COMMONS REGISTRATION ACT 1965

Reference No. 209/D/332

In the Matter of Throwleigh Common,
Throwleigh, West Devon District,
Devon

DECISION

Introduction

This Matter relates to 67 registrations (not counting replacements) made under the 1965 Act. My decision as regards each of the registrations is set out in the Third (and last) Schedule hereto. The disputes which have occasioned this decision , the circumstances in which they have arisen, and my reasons for my decision are as follows.

These disputes relate to the registrations at Entry Nos. 7, 8, 9, 10, 11, 12, 15, 16, 19, 20 (replaced by Nos. 138 and 139), 21, 24, 25 (replaced by Nos. 135 and 136), 27 to 31 inclusive, 34, 36 to 54 inclusive, 61 to 64 inclusive (63 and 64 replaced by Nos. 125 and 126 and Nos. 128 and 129), 68, 69, 72, 77, 78, 81, 82, 84 (replaced by Nos. 141, 142 and 143), 86 to 89 inclusive, 94, 97, 98, 102, 103, 104, 106, 109, 116 and 122 in the Rights Section of Register Unit No. CL 19 in the Register of Commons Land maintained by the Devon County Council and are occasioned by Objections Nos. 45 and 901 made by Throwleigh Parish Council and noted in the Register on 15 May 1970 and 9 July 1971, by Objections Nos. 400, 401, 402, 403 and 404 made by HRH Charles Prince of Wales, Duke of Cornwall and noted in the Register on 2 February 1971, and by Objection No. 1109 made by Devon County Council and noted in the Register on 11 September 1972.

I held a hearing for the purpose of inquiring into the disputes at Exeter on 9, 10, and 11 November 1983 and 7 February 1984. At the hearing: (1) Throwleigh Parish Council were represented by Mr F J Woodward, solicitor of Burd Pearse Prickman & Brown, Solicitors of Okehampton; (2) the Attorney-General for the Duchy of Cornwall was represented by Mr C Sturmer land agent for their Dartmoor Estate; (3) Lady Sylvia Rosalind Pleadwell Sayer on whose application with Vice Admiral Sir Guy Bourchier Sayer the registration at Entry No. 11 was made attended in person on her own behalf and as representing him; (4) Admiral Sir James F Eberle as successor in title of Mr David Miller Scott and (5) Mrs Eleanor Nancy Smallwood on whose application the registrations at Entry Nos. 12 and 69 respectively were made, were also represented by Lady S R P Sayer; (6) Lieut-Colonel John Rose Terry on whose application the registration at Entry No. 78 was made, was represented by his son-in-law Mr H W Lewis barrister-at-law (not professionally and not instructed other than in a private family capacity); (7) Mr Robert Norman Hurdle as successor in title (in part) of Mr William Webber on whose application the registration at Entry No. 84 (now replaced by Nos. 141, 142 and 143) was made attended in person (on 11 November and 7 February only); and (8) Mr William John Jordan on whose application the registrations at Entry Nos. 105 (final), 106 (disputed), and 142 (disputed) were made, attended in person being assisted by Mr H W Lewis (as aforesaid).

The land ("the Unit Land") in this Register Unit is a tract about 3 miles long from southwest to northeast and for the most part between ½ and ¾ of a mile wide;

on its west and part of its northwest side (together a little over 1 mile), it adjoins the Forest (Register Unit No. CL 164); on most of the remainder of its northwest side, it adjoins South Tawton Common (CL 176); on most of its southeast side it adjoins Gidleigh Common (CL 134); on its east side and the remainder of its other sides it adjoins enclosed farm lands situated near to and on the northwest, west and southwest of Throwleigh Village. On or just within its east side runs a road ("the East Side Road"); included in the Unit Lane is a strip ("the Ash Green Part") which is about ⅓ of a mile long from east to west and about 100 yards wide, which projects from the southeast corner of the remainder of the Unit Land and along which is a road ("the Ash Road") running off the East Side Road and leading to Ash and beyond to Forder and Wanson. In the Ownership Section, HRH Charles Prince of Wales, Duke of Cornwall is registered as owner of all the Unit Land except the Ash Green Part; of it no person is registered as owner.

In the Rights Section the registrations (not counting replacements) originally numbered 122 of these Nos. 117, 118, 119 and 120 have been cancelled without any replacement. Of the others 67 are disputed as stated above, and 49 of the remainder are recorded at Entry Nos. 123 and 133 as having, being undisputed become final. The registrations at Entry Nos. 80 and 85 are not so recorded in my copy of the Register, but because they are not mentioned in any Objection or in any reference made to the Commons Commissioners, in this decision I treat them as also having become final. Although the registration at Entry No. 7 is at Entry No. 123 said to have become final, in this decision I treat it as disputed because it is mentioned in Objection No. 901.

The grounds of the said Objections are summarised in the First Schedule hereto.

Course of the Proceedings

First (9 November), Colonel Terry gave oral evidence in support of the registration at Entry No. 78, in the course of which he produced the documents specified in Part I of the Second Schedule hereto. In his written statement (JRT/1) he said (in effect):- He bought (Great) Ensworthy Farm in July 1958 and when looking round it beforehand Mr William Hill the owner indicated the area between Shilstone Hill and Kennon as being where his stock grazed. The boundary of Ensworthy runs for over half its length either within 5 to 25 yards of Throwleigh Common boundary or right on Throwleigh Common boundary. The 5 moor gates round the farm open within 5 to 25 yards of Throwleigh Common boundary and one gate opens right on the boundary. In winter he feeds his cattle inside the farm and when let out they walk straight across Throwleigh Common boundary and up Shilstone Hill or Kennon for grazing because there is nowhere

else to go to get their grazing. They do not go to Gidleigh Common for grazing because Buttern Farm is across their front. During the summer time the cattle go further afield and graze chiefly on Dartmoor Forest and it is impossible to prevent them grazing on Throwleigh Common because they have to cross it to get further afield .... When first arriving he enquired about the grazing matter locally and was told that cattle belonging to Ensworthy had always been fed inside or just outside the farm, and then gone off onto Throwleigh Common for grazing. Even though Ensworthy Farm is in Gidleigh Parish for all other purposes, it is a special case because the farm literally forms the extensive part of the parish moor boundary with Throwleigh and is cut off from immediate access to Gidleigh Common. An inspection of the location would make this situation completely clear.

Colonel Terry amplified his said statement identifying the gates on the plan (JAT/2) and saying that his cattle go behind Hound Tor and graze between Metheral and Hound Tor. They go (from Ensworthy) straight across Throwleigh Common because there is a bog (Honeypool), an obstruction between Gidleigh Common and Ensworthy.

In answer to questions by Mr Woodward, Colonel Terry said (in effect):- He did not maintain that his cattle were leared on Throwleigh Common, strictly speaking because he thought of a lear as being their summer lear; their lear could be either on the Forest (CL 164) or Gidleigh (CL 134) or Throwleigh (the Unit Land). It was difficult to lear cattle, they move about; his cattle went on Throwleigh Common round the bottom end of Raybarrow Pool and then up towards Hound Tor. They did not graze the same every year, but he insisted that wherever they grazed they always "go round on Throwleigh Common and from there to the Forest". His personal knowledge of grazing (from Ensworthy) did not go back to before 1958.

Next (10 November), Mr Lewis said that Colonel Terry is not claiming turbary, piscary, shooting, estovers, or take stone sand and gravel.

