Commons Act 2006

Schedule 2(4)

# BRIEFING NOTES

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*Schedule 2(4) Briefing Notes*

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## Contents

**SCHEDULE 2(4) BRIEFING NOTES**

**('Waste Land of a Manor')**

**1. Introduction**

(1). If land is to be re-registered as common land under Schedule 2(4) of the 2006 Act, it must be shown: (i) that it satisfies the specified criteria concerning its provisional registration under the 1965 Act; and (ii) that it qualified as 'waste land of a manor' at the time of the Schedule 2(4) application. The first requirement is relatively straightforward and any disagreements there may be can usually be settled by consulting the entries in the commons register or the relevant Decision Letters. It is the second requirement that is controversial, not least because of a lack of clarity – on the part of both DEFRA and the Planning Inspectorate – as to the meaning of the expression 'waste land of a manor'. The discussion that follows is intended to provide a definitive answer to this question. As will become apparent, the view currently supported by DEFRA involves a number of quite fundamental misconceptions.

(2). In December 2014, the provisions of Part 1 of the 2006 Act – including Schedule 2(4) – were extended to Cumbria and North Yorkshire. Prior to this date, the official *Guidance* to the Registration Authorities and the Planning Inspectorate had adopted a relatively neutral stance on Schedule 2(4) which favoured neither applicants nor objectors. The *Guidance* issued in December 2014 came down on the side of the latter. Crucially, it was now clearly stated that the legal definition of 'waste land of a manor' to be found in *AG v Hanmer*[1] must be shown to apply at the date of the Schedule 2(4) application. So that, for example, if an objector could demonstrate that the land was part of the lord's 'demesne' at this date then the application must fail. Given the demise of the manorial system almost ninety years ago, the inherent absurdity of this position should be obvious. The key point to note, however, is the underlying assumption that the questions to be answered in the context of Schedule 2(4) are questions of law; and that the legal rules to be applied are those that applied under the manorial system. Apparently, the effects of the *Hazeley Heath* judgement are considered to be relatively minor, and are limited to a single element of the *Hanmer* definition (i.e. the requirement that the land be 'of a manor'). In actual fact, the implications of *Hazeley Heath* are much broader than this and much more radical.

(3). These changes in the Schedule 2(4) *Guidance* reinforce the legal case that has invariably been presented by objectors and there can be little doubt that they were introduced at the behest of landowning interests. As we shall see, this shifting of the goalposts so as to favour private landowners has no foundation in law. The stated purpose of Schedule 2(4) is to correct the mistakes that were made during the implementation of the 1965 Act. If it is allowed to go unchallenged, the view now supported by DEFRA will have the opposite effect by enforcing a re-enactment of the flawed process that was overseen by the Commons Commissioners. There are already signs of this in the more recent decisions issued by the Planning Inspectorate.[2]

**2. The Decisions of the Commons Commissioners**

(4). The Decision Letters produced by the Commons Commissioners prior to the judgement in *Hazeley Heath* proceed on the assumption that, if land is to qualify as waste land of a manor, the legal definition in *AG v Hanmer* must be shown to apply at the date of the Commissioner's Hearing. There is an obvious objection to this assumption. Since the manorial system was effectively abolished in 1926, it is not longer possible for the *Hanmer* criteria to be applied to *any* land. For the Commissioners there was an answer to this objection in the legal fiction of the 'reputed' manor. The idea is developed by Chief Commons Commissioner Squibb in his 1977 Decision Letter on Box Hill Common, Wiltshire.[3] On this view, manors have persisted in the period after 1926 in a kind of ghostly form as 'reputed' manors. As a consequence, the

[1] *Attorney General v Hanmer* (1858) 27 LJ 837, at p 840.

[2] The DEFRA *Guidance* documents were replaced in November 2015 by web-based guidance that omits most of the details considered here. The decision-making process, however, now has a momentum of its own incorporating all of the flaws discussed in what follows.

[3] In the matter of Box Hill Common, Box, Wiltshire (Jan 17 1977) 241/D/56-60.

