it to be divided into two separate clauses.

4.36 The Bill came up for Third Reading a week later, 31 May. Amendments to clause 102, were proposed by the Lord Chancellor having been agreed by the Commons and Footpaths Preservation Society, Land Union and Minister of Agriculture. An additional clause was then proposed by Lord Dynevor, which he said had been agreed with all parties after a most amicable discussion. All were approved by the House (HL Debates vol.45, cols.375-9). These, subject to the minor amendments mentioned in paragraphs 4.38, 4.39 and 4.42 below, became the sections as finally enacted.

4.37 The Bill was then sent to the Commons where it was given a First Reading, 9 June 1921. But it was too late in the Session and the Bill was withdrawn on 15 August without having received a Second Reading (HC Debates vol.146, col. 1144).

4.38 For the third time (fifth time since 1913), the Bill was reintroduced into the Lords, 8 March 1922. Someone had now realised that vehicles might not only be drawn onto commons by gipsies' horses but could be driven direct. Proviso (c) to clause 102(1) and subclause (4) had been amended to make this, also, unlawful.

4.39 Other amendments incorporated in the reintroduced Bill were -

> an addition to clause 102(4) specifically disapplying that section to any telegraphic line, as there was some doubt whether these were specially authorised by Act of Parliament; and
>
> clause 102(5) removing any possible effect on rights to get or remove mines or minerals.

4.40 The Bill was hastily passed through its remaining stages in the Lords without further amendment and was reintroduced into the Commons on 4 April 1922. Here, the Second Reading debate, 15 May, was led by Sir Leslie Scott, Solicitor-General, who was able to calm the fears of those most suspicious about the Bill.

4.41 Mr E G Pretyman MP, the spokesman for the Land Union, remarked -

> "The next point on which we felt some doubt is the Clause about access to commons. On that we had doubts as to the advantages to be given to the public. Therefore we took steps to call a conference with the Commons and Footpaths Preservation Society who look after the public, and those interested from the point of view of the commoners. A unanimous agreement was arrived at, and the Clauses in the Bill embody that agreement, and I hope they will be satisfactory to all concerned. I need not go into the details." (HC Debates vol.154, col.115).

No-one else in the debate mentioned the subject.

4.42 The only relevant amendment made by the Commons Standing Committee B was in clause 103(4), after "Act of Parliament", the insertion of "or in pursuance of an Act of Parliament or Order having the force of an Act".

4.43 There was no further mention of these clauses in the Commons Report stage, 14 June, or Third Reading, 16 June. The Commons' amendments were accepted by the Lords, 22 June (HL Debates vol.50, cols.1099-1107) amidst heartfelt congratulations that this - the largest public general Bill hitherto dealt with by Parliament - had, at last, finished its passage with such consensus of approval.

4.44 Royal Assent was given on 29 June 1922 and the enacted sections 102 and 103 are contained in Appendix I to this paper. The drafting of the consolidation Bills could now proceed.

5. After the 1922 Act

5.1 Viscount Haldane became Lord Chancellor again during the first Labour Government in 1924 and hoped to complete the final stages of the new Property legislation. However, he was not even able to get through a Bill postponing the commencement before the government fell and the Conservatives returned. The new Lord Chancellor, Viscount Cave was now responsible.

5.2 During the passage of the successive Bills, the commencement - originally, in the 1920 Bill, to be 1 January 1921 - had been increasingly deferred and, by 1922, was intended to come into force on 1 January 1925. This was now considered quite impracticable. On 9 December 1924, two further Bills were introduced into the Lords - the Law of Property (Postponement) Bill, to defer the commencement for another twelve months, and the Law of Property (Amendment) Bill, which was a tidying up operation in preparation for the consolidation. It was essential to pass the first Bill before the end of the year but the other could be given a little longer for consideration. However, both Bills were passed through both Houses without further discussion and received the Royal Assent on 18 December 1924.