Next Mr C Sturmer who has been employed by the Duchy since 1965 and has been since 1970 their land agent for their Dartmoor Estate gave oral evidence in support of Objections Nos 401, 402, 403 and 404 (no shooting, no piscary, no pannage, and no taking wild animals and birds). Those present at the hearing having made it clear they would not oppose my giving full effect to the said Objections, it was agreed that to save time I should treat the evidence which he had given in July 1983 at my hearings relating to Okehampton and Belstone Commons (CL155 and CL73) should be treated as given at this Unit Land hearing and that the documents he then produced (specified in Part II of the Second Schedule hereto) should be treated as produced again. So the hearing proceeded on the basis that the said 4 Objections wholly succeeded. Mr Sturmer offered no evidence or argument in support of Objection No. 400 (rights do not exist).

Next (10 November) Mrs Monica Alford gave oral evidence in support of the registration at Entry No. 78 in the course of which she produced the statement specified in Part III of the Second Schedule hereto. In such statement (MA/1) she said (in effect):- She was born in 1923 at which time her grandfather Mr William Hill was tenant of Ensworthy (then called Great Ensworthy Farm) and her father Mr James Hill was tenant of Thule Farm in Gidleigh; in March 1929 following the death of her grandfather her father took over Ensworthy and they moved there; since then she had lived all her life either at Ensworthy (the farm)

or Little Ensworthy (a dwelling house with land, adjoining the farm on the south). In 1953 her brother took over Ensworthy Farm. Near the main entrance of the farm there is a bog known as Honeypool. One of the fields of the Farm (near to where the road turns) known as "Brake"; she remembered her father "used to feed his cattle at or near the Brake gate". When he let them out they used automatically to make their way on to Throwleigh Common where they could graze. They always went up that way whenever they were let out.

Mrs Alford during her oral evidence amplified and in some respects qualified her written statement, saying (in effect):- Her father's cattle were South Devon; a milking herd with followers and young stock. They were turned out from the Farm onto the Moor all the year; out by day and brought in at night. In summer they found their own grass; in winter they were fed both at the Farm Gate (of the drive to the farmhouse) and at the Brake Gate (into the Brake field); round the Brake Gate was poached and to keep the food clean they were not fed on the poached grass. In high summer their cattle could be found either on Gidleigh Common (CL 134) or on the Forest (CL 164) or on Throwleigh (the Unit Land). They would go of right up the track towards Buttern Farm and then before they got to Buttern Farm would wander off the track (witness pointing to TRT/2 indicated generally upwards); if they had gone (attempted to go) to the left (southwards) they would have got either into boggy ground or onto Beara (part of Gidleigh Common south of Ensworthy) which is bracken and clitter and on which there is no grazing); there is a bog between it and the road. The cattle sometimes wander about on Kennon Hill (part of which is in the parish of Gidleigh), and Quannon Hill (northeast from Kennon Hill and between it and Shilstone Tor). She agreed that Gidleigh Common was a bigger common than Throwleigh Common but did not consider that the cattle from Ensworthy grazing on Throwleigh Common were "taking away grazing from Throwleigh Commoners". Cattle were not deliberately put onto Throwleigh Common because to begin with they started on Gidleigh Common; the position at Ensworthy is "unique" because the entrance gates are adjusted to the Throwleigh Common boundary.

Next (10 November) Mr William Jordan gave oral evidence the effect of which I have hereinafter summarised under the headings "Great Ensworthy" and "Moortown".

Next (11 November) oral evidence in support of the Parish Council Objections was given by Mr Thomas William Endacott who for 21 years before last year had been a member and for the last 15 years chairman of the Parish Council. He said (in effect):- He was born in 1924 and had all his life lived at Clannaborough Farm (near the northeast corner of the Unit Land). Since 1961 he had farmed there on his own; before then he was and had been since 1939 in partnership with his father (he died in 1981 aged 75 years); before him his grandfather and great grandfather had rented the farm. Ever since he had been at the Farm they had had stock on the Unit Land; all the year cattle from the farm go out in the day time and are brought in at night (on to the inby land). Throwleigh Common (the Unit Land) is a much smaller area than Gidleigh Common (CL 134); the parish of Throwleigh is about 2,980 acres and Gidleigh is about 3,506 acres, but the population of Gidleigh is about 100 people whereas the population of Throwleigh is just over 300; "we fail

to see why they (those at Gidleigh) want our common grazing, when they have a good amount of their own". The Parish Council had not objected to straying because when the registrations were made under the 1965 Act it was thought that a right of straying would be allowed by the Commons Commissioners. After they made Objection No. 901 (dated 28 April 1971) they had done nothing about grazing mentioned in the Objection because they thought that the position could be left to a Commons Commissioner to decide. In pre-war days (before 1939) people did "dog stock back" meaning that they would turn stray animals toward their own common and this is what had been done since that time (1939); the stock was before 1939 much less; because today there is much more stock on Gidleigh Common it is far more important for Throwleigh to object to strays. He disagreed with the evidence of Colonel Terry and Mrs Alford, particularly their argument that they could not go onto Gidleigh Common because of the bog; there is a track (marked on the Register map) along which it is possible to go from Ensworthy by Buttern (the high) part of Gidleigh Common; the ground near the track is hard enough for cattle to go near (without going on) the track. Before the 1965 Act stray animals were turned back. Since Colonel Terry came, he put stock (from Ensworthy) onto Shilstone; they would be turned back towards the bridge between it and the Brake field. Colonel Terry's stock had no right because nobody outside the parish had a right; his stock on the Unit Land were strays. Commoners (from Throwleigh) turned strays back.

Questioned by Mr Lewis, Mr Endacott said (in effect):- He could not see any difficulty about the Objections having been made by the Parish Council (formally advised at a Parish Meeting) at a time when Mrs Alford was clerk of the Parish Council and not being made by the commoners of the Parish. Stock not of the Parish would be turned back. He did not agree that Ensworthy was a special case; the Brake Gate opened onto Gidleigh Common and that part of the common (about 10 acres) is over grazed; it is not now grazed (by other commoners) because the grass has all been eaten (it does not last long with 30 cattle on it). There is an important difference between the grazing of Colonel Terry and the grazing described by Mrs Alford in that her grazing was of South Devon and not of Hill cattle; from about November to the beginning of May South Devon cows are fed indoors, in the shippon to encourage them to go in. There had been changes starting (Dartmoor generally) in the 1920s; just before 1938-39 the South Devon (in the locality) began to go; through the war (1939/45) there was a subsidy for them, so they continued; when after the war the subsidy was for Hill cattle there was a change to Galloway. He did not agree with the suggestion that farmers did not know where their cattle were on the Moor; he thought most farmers would know. The idea of feeding on the Moor was to avoid poaching the fields (inby land). He did not accept that cattle from Ensworthy are more on Throwleigh than on Gidleigh; perhaps they had spent more time straying on Throwleigh Common than they spent grazing on Gidleigh Common.

Lady Sayer asked Mr Endacott: "Owners of the Venville holdings which I represent have used their rights as they are now registered; have you ever had any trouble or driven off animals from Widecombe or Holne Commons?" to which Mr Endacott said: "No, I have never seen them. You would know what would be my answer if I had ever

seen these animals". Later he explained to Mr Woodward that they would have been turned back to the Forest (CL 164) or to wherever they came from; the question had never arisen as he had never seen any animals from Widecombe or Holne Commons.

During the oral evidence of Mr Endacott Mrs Alford intervened to say (in effect):- Her brother took over Ensworthy Farm in about 1950; before then he was working with her father; before 1953 the milking herd was cut so there were only about 2 South Devon cattle kept for domestic purposes and the Galloway herd was increasing. After her brother took over he gradually built up the herd (Galloways) retaining some South Devon for domestic purposes.

Next (11 November) Mr Lewis handed in his submission about Entry No. 78 and said he would provide Mr Woodward with a copy so that he and I could consider them when the hearing was continued.

Next (7 February) Mr Woodward handed in the documents specified in Part V of the Second Schedule hereto and Mr Robert Norman Hurdle who was concerned to support the registration at Entry No. 84 (replaced by Nos 141, 142 and 143) said:- He and his family took over the ownership of Buttern Farm in January 1982, in support of the registration he would rely not on his Venville rights but on evidence similar to that given in relation to Moortown and Ensworthy.

Accordingly next in support of Entry No. 84 oral evidence was given by Mr William Webber in the course of which were produced the documents specified in Part VI of the Second Schedule hereto. He said (in effect):- He was born in 1917 in Brook Cottage; in 1931 his father from there moved to Buttern Farm which he farmed for 20 years until his death in 1951; his mother then continued for 3 years and after that (1954) he farmed it as owner until March 1981. They had about 50 Galloways, 7 or 8 South Devon and a flock of about 300 sheep which they kept on the moor; they went on to Gidleigh Common and also on to Throwleigh Common; they went there on their own free will not coerced in any way. He would think they were about half the time on each common. They were fed (in winter time) on Gidleigh Common just outside Buttern Farm.

Mr Webber in answer to questions by Mr Woodward about land he rented in Throwleigh from Mr John Fletcher Palmer and generally said (in effect):- His cattle were "leared on Gidleigh Common and grazed on Throwleigh; they grazed on Gidleigh Common and over to Throwleigh". For feeding they were back on Gidleigh Common. They did not "stray" on Throwleigh, they grazed there.

Next (7 February) Lady Sayer read the statement (Lady S/1) specified in Part VII of the Second Schedule hereto adding (a) the Duchy now conceded that the Forest and the adjoining commons (Commons of Devon) are one common; (b) she had exercised rights over Throwleigh Common in that she had dug some vags there and if any Throwleigh commoners had seen her doing so they did not raise any objection; and (c) Mr Woodward in questioning Mr Endacott had relied on cattle being "dogged off"; this was done secretly otherwise there would have been a fight. Lady Sayer then formally gave oral evidence confirming what she had said in her said statement.

On being questioned by Mr Woodward as to whether she had exercised grazing rights over the Unit Land, she said: "there is no need to because I exercise them over the Commons of Devon as one whole". On my saying that it seemed to me that she was not answering the substance of the question she added "... as has been pointed out over and over again ponies roam anywhere, I have had 2 Dartmoor ponies, one in particular wandered, it may have gone anywhere. I have not kept cattle or sheep but we have a right to graze on the land". At the conclusion of Mr Woodward's question, she referred me to her other statement (Lady Sayer/2) specified in Part VII of the Schedule hereto.

Next oral evidence was given by Mr Frederick John Kingsland who had lived in Throwleigh Parish all his life and being vice chairman and acting chairman of the Parish Council. He said (in effect): the Council did not agree with persons outside the Parish being a right to graze. Commoners could tell the difference between strays and those who had a right; there was nothing physically to stop them straying from miles away; but they would not come more than about 2 commons away. He produced Mr Endacott's letter (PC/3) regretting that he was unable to attend the reopened inquiry (7 February).

I then read the letter as further evidence by Mr Endacott; he said: "I was chairman of the Throwleigh Parish Council when objections were being made to those claims for rights on Throwleigh Common which the Council did not recognise as valid. There was no commoners' association at that time. Mr William Webber, the owner of Buttern Farm at the time, was among the claimants to which we objected. However as he rented land from Mr Palmer of Gorsmoor, Throwleigh, we assume that any of his stock seen grazing on Throwleigh Common over the years, were there with the rights claimed by Mr Palmer and not from any rights connected with Buttern. The members of Throwleigh Commoners' Association are also in full agreement that Buttern Farm shall have no rights on Throwleigh Common. As chairman of the Throwleigh Commoners' Association and past chairman of Throwleigh Parish Council, I was the last witness to give evidence at the inquiry adjourned on 11 November. Many of the objections I have raised to the claims of Mr W Jordan and Colonel Terry whose farms adjoin Buttern Farm are relevant in the case of Buttern Farm".

Mr Woodward intervened to say that he had telephoned Mr Endacott who had telephoned Mr Palmer who had said that Mr Webber rented his land since 1967 and that he has a written answer from Mr Palmer as to the correctness of this date.

Mr Kingsland in answer to questions by Lady Sayer said that he had not read either History of the Rights of Common upon the Forest of Dartmoor and the Commons of Devon (1890) published by the Dartmoor Preservation Association, or the decisions dated 17 February 1976 and 30 May 1977 made by the Chief Commons Commissioner about the Register Unit Nos CL148 and CL190 or the judgement dated 26 October 1979 of His Honour Judge Finlay QC sitting as a judge of the High Court (about CL190) or the Minutes of the evidence of the Dartmoor Commoners Association and of the Duchy of Cornwall given to the 1954 Royal Commission.

Inspection

On 17 March I inspected the parts of the Unit Land to which my attention was drawn by Colonel Terry and Mr John Jordan (son of the Mr William Jordan who gave evidence at the hearing) in the presence of Mrs Alford and Mr F J Kingsland, being much helped by the Land Rover provided.

Immediately afterwards I inspected from the high ground (part of Gidleigh Common) above and southwest of Buttern Farm and the parts of the Unit Land to which Mr R N Hurdle (or his son Mr R S Hurdle) drew my attention in the presence of Mr Webber and Mr Kingsland, being for this purpose much helped by the tractor provided.

Ensworthy

The relevant registration (Entry No. 78), leaving out the rights said by Mr Lewis not to be claimed is: "To graze:- 70 cattle and 100 sheep and 9 ponies or their combined equivalent in NFU units and 12 geese over the whole of the land in this register unit being part of the animals to be grazed on CL134 and CL164 ...".

The grounds of the relevant Objection (No. 901 dated 28 April 1971) are: "The right does not exist at all as claimed. Only a straying right exists ...".

In my decision dated 30 June 1983 re Forest of Dartmoor (CL 164), under heading "Straying", I set out my reasons for concluding that a right by reason of vicinage is not registrable. A right expressed as "to stray" is confusing because although it might be valid if it can properly be read as a right to graze, as it was, for example, in Crow v Wood 1971 1QB 77 (a straying intended by the owner); it can also in popular speech mean exoneration more or less from the consequence of an animal being where its owner never intended it to be. That there cannot in law be a customary right for animals "to go escape and ramble" was established in Jones v Robin (1847) 10QB 581 and 620; and it follows I think that there cannot in law be a "right to stray" within any of the possible meanings of a "right of common". Whether the consequence to an owner of an animal of his being where he did not intend it to be or had no right to put in, for example whether he must submit to it being impounded, or must pay to get it back, or pay for its keep until he can take it, or pay for any incidental telephone calls or transport, are part of the law relating to animal trespass (now in part regulated by the Animals Act 1971). The grounds of the Objection are wide enough to put in question all aspects of the registration; I give them this effect, notwithstanding that they include a purported concession of a right of straying to which I can give no effect.