5.3 The Law of Property (Amendment) Act 1924 (15 Geo.5, c.5), 3rd Schedule, included the following paragraph:-

> 36. Section one hundred and two of the principal Act shall not apply to any common or manorial waste which is for the time being held for Naval, Military or Air Force purposes, and in respect of which rights of common have been extinguished or cannot be exercised.

For consolidation purposes, this was treated as s.102(6).

5.4 Immediately after the passing of the 1924 Acts, seven consolidation Bills were introduced and, on 9 April 1925, were finally passed. Sections 102 and 103 of the Law of Property Act 1922, now became sections 193 and 194 of the Law of Property Act 1925 (15 & 16 Geo.5 c.20), as printed at the end of Appendix II to this paper.

5.5 It will be recalled (paragraph 2.5 above) that the 1922 Act had one other important reference to commonable rights. These were preserved for the benefit of enfranchised copyhold land under the Twelfth Schedule, paragraph (4), included in Appendix I to this paper. The paragraph was not carried forward to the 1925 Act and, with the remainder of the Schedule (and other residues of the 1922 Act) was repealed by the Statute Law (Repeals) Act 1969. However, by virtue of the Interpretation Act 1978, section 16(1)(c) as applied by that Act's Schedule 2, paragraph 3, the acquired rights are not affected.

5.6 Section 202 of the 1925 Act provides:

> For giving effect to this Act, the enfranchisement of copyhold land ..... effected by the Law of Property Act 1922 as amended by any subsequent enactment, shall be deemed to have been effected immediately before the commencement of this Act.

5.7 Among the few provisions of the 1922 Act still in force are section 144 and (as incorporated by the Second Schedule to the Law of Property (Amendment) Act 1924) section 144A. Section 144 enables any person interested in enfranchised land to inspect any Court Rolls of the manor of which the land was held, subject to payment of a fee prescribed by the Lord Chancellor.

5.8 Section 144A put all manorial documents under the charge and superintendence of the Master of the Rolls who can ensure that they are being kept in proper custody and properly preserved. They remain in the possession or under the control of the lord of the manor but the Master of the Rolls may direct, if they are not being properly preserved or the lord of the manor requests, that the documents be transferred to the Public Record Office or a public library, museum or historical or antiquarian society willing to receive them and be responsible for their proper preservation and indexing.

5.9 Section 7(1) of the Local Government (Records) Act 1962, also permits the transfer to a local authority for deposit of the documents with its archives. Section 8 of the Parochial Registers and Records Measure 1978 permits the documents of Church owned manors to be deposited in diocesan record offices.

5.10 The Manorial Documents Rules 1959 (SI 1959/1399), as amended by SI 1963/976 and 1967/963, have been made by the Master of the Rolls under section 144A(7) of the 1922 Act as applied by the 1962 Act and these provide for supervision by the Historical Manuscripts Commission.

6. Amendments of the Law of Property Act 1925

6.1 The functions of the Minister of Agriculture and Fisheries (and, later, Food) under sections 193 and 194 were transferred (5 February 1965) to the Minister of Land and Natural Resources under Article 2(1) of the Minister of Land and Natural Resources Order 1965 (SI 1965/143). The Minister was Fred Willey QC, who was responsible for the Commons Registration Act of that year. However, his Ministry did not last long (it had not been allowed to take over town and country planning, which ought to have been an intrinsic part of its job) and Article 2(2)(a) and (5) of the Ministry of Land and Natural Resources (Dissolution) Order 1967 (SI 1967/156) retransferred (16 February 1967) its functions to the Secretary of State for Wales and (for England) the Minister of Housing and Local Government. The functions of the latter were (12 November 1970) further transferred to the Secretary of State for the Environment, under Article 2(1) of the Secretary of State for the Environment Order 1970 (SI 1970/1681).

6.2 As originally enacted, the number of commons automatically becoming subject to section 193(1) of the 1925 Act was increased as the boundaries of boroughs and urban districts were extended and new such areas were created - which happened frequently in the 1930's and after the building of the post-war new towns. But it is possible that some of these subsection (1) additions replaced previous voluntary rural declarations under subsection (2).