At the hearing for Colonel Terry it was contended that Ensworthy is special; he used the words "special case", and Mrs Alford used the word "unique". The idea that the grazing from Ensworthy is in some way special, carries with it the idea that there is grazing on the Unit Land from other lands which is ordinary. As to the grazing

from Ensworthy on the Unit Land being special, I had the oral evidence of Colonel Terry and Mrs Alford; they said little if anything about ordinary grazing. About ordinary grazing I have the oral evidence of Mr Endacott. As to this I am concerned with grazing as actually practised. Mr Endacott when giving his evidence included his views and the views of the Parish Council as to what the legal position should be; although the Unit Land is wholly within the Parish of Throwleigh, the Parish Council has no power to legislate about it; their and his views are for me only relevant as a background to Mr Endacott's evidence and as possibly reflecting what was being done on the Unit Land. But disregarding all such irrelevances, the meaning of the evidence of Mr Endacott was at the hearing clear; within living memory the Unit Land was grazed on a parish basis meaning that as a general rule animals from other parishes were treated as strays and turned back. There is no rule of law that such turning back must be disregarded if done secretly meaning that the owner was not informed either at the time or as soon as possible afterwards. On the contrary the rule of law is that a person relying on his grazing being as of right must establish by inference or otherwise that such grazing was not secret. It was I think unfortunate at the hearing that the words "dog back" (I am not sure who first used them) were so often repeated; such words in some contexts carry with it the idea of a herd or flock being with dogs driven violently from one place to another in a way which might harm the animals or at least impress their owner with the hostile intention of those responsible for the dog. I find that on the Unit Land there has been no such dogging back within any such meaning of the words. But this in no way prevents me from giving full effect to the evidence of Mr Endacott that strays were turned back without violence doing no injury to any animal. Such turning back is often not only accepted but also gratefully acknowledged by the owner. Many of the questions put by Mr Lewis to Mr Endacott at the time seemed to me to be intended to cast doubt on the reliability of his evidence about the Unit Land and in particular about the grazing on it and on nearby register units; because others present at the hearing may have thought that Mr Lewis had such an intention, I record that I consider Mr Endacott's evidence reliable generally, and particularly as regards ordinary grazing. The "special" contention for Colonel Terry accepted this.

However I differ from Mr Endacott about some of the inferences he draws as to the legal effect of the facts about which he spoke. It does not as a matter of law follow because a common is ordinarily grazed on a parish basis that all animals of a person outside the parish must be strays and cannot be there pursuant to an exercise of a right of common. A customary right attached to all lands in a parish to graze on a common is not recognised by law, see Smith v Gateward (1607) Cro Jac 152 and 6 Co Rep 59b and the numerous cases in which it has been explained. But this non-recognition of such a right does not preclude effect being given to evidence that many of the lands in the parish have practically identical rights, see de la Warr v Miles (1881) 17Ch D 535. There are many commons in this country which are grazed on a parish basis, and I feel no hesitation in giving effect of the evidence of Mr Endacott above summarised; but the existence of numerous rights of common incidentally accompanied by a regular practice of turning strays back exercised on a parish basis does not automatically preclude proof in any manner by law provided of other rights attached to land outside the parish exercisable over the Unit Land.

So I must consider whether the right of grazing claimed by Colonel Terry is established by prescription at common law, or under the Prescription Act 1832 or under a grant to be presumed in accordance with the principles established in Tehidy v Norman 1971 2QB 528. I am concerned to consider only grazing as of right; the Objection is dated 1971 and by section 16 of the Commons Registration Act 1965, for the purposes of the 1832 Act 1971 is to be treated as the end of the 30 or 60 year prescription period in the Act mentioned; grazing after 1971 is therefore only relevant so far as it continues or can be reflected back to what was done earlier. In my opinion 1971 is also the relevant date for prescription at common law and for a presumed grant either by analogy with the said section 16 or because the Objection itself and the consequential notices are indications clear enough for those concerned that thenceforth any grazing contrary to the Objection was not as of right.

About the "special" grazing from Ensworthy, Mr Jordan in reply to questions by Mr Lewis, said (in effect):- He was born 1904 at Wooda Farm, from about 1908 to 1913 his father farmed Forder Farm and then moved to Moortown Farm where he farmed for the next 20 years; he (the witness) then took over and from then first as tenant and from 1947 as owner farmed Moortown where he still lives. About actual grazing from Ensworthy, he remembered Mr William Hill (grandfather of Mrs Alford); South Devon cattle and grey faced Dartmoor sheep "as I just remember"; summer until about now (11 November) there were on the hill; he brought them back about now if the weather was against him, although they would continue on the Moor by day for exercise and drink. The South Devon (the Galloways went further) went up over the hill onto Gidleigh Common behind (southeast, south? of) Buttern (Farm) and if the weather got worse they would stray out onto Throwleigh. The difficulty is that the farm borders on 2 parishes, and they can go whichever side of the river (Forder Brook) they like. They did not go a lot onto Throwleigh but they did so sometimes. If it is rough weather they come down from Gidleigh onto Throwleigh where it more sheltered. "It is an undivided right; I don't know whether they did they always could do so". In winter time they would go onto (beyond) Buttern, but they did not go far; it would depend on the wind. They could go on to Throwleigh. He did not think they went onto Kennon (so far) in winter time. They could go onto Quannon and Shilstone, but not often; not (at all) in winter time. When let out at the Brake Gate, they could go either way, depending on the wind and the weather; either to the left beyond Buttern or to the right. As to grazing by Mr Jim Hill (Mrs Alford's father and Mrs Alford's statement about it) his cattle could have gone after feeding in winter time onto Throwleigh but it would depend on the weather which way they went; prevailing wind is from the south. Questioned by Mr Woodward as to whether they always went up onto Throwleigh, he (the witness) said I cannot answer the question, my farm is out of sight.

Mr Jordan impressed me as a person with knowledge based on lifetime experience of the behaviour of cattle on the Unit Land and its surroundings and anxious to give me as best he could the benefit of his experience. But as to the facts relating to the possible determination by me whether the grazing from Ensworthy on the Unit Land was as of right and what was the right if any in respect of which such grazing was exercised, I find that from lack of knowledge his evidence neither added to nor subtracted from in any significant way that given by Mrs Alford and Colonel Terry.

As to the grazing from Ensworthy before and after 1958, I accept what Mrs Alford and Colonel Terry respectively said about it. By this I mean I accept

what they said orally at the hearing in the light of what I saw on my inspection and the explanation they then gave. I do not accept the written statements (JRT/1 and MA/1) which were before they gave oral evidence at the hearing put in by Mr Lewis, as wholly accurate in the sense of supporting any inference of fact which might be made upon their consideration alone; for example, from Colonel Terry's statement "one gate opens right on the boundary" it might be inferred that this gate had some significance; the gate opens more or less onto Ash Green and during my inspection it was obvious it had no significance in this case as Colonel Terry (as I understood him) then agreed. Although Colonel Terry and Mrs Alford were perhaps properly questioned about where animals were fed in the winter time and what they did after being so fed, the answers given are not of primary but only of incidental significance; it may be that it is in law an exercise of a grazing right on a common to feed the animals there when there is little or no grass for them to graze; during my hearings about other register units in the Dartmoor National Park, in some parts people spoke of feeding animals on the Moor approvingly or without disapproval, in other parts there was disapproval because such feeding resulted in the Moor being poached in or around the feeding area to the prejudice of its summer use by other commoners; it may be that the practice is tolerated notwithstanding that incidentally it enables some farmers to put their inby land to other uses and to graze on the Moor more animals than they otherwise could do. However this may be, as a right of common, a right to graze is primarily to put animals out to eat the grass which grows on the common, and does not include a right to assemble animals there for feeding, so as to avoid inby land becoming poached. It may be that during the winter there is nearly always some grass on either Throwleigh or Gidleigh Common for the animals to eat or at least nibble; but as to such use during winter after feeding, Mr Jordan said (aptly I think): it is "for exercise and drink".

Grazing after 1958 by Colonel Terry (less than 20 years before 1971) unless it can be added to grazing before then cannot be decisive. So my first concern is with the grazing of Messrs Hill as described by Mrs Alford. During her period there was near the Farm Gate a shippon (since demolished, the site was indicated during my inspection). I conclude that as a general rule the herd left and entered by the Farm Gate although ⟶ the Brake Gate was sometimes more convenient. I reject the suggestion made at the hearing that it was impossible even for animals coming from the Farm Gate to get onto the higher parts (above Buttern) of Gidleigh Common otherwise than by going onto some part of the Unit Land; it was apparent during my inspection that it was possible. However the situation of the bog and the appearance of that part of Gidleigh Common between Buttern farm buildings and the road favours the cattle coming from the Farm Gate (more obviously if they come from the Brake Gate) then as a general rule going up starting by the track towards such buildings and then before getting there crossing the Brook above the road bridge and then going up on the north side of the Brook. I accept Mrs Alford's evidence that in her time this is what the cattle from Ensworthy regularly did. However during the inspection I became satisfied that an inference which I had been inclined to draw from her written statement (MA/1) that animals once they crossed the River would graze the Unit Land in the same way as those belonging to persons with "ordinary" rights, was not correct. All concerned would know well the boundary between the Unit Land and Gidleigh Common, being the Forder Brook so far as now relevant; above the bridge animals would not normally regard the Brook as interfering with their movements. During the hearing I was inclined to infer that when Mrs Alford spoke of animals going "into Throwleigh"

when they got across the Brook would then graze on the Unit Land as would animals belonging to persons of the parish who had "ordinary" rights; during my inspection I was satisfied that such an inference was incorrect and that the grazing she described was of animals which regularly went up and that she used the expression going onto Throwleigh as meaning (not inaccurately) that they were on the Throwleigh side of the boundary not as meaning that having got onto the Unit Land they then grazed it in some general way (northwards and in other directions) as the animals from the lands in the Parish of Throwleigh. Essentially the grazing described by Mrs Alford on the Unit Land was incidental to the animals upward movement and the upper parts of Gidleigh Common and to their downward movement coming back; the animals were never "put onto Throwleigh" because they started either from the Farm Gate or the Brake Gate both of which open onto a part (compared with the rest very small) of Gidleigh Common bounded on the north side by the Forder Brook. The grazing she described was "special" in that although the cattle started on this small part of Gidleigh Common, they did for the purpose of going "up" continue onto the Unit Land somewhere higher than the bridge. Such use of the Unit Land was more than an exercise of a right of way over the lower part of the Unit Land to the upper part of Gidleigh Common because there is grass near the Brook which cattle when going up (or coming down) would graze. I decline to infer from the evidence of Mr Endacott that this use for those from Ensworthy (small when compared with the whole but important to Ensworthy) was ever interfered with or that there was ever any turning back such as was mentioned by him. I find therefore that such use within the period covered by Mrs Alford's knowledge was as of right but that such use never extended more than a short distance north or northwest of the Brook and of the Unit Land boundary where it continues southwest above the Brook source.

The after 1958 grazing described by Colonel Terry was essentially different from that described by Mrs Alford. Standing on the top of Shilston Tor he described how his Galloway cattle coming (more often than not) from Brake Gate did a round; he pointed to the lower end of Raybarrow Pool (on the boundary of the Unit Land and South Tawton Common) and described how they went thence round onto the Forest to graze there then in the upper parts of Gidleigh Common, (or went round in the opposite direction. My finding is that his grazing when compared with that described by Mrs Alford was over a greater part of the Unit Land and for a greater number of animals; the grazing she described was up and back, his grazing was a round over a significantly large area. So it becomes necessary to consider whether the grazing he described was as of right for a long enough period to enlarge the rights beyond that ascribable to the grazing described by Mrs Alford.

As to the suggestion that it has been since 1958 impossible to graze from Ensworthy on Gidleigh Common and the Forest except by also grazing on the Unit Land I have the registrations made on the Unit Land register which presupposes such a possibility as also does that made on his application on the Gidleigh Common register (Unit No. CL134 at Entry No. 72) "to graze 90 cattle and

300 sheep and 9 ponies ... over the whole of the land comprised in this register unit and CL164 and 19 (limited to 70 cattle, 100 sheep and 9 ponies) ..."; these registrations presuppose the possibility of the grazing of animals from Ensworthy on Gidleigh Common independently of the Unit Land, and correspond so far as now relevant with Colonel Terry's application dated 21 October 1969 and numbered 3266 which is in form for distinct rights of common over Gidleigh Common (more animals) and over Throwleigh Common (less animals), and therefore also presupposes a like possibility. I have not overlooked that in October 1969 when the application was made there was considerable doubt and much misunderstanding as to how such forms should be completed. However whatever may have been in Colonel Terry's mind at the time he made the application, on my inspection it was (as above stated) obviously possible from Ensworthy to graze the upper part of Gidleigh Common without going onto Throwleigh Common and the grazing described by Mrs Alford was over a less area of Throwleigh Common than that described by Colonel Terry. I therefore reject his contention that grazing on Ensworthy other than as described by him was impossible.

I decline to infer from Colonel Terry's understanding of what Mr William Hill said to him as vendor that Mr Hill before 1958 was grazing as of right a Galloway herd of the same number and over the same parts of the Unit Land as are now grazed by Colonel Terry. On the evidence of Mrs Alford I conclude that from about 1950 onwards Mr William Hill was changing from Devon Cattle to Galloway cattle, but I decline to infer that by so doing he increased the number or enlarged the area of the Unit Land affected beyond that described by Mrs Alford or to infer additionally if there was any such increase or enlargement it was done sufficiently openly to be "as of right" within the legal meaning of these words.

After his purchase Colonel Terry built up a new herd. Even if there had been no 1965 Act and no Objection, a little time would have elapsed before his grazing would have been open enough to be as of right to any extent beyond that described by Mrs Alford. I accept the evidence of Mr Endacott that up to the making of the Objection, cattle grazing to the larger extent described by Colonel Terry would have been turned back.

Even if the grazing after 1958 described by Colonel Terry was as of right, for the purposes of enlarging the effect of that described by Mrs Alford it was not for long enough, being less than the 20 years required for prescription at common law or to presume a grant, and the 30 years required by the 1832 Act.

I realise that it may be practically impossible for Colonel Terry except by selling his herd and starting again to limit his grazing from Ensworthy to no more than thatdescribed by Mrs Alford and my decision for this reason may against him be hard; but the Parish Council were entitled having made their Objection to wait for a decision of a Commons Commissioner.

The grazing described by Mrs Alford in accordance with the principles applicable to prescription at common law, I reflect back as being in exercise of the rights so described from time immemorial, and conclude that the right so exercised in accordance with her description have been proved as attached to Ensworthy, and that in relation to the Unit Land, Ensworthy is "special" or "unique". But I dissent from the proposition that it necessarily follows that a registration

of right "over the whole" of the Unit Land is thereby established. The contention much stressed at the hearing that Ensworthy is in relation to the Unit Land "special" in my view applies not only to the question: is a right of common attached to it, but also applies to the question: what is the right of common attached to it by prescription at common law; the right so established in special circumstances is, in my opinion, no greater than the right appropriate to the special circumstances. I reject the contention that a grazing right as described in the registration at Entry No. 78 over the whole of the Unit Land was established by the special (or unique) grazing described by Mrs Alford.

I am left in the unsatisfactory position that I reject the contention made by Mr Lewis at the hearing that by proving there is a right of common attached to Ensworthy over the Unit Land (or some part of it) a right over the whole of the Unit Land in accordance with Entry No. 78 is established; and I also reject the contention made by Mr Woodward that because there cannot be a right over the whole of the Unit Land there is attached to Ensworthy no grazing right of any kind over it. The circumstances that no evidence or argument was at the hearing expressly directed to defining the rights which I have now decided exist does not I think preclude me from making such definition on the evidence put before me at the hearing and from what I saw on my inspection. Unavoidably I must act somewhat arbitrarily in framing my definition. My decision is that the prescriptive right which I find has been established as attached to Ensworthy is over that part of the Unit Land defined in paragraph 1 of the Third Schedule hereto and that the number of animals should be reduced to two thirds of those now registered.