6.3 The reorganisation under the Local Government Act 1972 removed the comparatively clear division between urban and rural areas. Consequently, section 189(4) of the 1972 Act limited the mandatory provisions of section 193(1) to areas (apart from those governed by the Metropolitan Commons Acts) which, immediately before 1 April 1974, were boroughs or urban districts.

6.4 Other references to local government areas have been repealed by the Local Government Act 1972 and further amended by the Local Government Act 1985, Schedule 8, paragraph 10(5), the Local Government (Wales) Act 1993, Schedule 16, paragraph 7, and the Environment Act 1995, Schedule 9, paragraph 1.

6.5 The fine leviable under section 193(4) is now level 1 on the standard scale, under the Criminal Justice Act 1982, sections 38 and 46.

6.6 The end of section 194(4) has been amended by the Telecommunications Act 1984, Schedule 4, paragraph 16 to refer to "telecommunication apparatus installed for the purposes of a telecommunications code system".

7. Wisdom after the event

7.1 In the years immediately following the first World War, many hoped or feared much from political dogmas which were to shake the world for more than half a century to come. Few anticipated the social revolution which was to take place because of technological and economic changes. The governing classes and influential members of the Commons etc. Society (largely the same people) could only judge from their pre-War experiences. Paragraph 4.38 above gives an indication that the possible effect of motor traffic was only gradually sinking in but Mr Justice Bray (paragraph 4.16 above) could only foresee charabancs bringing people down from London. The most radical thought the only solution to the many problems of the day was through land (and other) nationalisation which was, ofcourse, fought tooth and nail by others such as the members of the Land Union.

7.2 As Frank Jones hinted (paragraph 3.6 above) the housing of the rural working class was deplorable: insanitary cottages in villages or scattered over the countryside, often subject to "tied" occupation which was only a licence, terminated if the licensee got the sack or became too old to continue working, the occupiers ending their days in the much-feared workhouse with husband separated from wife. (The copyhold system had little to do with it and the effect of its abolition would be minimal.) It was this class of person which made the most use of the common, for all or most fuel requirements and the grazing of its milk supply and meagre meat provision. But, even in the countryside, coal had been the almost universal cooking and heating fuel for the previous half-century.

7.3 The urban housing of all but the richest was tightly packed, in both the individual houses and geographically. The census returns of a century ago of, even, middle class houses and the slum clearance figures of much later, often horrify by comparison with what would now be considered the worst imaginable conditions. Everyone expected to have to walk or, at best, cycle for everyday journeys, except for those who had to work in the central areas of London or the largest towns, but even there it was necessary to live within easy reach of railway stations, tram or omnibus routes. These transport limitations also governed recreation activities.

7.4 It is, therefore, to be expected that in the early 1920's there was wide-spread acceptance by representatives of all interests that the public would have to be allowed continued access over common land near towns whether or not it was by any legal right. It was not possible for the owners of the soil to take effective action against trespassers as there was no way of distinguishing between the general public and copyholders or

other commoners and their families. Public enjoyment was only practicable to any extent where commons could easily be reached from centres of population. In remoter areas, so few people could reach the commons for recreation that they were no problem. If sport or game rearing might be interfered with, visitors could easily be controlled or intimidated by numerous gamekeepers, themselves living off the land.

7.5 The first issue of the Journal of what was now the Commons, Open Spaces and Footpaths Preservation Society, in November 1927, records (later to be Sir) Lawrence Chubb's recollections of the background to and enactment of sections 193 and 194 and the Society's hopes for the future. This is reproduced in Appendix II to this paper. The sequence of events, described in the middle paragraph on page 8 of the Journal, is not quite right but it is not surprising his memory was confused. Allowance must also be made, perhaps, for exaggerated optimism when telling the membership of the Society's achievements. Nevertheless, the Society's establishment had thought section 193 was a considerable gain and that landowners of commons outside the influence of towns would find it an advantage to enter into deeds under the section.