I realise that the dividing line and the animal numbers specified in such paragraph are somewhat arbitrary because no evidence or argument was at the hearing offered about them; so I give to Throwleigh Parish Council and to Colonel Terry liberty to apply for the hearing to be reopened for the purposes of producing such evidence or argument; such application should be made within the time limit and otherwise as specified in paragraph 6 of the Third Schedule hereto. I am not encouraging such an application, because on the information now before me I think the dividing line as I have determined it, is for practical purposes clear enough.

Buttern

The relevant registration (Entry No. 84) made on the application of Mr William Webber is: "Estovers, Turbary, Piscary, Pannage, Shooting, to take sand gravel and stone, to graze 40 cattle and 100 sheep and 10 ponies ... over the whole of the land in this register unit being part of the animals to be grazed on CL134 and ...". The registration is now replaced by Nos. 141, 142 and 143 made on applications dated 1981 of Mr Stuart Abrahall, Mr William John Jordan, and Mr William Webber, being registrations of the same rights split into three parts (16/20ths, 3/20ths and 1/20ths approximately) corresponding to the different parts of Buttern acquired by the applicants.

For the registration I have the evidence of Mr Webber, above summarised. On the basis of his letter of (PC/3), I treat the evidence of Mr Endacott against the Ensworthy registration as equally applicable to Buttern. Subject to this and to the differences apparent on my inspection, I understood all persons concerned with Buttern were agreeable to my treating all the arguments put forward about Ensworthy as having been repeated in relation to Buttern.

Buttern Farm is completely surrounded by the part of Gidleigh Common (CL 134) adjoining the Unit Land. Although it is possible from Buttern Farm to graze Gidleigh Common and the Forest (CL164) without grazing the Unit Land, the convenience and advantage of such grazing including the upper part of the Unit Land was apparent during my inspection. So in relation to the grazing on the Unit Land Buttern can properly be regarded as "special", like Ensworthy (but not identically). I accept the evidence of Mr Webber that during his period, the grazing from Buttern was as he described and that such grazing was as of right; I have not overlooked but he said his cattle were leared and in winter feed on Gidleigh Common but in so saying I did not understand that the grazing was practically limited to the lear. But upon considerations similar to those above set out about Ensworthy, I find that such grazing was not in exercise of a right over the whole of the Unit Land but only of the upper part, as viewed by me during my inspection.

So I am left with the same unsatisfactory position above-mentioned in relation to Ensworthy, in that I reject the registration so far as the grazing right mentioned in it is expressed to be over the whole of the Unit Land and I reject the contention made by Mr Woodward that there is attached to Buttern no grazing right of any kind over the Unit Land. I define the part of the Unit Land over which by prescription at common law a right of grazing has been established, in paragraph 2 of the Third Schedule hereto. My decision is accordingly.

About the other rights mentioned in the registration there was no evidence in support of them. There was as below mentioned evidence against piscary, pannage and shooting. I am not concerned in this decision to say whether these other rights are exercisable over Gidleigh Common on the basis that Buttern Farm being at Gidleigh Parish is reputed to have them; in relation to such rights and to the Unit Land there is about Buttern Farm nothing special. I conclude therefore that in this registration these other rights should not have been included.

I give to Throwleigh Parish Council and to those concerned with the registration at Entry No. 84 liberty to apply about the line specified in paragraph 2 of the Third Schedule hereto such application should be made within the time limit and otherwise in accordance with paragraph 6 of such Schedule. Subject to such liberty my decision about this registration is as set out in the said paragraph 2.

Moortown

The relevant registration (Entry No. 106) made on the application of Mr W Jordan, is: "To take sand gravel and stone to graze 50 cattle, 30 ponies and 100 sheep ... over the whole of the land comprised in this register unit being part of the animals grazed on CL134 ..."

The oral evidence of Mr Jordan was first in answer to questions by Mr Lewis: after saying what he could about the grazing from Ensworthy (as above recorded), he said about the grazing from Moortown (in effect):- He had never heard of anybody from Throwleigh turning his cattle or his father's cattle back from Throwleigh. His cattle went from Moortown Bottom up Buttern Hill. Sometimes they were fed near Ash Green; after such feeding there is shelter (? on Ash Green) where they could go. After feeding on Moortown Bottom they went onto Gidleigh Common. "Q, did they ever go onto Throwleigh Common? A, No. Q, Ash Green did your cattle go there? A, well there is nothing to stop them; Throwleigh Common is one side of the River and I own one side of the River; or vice versa. Q, any of your cattle on Shilstone, Kennon or Quannion? A, No. Q, ever heard of it? A, No".

In answer to questions by Mr Woodward suggesting that his cattle grazed Gidleigh Common (CL 134) and only strayed on the Unit Land, Mr Jordan gave a long answer to the effect that after being fed or let out they didn't go on Throwleigh Common, "they are away" and can go anywhere and unless (eg by snow) they come back; neither I nor my father have put out (our cattle) onto Throwleigh but they do go there.

In re-examination Mr Jordan after explaining the cattle feeding would start in about 3 weeks time (3 weeks after 11 November), said (in effect):- He kept 50 ponies. His father first had ponies in 1882 they were out every day they could be grazing anywhere within 5 miles or at least within 2 miles. They had done this for 101 years.

Mr Jordan when giving his evidence (like many other persons of his age) did not always express himself clearly or appreciate the matters to which the question was directed. Subject to the possibility that on my inspection I might realise that I had at the hearing overlooked some important aspects of his evidence, when he had finished giving it I formed the opinion that from Moortown there had never been any grazing as of right on the Unit Land and there was nothing about Moortown which was "special" in the sense in which word was at the hearing used about Ensworthy and Buttern. However I record the matters mentioned in the next 3 paragraphs as possibly relevant in my assessment of the evidence of Mr Jordan.

About the evidence of Mr Jordan Lady Sayer said (Lady S/1):- It was splendid to hear Mr William Jordan of Moortown Farm giving his evidence. There was the real Dartmoor speaking from honest experience and from personal knowledge and proof: a glimpse of the Old Dartmoor where the animals moved about the moor according to the weather and the time of year and if they moved over a parish boundary according to what Mr Jordan rightly called an "undivided right", in order to find better shelter in the chilling wind or to seek out the better grazing on the summer time heights, no one in all his long experience - dogged them off as though the several commons had their boundaries drawn on the ground with red paint; it was "live and let live", according to the old and time honoured husbandry; and the animals ordered usage of the common. The annual pony drifts when properly held eventually sorted out the question of ownerships. Mr Jordan's family kept ponies on Dartmoor for over a century and of course they ranged far and wide, and no-one complained for the real Dartmoor farmers know that this is something that has always been so ..."

At a hearing held by myself on 7 and 8 February relating to Gidleigh Common (CL134) in which I considered three Objections signed by Mr William Jordan as chairman of the Gidleigh Parish Commoners Association I had evidence from his son Mr John Jordan that his father had lived in the parish all his life and had been chairman of the Association ever since it started in 1950 and that the objections were made by him on the basis that anyone who had land in Gidleigh had a right to graze and that anybody who had not such land was automatically out.

During my inspection on 17 March I explained to Mr John Jordan that what he had said at the recent Gidleigh Common hearing about his father's attitude to grazing on Gidleigh Common by persons outside the parish of Gidleigh was possibly inconsistent with his attitude towards his own registration on the Unit Land. As to this, Mr John Jordan said that he thought his father's registration should be supported by prescription.