7.6 It could hardly be anticipated that, from just before he wrote his article until braked by the Second World War, the face of England was going to be changed out of all recognition, and this was to be accompanied by a change of expectations by all classes on living and recreation which would become even more marked from the 1960's.

7.7 In the inter-war years there were few effective planning controls and, compared with the prewar compact housing, new development, private and public, inspired by the garden city movement but without its architectural and social disciplines, spread itself around towns on which the residents depended for employment and other requirements, but eating up square miles of countryside in the process. This was aided by the increased availability of motor transport which itself led to new arterial roads and bypasses (treated as unemployment relief works), paid for by allowing ribbon development along them, and so defeating the object of the roads in the first place. Increased mobility allowed families to travel further from their homes for recreation and all parts of the countryside became easily reachable.

7.8. Rural life was also affected. There was a major agricultural slump between the wars but it did not stop a local authority rehousing programme for its rapidly reducing labouring classes - often segregated in ugly groups of cheaply built houses outside or away from the villages but increasingly enjoying the use of electricity. The Council house residents probably had no rights of common in any case but there was now less need to collect firewood and turf (peat) for all fuel purposes from the commons.

7.9 Therefore, soon after the Act came into force in 1926, the combination of events was making many landowners reluctant to take any positive steps which might further encumber or reduce the value of their property.

7.10 The 1972 Act and subsequent reorganisations of local government do not provide reasonably assured administrative means of identifying urban areas, so it is no longer practicable to try making section 193 effective again in the neighbourhood of such areas which had not already been created by 1972.

7.11 The administration of section 194 over 60 years has revealed a number of defects requiring remedy but it is still a valuable safeguard for the protection of many commons.

8. Conclusion

8.1 The final result of the 1922/1925 legislation was well below the full public access over the commons which the Society's representatives had been seeking but, in the climate of the time, that would have been impossible. Nevertheless, taking account of that climate, they achieved far more than might have been expected. Without their efforts, the 1925 Act would have contained nothing about commons and, with only the safeguards of the earlier specific commons legislation, there would have been a much greater risk of losing common land in many parts of the country than actually occurred.

8.2 The situation will now have to await remedy in accordance with the recommendations of the Royal Commission on Common Land, 1958 (Cmnd 462) and the Common Land Forum, 1986 (Countryside Commission, CCP 215). We hope it will not be for much longer.

APPENDIX I

These extracts from the Act are as given the Royal Assent on 22 June 1922.

Rights of the public over waste land and commons.

102.—(1) From and after the commencement of this Act members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or manorial waste or a common which is wholly or partly situated within a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:

Provided that—

(*a*) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw or regulation made thereunder; and

(*b*) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land being injuriously affected, or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and

(*c*) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon; and

(*d*) the rights of access shall cease to apply to any land over which the commonable rights are extinguished under any statutory provision, and to any land over which the commonable rights are otherwise extinguished if the council of the county or county borough in which the land is situated by resolution assent to its exclusion from the operation of this section, and the resolution is approved by the Minister.

(2) The lord of the manor or other person entitled to the soil of any land subject to rights of common may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies.

(3) Where limitations or conditions are imposed by the Minister under this section, they shall be published by such person and in such manner as the Minister shall direct.

(4) Any person who, without lawful authority, shall draw or drive upon any land to which this section applies any carriage, cart, caravan, truck, or other vehicle, or shall camp or light any fire thereon, or who shall fail to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding forty shillings for each offence.

(5) Nothing in this section shall prejudice or affect the right of any person to get and remove mines or minerals or to let down the surface of the manorial waste or common.

Restriction of inclosure of commons.

103.—(1) From and after the commencement of this Act, the erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded, shall not be lawful unless the consent of the Minister thereto is obtained, and in giving or withholding his consent the Minister shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act, 1876, to be taken into consideration and held by the Minister before forming an opinion whether an application under the Inclosure Acts, 1845 to 1882, shall be acceded to or not.

39 & 40 Vict. c. 56.

(2) Where any building or fence is erected, or any other work constructed without such consent as is required by this section, the county court within whose jurisdiction the land is situated, shall, on an application being made by the council of any county or borough or district concerned,

or by the lord of the manor or any other person interested in the common, have power to make an order for the removal of the work, and the restoration of the land to the condition in which it was before the work was erected or constructed, but any such order shall be subject to the like appeal as an order made under section thirty of the Commons Act, 1876.

(3) This section shall apply to any land which at the commencement of this Act is subject to rights of common: Provided that this section shall cease to apply to any land over which the rights of common are extinguished under any statutory provision, and to any land over which the rights of common are otherwise extinguished, if the council of the county or county borough in which the land is situated by resolution assent to its exclusion from the operation of this section and the resolution is approved by the Minister.

(4) This section shall not apply to any building or fence erected or work constructed if specially authorised by Act of Parliament, or in pursuance of an Act of Parliament or Order having the force of an Act, or if lawfully erected or constructed in connexion with the taking or working of minerals in or under any land to which the section is otherwise applicable, or to any telegraphic line (as defined by the Telegraph Act, 1878) of the Postmaster-General. 41 & 42 Vict. c. 76.

TWELFTH SCHEDULE.

Section 128.

EFFECT OF ENFRANCHISEMENT.

(4) An enfranchisement by virtue of this Act shall not deprive a tenant of any commonable right to which he is entitled in respect of the enfranchised land, but where any such right exists in respect of any land at the commencement of this Act it shall continue attached to the land notwithstanding that the land has become freehold.

APPENDIX II

Extract from the

JOURNAL of the COMMONS, OPEN SPACES

AND FOOTPATHS PRESERVATION SOCIETY

No.1 November 1927

THE LAW OF PROPERTY ACT, 1925.

(PROVISIONS FOR THE PROTECTION OF COMMONS.)

By LAWRENCE W. CHUBB.

Amongst the most striking alterations of the law effected by that monumental piece of legislation, the Law of Property Act, has been the change it has quietly brought about in the relationship of the public to common lands. The main object of the Act is to simplify the practice of conveyancing. Around this central object, however, are grouped many other reforms which must vitally affect the future of commons. It is provided that copyholds shall be abolished and that quit rents, heriots and other incidents of manorial tenure shall eventually be extinguished; manor courts will cease to function and with their passing many of the ancient customs which have operated to preserve commons from enclosure must speedily die out or will become mere traditions because of the lack of any local organisation to perpetuate them.

Hitherto when an attempt was made to enclose a common, the first counter-step to be taken was to ascertain which farms or tenements within the manor enjoyed the right of exercising pasture, estovers or other rights of common. In normal manors it was found that copyholds, or ancient freeholds in respect of which quit rents or heriots were payable, or copyholds enfranchised after 1894 (when the last great Copyhold Act was passed) were the tenements to which rights of common might be expected to attach. The Manor Rolls afforded invaluable evidence of such tenements and of the peculiar local customs and rights. They are the title deeds of all copyhold land and generally contain presentments describing the rights of the commoners. To be of real use the Rolls must be kept up to date, but with the compulsory enfranchisement of copyholds no further Court Rolls will be kept in Manors where Courts are discontinued.

It was thus obvious that the extinction of Manor Courts as well as of copyholds and all incidents of manorial tenure associated with ancient freeholds would inevitably and seriously increase the difficulty of establishing the existence of rights

of common and endanger the future of the commons; for a common is only a common so long as common rights are exercisable over it. For this reason it was recognised by the Commons and Footpaths Preservation Society that something must be done to prevent the new law from operating adversely to the interests of the commoners and general public.