I am unable to say from anything said by Mr W Jordan at the hearing whether he adopted the above quoted observations of Lady Sayer as arguments in support of his Moortown registration. In case this was his intention, I record that I reject them for the reasons set out below under the hearing Venville.

During my inspection I walked from Ash Green across the Forder Brook (there leaving the Unit Land) along the track on either side of which there is apparently waste ground known so I understood as Donkeys Corner (not part either of the Unit Land or of Gidleigh Common or as far as I know otherwise registered under the 1965 Act, or part of Moortown Farm) and thence by Brook Cottage to join the nearby somewhat isolated projecting part of Gidleigh Common and then to the road (public for motor vehicles) which from the Forder Brook road bridge runs southwest by the main entrance to Moortown Farm. I have no information about the ownership of the Donkeys Corner strip (it is not included in the plans of either Ensworthy or Moortown); it apparently provides convenient access from Moortown for watering animals in the Brook, and I understood cattle from Moortown Farm grazing in Gidleigh Common were sometimes (as was apparently convenient) fed at Donkeys Corner or on the said isolated part of Gidleigh Common. However this may be, Forder Brook is a substantial boundary where it runs next to Moortown Farm and appearances are against animals from there being grazed across the Brook on Ash Green merely by reason of this boundary. Although animals on Donkeys Corner after having been fed there or for some other reason could easily cross by the ford onto Ash Green and might well in winter cross for shelter as was suggested at the hearing, appearances are against there being for this reason a grazing right attached to Moortown Farm on Ash Green. So after my inspection I saw my reason to alter the view I had already formed at the hearing that the evidence of Mr Jordan did not establish any such right. At my inspection it was obvious that from Moortown there could be grazing on Gidleigh Common easily and conveniently without going onto the Unit land and I adhere to the conclusion formed at the hearing that there was nothing "special" about Moortown Farm in relation to the Unit Land.

As to prescription mentioned by Mr John Jordan, his father did not I think intend me from his evidence at the hearing to conclude that Gidleigh Common (CL134) and the Unit Land are or ever have been the same common or part of the same common in any now relevant sense; I accept the evidence of Mr Endacott above referred to that the Unit Land has always been grazed on a parish basis; and deduce from it

that no right attached to Moortown over the Unit land was established by prescription at common law. As to the establishment of a right under the 1832 Act or by presumed grant I saw nothing during my inspection to negative the conclusion I reached at the hearing that there had ever been any relevant grazing as of right on the Unit Land from Moortown.

My decision is therefore that no part of registration at Entry No. 106 was properly made and that confirmation of it should therefore be refused in accordance with paragraph 3 of the Third Schedule hereto.

Venville

The relevant registrations (Entry Nos. 11, 12 and 69), made on the application of Sir Guy and Lady Sayer, Mr D M Scott and Mrs E M Smallwood, are of rights attached to lands in Widecombe-in-the-Moor and in Holne.

The registrations are essentially the same as those considered in my decision dated 30 June 1983 about land in Sheepstor (Ditsworthy Warren etc being CL188) and which for the reasons therein set out I refuse to confirm. At the CL188 hearing in 1982 about these registrations evidence was adduced and arguments made in some detail by a solicitor acting for Lady Sayer and those she represented at this Unit Land hearing. The solicitor dealt in detail with documents which Lady Sayer put to Mr Kingsland and which he said he had not read. Her evidence and argument at this Unit Land hearing added nothing to the said CL188 evidence and arguments. I am not persuaded by anything in her statement (Lady Sayer/2) that I should not adhere to the reasoning set out in my said CL188 decision, and accordingly in relation to these Unit Land registrations for the reasons therein set out my decision is the same.

That these registrations are included in Duchy Objection No. 400 and that one of them, No. 69 is in County Council Objection No. 1109, and that the Objection was either withdrawn or not supported at the hearing provides no reason why I should not give effect to the Parish Council Objection Nos 45 and 901 which include these registrations and which were so supported.

I do not accept the allegation by Lady Sayer that she had in any now relevant sense exercised the rights specified in registration No. 11. Her evidence to this effect was made on the assumption that the Unit Land and the Forest (CL164) and a large number of other commons adjoining or near to the Forest, are all one common, as assumption which for the reasons set out or referred to in my said CL188 decision is I think mistaken. I reject the suggestion made at the hearing that because Mr Endacott agreed that nobody from Throwleigh had ever turned back animals on Widecombe-in-the-Moor in some ways supports the registrations; he was entitled to add to his answer to the above quoted question the above quoted words qualifying it and Mr Woodward was entitled as he did to ask Mr Endacott why he so made such qualification; on Mr Endacott's evidence about this, I find that there has been no such exercise.

As to Lady Sayer's contention that the evidence of Mr Jordan about his ponies in some way added to her case:- I can give no meaning to the expression "undivided

rights" which was used by him and to which she attached importance. A customary right for animals to roam is not recognised by law, see Jones v Robins 1847 10 QB 620; and in my view it is a necessary implication of the judgment that an excuse for trespass is not a right of common and that a right for animals to roam cannot be proved by prescription. About this I have nothing to add to what my said CL188 decision and to my CL164 decision of even date referred to in it.

For the above reasons my decision is that these registrations were not properly made and that accordingly as stated in paragraph 3 of the Third Schedule hereto confirmation of them is refused.

Others

No evidence or argument was offered in support of the registrations (other than Nos. 11, 12, 84 and 106 above mentioned) referred to in Parish Council Objections Nos. 45 and 901. I have the evidence of Mr Endacott against them. My decision is therefore that they were not properly made and in accordance with paragraph 3 of the Third Schedule hereto should not be confirmed.

As to piscary and pannage against which Duchy Objections Nos. 402 and 403, nobody at the hearing sought to support the inclusion of these rights in any registation or suggested that I should not treat the evidence given by Mr Sturmer at the CL155 and CL73 hearings should not be treated as given this Unit Land hearing. On the basis of such evidence and the documents then produced I find that no such rights of common exist over the Unit Land and that accordingly these Objections wholly succeed.

As regards some of the registrations specified in the said two Objections I have elsewhere in this decision decided that the registration should not in any respect be confirmed. As regards the other registrations in the said Objections, being Nos. 10, 15, 28, 34, 61, 62, 63 (replaced by Nos. 125, 126 and 64) (replaced by Nos. 128 and 129) specified in Objection No. 402 (no piscary) and the registrations at Entry Nos. 8, 9, 16, 94 and 104) specified in Objection No. 403 (no pannage), there was no suggestion that any of these registations were in any other respects irregular. They were if not expressly at least impliedly supported by the evidence of Mr Endacott. I understood from Mr Woodward that both the Parish Council and the Commoners Association considered that they were proper. My decision is therefore that they be confirmed with the modification that piscary and pannage be deleted as set out in paragraphs 4 and 5 of the Third Schedule hereto.

Upon similar considerations I conclude that Duchy Objection Nos. 402 and 404 (no shooting, no right to take wild animals and birds) wholly succeed; but because the registrations specified in such Objections are by reason of the Parish Council Objection being wholly avoided I need not in this decision say any more about them.

Final

Because much of this decision relates to agreements and statements about which there may herein be some mistake or error, which ought to be corrected without putting those concerned to the expense of an appeal, I give liberty to apply to any person who might be affected by any such mistake or error. Such application should be made within the time specified and otherwise in accordance with paragraph 6 of the Third Schedule hereto.

The effect of my above detailed decisions is set out in the decision table being the Third Schedule hereto such Schedule should be treated as part of this decision.