In this connection it should be remembered that the public have hitherto been unable to claim any legal right to wander over the usual classes of unenclosed commons which have not been acquired by a local authority or regulated as open spaces. It is true that, in consequence of the difficulty of proving damage, attempts to exclude pedestrians from normal commons have seldom been made, but such persons have had no actual right to wander away from definite highways and have really been " dispunishable trespassers."

The original Law of Property Bill, introduced at the instance of Viscount Haldane, was accordingly amended in Committee through the efforts of Lord Buckmaster, who carried a provision that the public should enjoy a permanent right of access to all commons for air and recreation. This form of protection met with considerable opposition and, eventually, was not proceeded with. A subsequent Lord Chancellor, the Earl of Birkenhead, was approached, and he suggested that the Society should consult with the Ministry of Agriculture to see whether some generally acceptable form of the provision could be framed to ensure the protection of the public interests in commons. Clauses were at once prepared by the Society and submitted to the Government.

Many conferences took place between the Society and representatives of the Ministry, and subsequently with the Land Union, upon the Society's proposals. The outcome of these conferences was that two clauses were eventually agreed and inserted in the Bill by the Government.

These clauses are now Sections 193 and 194 of the Law of Property Act, 1925, and their unanimous acceptance by the great organisation representing landowners and by Parliament is a complete vindication of the consistent policy of the Society during the last 60 years.

Every struggle undertaken by the Society to protect commons

* See comment in paper para. 7.5

from unlawful enclosure has been fought with the object of ensuring that the threatened areas should be preserved as open spaces for public use and enjoyment. This was achieved by proving the illegality of attempted enclosures. The public interest, although the motive of the Society's action, was vague, indefinite and not legally recognised, and it was only secured by asserting and preserving the rights of the commoners.

As will be seen, Section 193 of the recent Act for the first time gives to the public a statutory right of access for air and exercise to every common or piece of manorial waste situate (*a*) in the Metropolitan Police District, (*b*) wholly or partly in any borough or urban district, and (*c*) to any rural common to which the Section may hereafter be applied.

These rights of access may be made subject to rules or limitations imposed by the Minister of Agriculture for the protection of the lord of the manor and commoners. They do not include any right to draw vehicles upon the common or to camp or light fires thereon; indeed, it becomes an offence for gipsies or others to encamp, without authority, upon commons to which the Section already applies or is applied. For this reason there is no doubt that in country districts much use will be made of Section 193 by lords of manors who desire to put a stop to the gipsy nuisance. The Section becomes operative in the case of rural commons as soon as the lord of the manor, by revocable or irrevocable deed deposited with the Ministry of Agriculture, declares that the Section applies to the commons within his manor. By executing such a deed he will, on the one hand, give to the public a right of access to the commons, and on the other will gain the advantage of being able to stop objectionable nuisances by prosecutions before the local bench of magistrates.

The Commons and Footpaths Preservation Society has already been asked to assist in bringing many commons, having a total area of over 5,000 acres, under Section 193. Model forms of deeds and regulations have been prepared for the Society and are now available.

Section 194 of the new Act is also of the utmost value. It provides that no enclosure or appropriation of land commonable

on January 1, 1926, shall hereafter be lawful without the consent of the Minister of Agriculture, who cannot consent to any enclosure unless satisfied that the interests of the public, as distinguished from those of the owners of the soil, will be benefited thereby.

Even if all common rights should hereafter disappear by merger, surrender, purchase or abandonment, it will still be unlawful to enclose any existing common unless the consent of the County Council, as well as of the Minister, is first obtained. Moreover, any County or Borough, or District Council may take County Court proceedings to restrain any future enclosure of common land within their respective areas.

These two Sections are the coping stones of the edifice which it has taken the Society over 60 years to build; they will make it infinitely more difficult in the future for illegal encroachments to take place upon common lands. They immensely extend and strengthen the protection given by the Legislature to commons, and show that it has at last come to be recognised that commons as public open spaces have a value far exceeding their use as grazing grounds. Every member of the Society will welcome this outstanding achievement and extend to Lord Eversley, their President, their congratulations upon the crowning of his life's work for the preservation of commons.

But the work of watching and advising must still be continued unabated, for attempts to evade or ignore the new Act will undoubtedly be made and in fact are already taking place; and the Society will be expected to see that the safeguards it has secured for the protection of the public and commoners are observed and enforced. It will also be necessary to press for the preparation of an official Survey showing the lands that are still commonable and to which the Law of Property Act therefore applies. The last official estimate indicated that the commons in England and Wales had an area of 2,625,000 acres; that estimate was excessive and it is probable that the total does not exceed 1,600,000 acres, of which more than 400,000 acres have been definitely protected through the efforts of the Society and its members. The residue, though not in public hands, cannot now be lawfully enclosed in consequence of this striking amendment of the law. No piece of work ever

carried out by the Society has more fully justified its existence than its great success in securing the following provisions in the Law of Property Act. By this indeed the seal of victory has been placed upon the long fight for the preservation of the ancient playgrounds of the Nation.

LAW OF PROPERTY ACT, 1925.

SECTION 193.

Rights of the public over commons and waste lands.

(1.) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or manorial waste, or a common, which is wholly or partly situated within a borough or urban district, and to any land which at the commencement of this Act* is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:

Provided that—

(*a*) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and

(*b*) the Minister† shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and

(*c*) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon; and

(*d*) the rights of access shall cease to apply (i) to any land over which the commonable rights are extinguished

* Namely, the 1st January 1926 (see Section 209 (2) of Act).

† Namely, the Minister of Agriculture and Fisheries (see Section 205 (1) (xv) of Act).

under any statutory provision; (ii) to any land over which the commonable rights are otherwise extinguished if the council of the county or county borough in which the land is situated by resolution assent to its exclusion from the operation of this section, and the resolution is approved by the Minister.

(2.) The lord of the manor or other person entitled to the soil of any land subject to rights of common may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies.

(3.) Where limitations or conditions are imposed by the Minister under this section, they shall be published by such person and in such manner as the Minister may direct.

(4.) Any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck, or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding forty shillings for each offence.

(5.) Nothing in this section shall prejudice or affect the right of any person to get and remove mines or minerals or to let down the surface of the manorial waste or common.

(6.) This section does not apply to any common or manorial waste which is for the time being held for Naval, Military or Air Force purposes and in respect of which rights of common have been extinguished or cannot be exercised.

SECTION 194.

Restrictions on inclosure of commons.

(1.) The erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded, shall not be lawful unless the consent of the Minister thereto is obtained, and in giving or withholding his consent the Minister shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act, 1876, to be taken into consideration and held by the Minister before forming an opinion whether an application under the Inclosure Acts, 1845 to 1882, shall be acceded to or not.

(2.) Where any building or fence is erected, or any other work constructed without such consent as is required by this section, the county court within whose jurisdiction the land is situated, shall, on an application being made by the council of any county or borough or district concerned, or by the lord of the manor or any other person interested in the common,

have power to make an order for the removal of the work, and the restoration of the land to the condition in which it was before the work was erected or constructed, but any such order shall be subject to the like appeal as an order made under section thirty of the Commons Act, 1876.

(3.) This section applies to any land which at the commencement of this Act is subject to rights of common:

Provided that this section shall cease to apply (*a*) to any land over which the rights of common are extinguished under any statutory provision; (*b*) to any land over which the rights of common are otherwise extinguished, if the council of the county or county borough in which the land is situated by resolution assent to its exclusion from the operation of this section and the resolution is approved by the Minister.

(4.) This section does not apply to any building or fence erected or work constructed if specially authorised by Act of Parliament, or in pursuance of an Act of Parliament or Order having the force of an Act, or if lawfully erected or constructed in connexion with the taking or working of minerals in or under any land to which the section is otherwise applicable, or to any telegraphic line as defined by the Telegraph Act, 1878, of the Postmaster-General.