I am required by Regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of this decision is sent to him, require me to state a case for the decision of the High Court.

FIRST SCHEDULE
(Objections)

Part I: Throwleigh Parish Council

No. 45; applicable to Nos. 11 and 12; grounds "claiming a right which does not exist".

No. 901: applicable to all other disputed registrations (except Nos. 8, 9, 10, 15, 16, 28, 34, 61, 62, 63, 64, 94 and 104); grounds "right does not exist at all as claimed, only a straying right exists in respect of these entry numbers.

Part II: HRH Charles Prince of Wales, Duke of Cornwall

All expressed to be applicable to the part of the Unit Land lettered B on the map, ie the part in Duchy ownership.

No. 400; applicable to 11, 12, 37 to 54 inclusive and 69; grounds "right does not exist ..."

No. 401; applicable to Nos. 55, 56, 68, 78, 84, 94 and 116; grounds "right for shooting does not exist ..."

No. 402; applicable to Nos. 10, 15, 21, 28, 34, 55, 56, 61, 62, 63, 64, 68, 72, 78, 81, 82, 84, 94, 116 and 122; grounds "right for piscary does not exist ..."

No. 403; applicable to Nos. 8, 9, 16, 68, 78, 84, 94 and 104; grounds "right for pannage does not exist ..."

No. 404; applicable to Nos. 81 and 82; grounds "right to take wild animals and birds does not exist ..."

Part III: Devonshire County Council

No. 1109; applicable to Nos. 37 to 54 inclusive, 69, 81 and 82; grounds "right does not exist at all".

SECOND SCHEDULE
(Documents produced)

Part I: by Lt Col J R Terry

JRT/1	7 November 1983	Statement
JRT/2	1905	OS map 1/2500: marked red line Ensworthy boundary, blue line stream, hellow strip boundary of Throwleigh and Gidleigh Common: also marked "grazing area indicated by Mr Hill in 1958".

Part II: by Mr C Sturmer
(at CL 155 and CL 73 hearings in July 1983)

Duchy/351	--	Specimen fishing-licences, salmon week, salmon season, trout season, trout day and trout week.
Duchy/352	28 March 8 June 22 August 1908	Letters about shooting.
Duchy/352	23 April and 24 May 1910	Letters about shooting.
	2 October 1981	Letter enclosing £5 rent for permission to shoot over Riddon Ridge.
	22 July and 5 August 1953	Exchange of letters between Duchy and Devon River Board as to the Board's Bailiffs asking fishermen to produce their Duchy permits.
	28 January 1954	Letter to F Warne about payment by Duchy for ensuring that fishermen in Duchy waters have appropriate Duchy fishing ticket.

	Before 1900	Specimen grant by Warden of the Stannaries in Cornwall and Rider and Master Forester of the Forest and Chace of Dartmoor of licence to hunt with Harriers from 1 October 18-- to 31 May 18--.

Part III: by Mrs M M Alford

MA/1	8 November 1983	Statement of evidence to be given by Mrs Monica Alford.

Part IV: on behalf of Colonel Terry
(handed in at end of hearing on 11 November)

--	(11 November 1983)	Memorandum of Submissions, with extract from Halbury Laws of England 4th ed. vol. 6 paragraphs 587 et seq and Tehidy v Norman 1971 2QB 528.

Part V: on behalf of the Parish Council
(handed in at beginning of hearing on 7 February)

PC/1	--	Submissions of Mr F J Woodward in answer to said submissions (slightly revised in manuscript) of Mr Lewis specified in Part IV above with letter of 4 February 1983.
PC/2	--	Analysis (4 pages) of objections prepared on behalf of Throwleigh Commoners Association.
PC/3	7.2.84	Letter from Mr T W Endacott.

Part VI: on behalf of Mr Hurdle

RNH/1	--	Extract from OS Ref 1/2,500 showing Buttern Farm edged red.
RNH/2	--	Copy register supplemental map referred to in column 3 of Right Section Entry No. 10 (right attached to Gorsemoor).

Part VII: by Lady Sayer

Lady S/1	--	Statement on behalf of Sir Guy and Lady Sayer about registration at Entry No. 11.

Lady S/2 6 November 1983

Statement by Lady Sayer on the views expressed on Venville rights by Commons Commissioner A A Baden Fuller in his recent decisions on CL 164 and CL 188.

THIRD SCHEDULE
(Decision Table)

1. I confirm the registration at Entry No. 78 with the modification in column 2 delete "Turbary, Piscary, Shooting, Estovers, Pannage, To take stone sand and gravel", for "70 cattle and 100 sheep and 9 ponies" substitute "47 cattle and 67 sheep and 6 ponies" and for "the whole of the land in this register unit" substitute "over that part of the land in this register unit which is south of the line which starts from the summit of Hound Tor (on the register map marked "1622"), then goes straight to the summit of Kennon Hill (on the register map marked "1573"), and then goes straight to the figure 1030 on the register map (being a point on the road marked on the said map as being or as near to "Higher Shilstone") and then southwards along the middle line of the said road to the bridge across Forder Brook on the southeast boundary of the said land.

2. I confirm the registration at Entry No. 84 (replaced by Nos. 141, 142 and 143) with the modification in column 2 delete "Estovers, Turbary, Piscary, Pannage, Shooting, To take sand gravel and stone", and for "over the whole of the land comprised in this register unit" substitute "over that part of the land in this register unit which is south of the line which starts from the summit of Hound Tor (on the register map maked "1622"), then goes straight to the summit of Kennon Hill (on the register map marked "1573") and then goes straight in a direction due east to the east boundary of the said land".

3. I refuse to confirm the registrations at the following Entry Nos, being those except as above mentioned to which are applicable Parish Council Objections Nos. 45 and 901, that is to say Nos. 1, 11, 12, 19, 20 (replaced by Nos. 138 and 139), 21, 24, 25 (replaced by Nos. 135 and 136), 27, 29 to 31 inclusive, 36 to 56 inclusive, 68, 69, 72, 77, 78, 81, 82, 86 to 89 inclusive, 97, 98, 102, 103, 106, 109, 116 and 122.

4. I confirm the registrations at Entry Nos. 10, 15, 28, 34, 61, 62, 63 (replaced by Nos. 125 and 126) and 64 (replaced by Nos. 128 and 129) with the modification in column 4 delete "Piscary".

5. I confirm the registrations at Entry Nos. 8, 9, 16, 94 and 104 with the modification in column 4 delete "Pannage".

6. Wherever in this decision I have given liberty to apply which application should be made within THREE MONTHS from the date on which this decision is sent out (or such extended times a Commons Commissioner may allow) and should in the first instance be by a letter to the Clerk of the Commons Commissioners stating the mistake or error and the applicants' reasons for thinking it should be corrected. A copy of the application should be sent to any person who might be adversely affected by the application being granted and for their information to the County

Council as registration authority. As a result of the application the Commons Commissioner may direct a further hearing unless he is satisfied that the error or mistake is obvious and all concerned are agreeable. Of such further hearing notice will be given only to those persons who on the information available to the Commons Commissioner appear to him to be concerned with the registration in question. Any person who wishes to be given notice of any further hearing should by letter inform the Clerk of the Commons Commissioner as soon as possible specifying the registration a further hearing about which he might wish to attend or be represented at.

Dated the 5th day of October 1984

a. a. Baden Fuller

COMMONS COMMISSIONER

Pursuant to my second decision dated 8 January 1988 and this clerical correction. This 1984 decision is corrected by (i) deleting "7" in the first line of the first paragraph of page 1 and (ii) and deleting "7" [redacted] and "78" in paragraph 3 of the Third Schedule.

a a Baden Fuller

8 March 1988