*Hanmer* criteria continue to apply, as do the legal rules that were applicable to waste land of the manor under the manorial system. When this legal fiction was subsequently examined by the Court of Appeal, though the supporting arguments employed by Mr Squibb were rejected, the notion of 'reputed' manors was upheld as a valid legal concept:

> [W]hen…in 1965 the legislature used the simple phrase 'waste land of a manor not subject to rights of common' without further defining it, it was not drawing a distinction between manors and reputed manors and was using the expression 'waste land of a manor' to comprehend waste land of the lord of a reputed manor.[4]

(5). The Commissioners adopted an approach, then – based on the fiction of the 'reputed' manor – which allowed them to ignore the fact that the manorial system had ceased to exist. There is, however, a fundamental problem with this legal stratagem: it is incompatible with the definition of 'common land' to be found at section 22(1)(b) of the 1965 Commons Registration Act ('waste land of a manor not subject to rights of common'). This new category of land was created by the 1965 Act; and, prior to the Act, the land in this category would not have been considered to be common land. The intention behind section 22(1)(b) was to register, and thereby protect, the waste land that had survived the demise of manorial system. The legal rules applied by the Commissioners, however, were based on the assumption that this system continued to exist. As a result, any application under section 22(1)(b) that was brought before a Commissioner was almost certainly doomed to failure.

(6). Under the manorial system, most if not all of the land that was waste land was subject to rights of common. In considering section 22(1)(b) of the 1965 Act, then, it is necessary to account for the loss of these rights. Historically, it would be very unusual indeed for rights of common simply to have been abandoned. This is particularly true of the uplands of the north and west of England and of Wales which, in terms of their extent, include much the greater part of the land that was provisionally (or finally) registered under the 1965 Act. In these areas, rights of common grazing are as important today to the farming economy as they were at any time in the past. Clearly, in some cases – for example, in some urban areas, or in the case where only a small area of a common or waste has survived – common rights may well have been neglected or even abandoned in more recent years. The amount of land involved, however, does not constitute a significant proportion of the land that was provisionally or finally registered under the 1965 Act.

(7). If the rights were not abandoned they must have been deliberately extinguished. Though it is not possible to say what the exact figures are, what is apparent is that almost all of the land described at section 22(1)(b) of the 1965 Act will, at some point in its history, have been subject to a process of inclosure involving: (i) the extinguishment of common rights and the communal rules governing the use of those rights; and (ii) the taking of the land into severalty (individual use). Particularly in the case of upland areas, there is no reason why the waste land targeted by the 1965 Act should not have survived a formal Inclosure Act. In many cases, the effect of an Act of this kind was not to facilitate the improvement of the land but to provide for its reallocation (where the intention was improvement, it quite often failed). However, it would probably be more usual to find that the rights over an area of waste had been extinguished by a process of non-statutory inclosure. This may have involved some kind of inclosure by agreement; though it would perhaps more often have been the result of the landowner buying out all of the rights of common, or all of the holdings to which they were attached, and thus extinguishing the rights through 'unity of seisin'.

(8). For the most part, then, the land that was targeted by section 22(1)(b) could plainly not be expected to satisfy the legal definition in *AG v Hanmer*; because: (i) it would have been inclosed at some point in its history; and (ii) it would in any case have ceased to be 'waste land of a manor' with the demise of the manorial system in 1926. These facts are so patently obvious that they cannot have been missed by the sponsors of the 1965 Act or by the Parliament that considered the Commons Registration Bill. Why the Commons Commissioners chose to ignore them is not entirely clear. What is clear is that, as a result of the flawed interpretation adopted by the Commissioners, a substantial proportion of the applications made under the 1965 Act were wrongfully declared to be void; and an even greater number were cancelled voluntarily in anticipation of a negative outcome – and a possible award of costs – if they were taken to a Commissioner's Hearing.

[4] *Box Parish Council v Lacey* [1979] 1 All ER 113, at 117(e).

(9). Given the demise of the manorial system in the early twentieth century the approach adopted by the Commons Commissioners was fatally flawed. Nor can this conclusion be avoided by arguments based on the assumed existence of 'reputed' manors. By definition, the land described at section 22(1)(b) of the 1965 Act would almost invariably have been subject to inclosure at some point in its history; and would in any case have ceased to be 'waste land of a manor'. The notion, then, that it should be required to satisfy the *Hanmer* criteria at the time of a Commissioner's Hearing was not only incompatible with the provisions and the purposes of the 1965 Act. It was patently absurd. It was this absurd assumption that determined the actions of the Commons Commissioners in their refusal to register land under section 22(1)(b) of the 1965 Act. The outcome can only be described as an unmitigated disaster involving the loss of over 1800 sq kms of land to the commons registers of England and Wales. Hence the need now for Schedule 2(4).

### 3. The *Hazeley Heath* Judgement

(10). This whole fiasco was finally brought to an end in 1990 by the House of Lords' judgement in *Hazeley Heath*.[5] As indicated above, the process overseen by the Commissioners had been validated in 1978 by the Court of Appeal in *Box Parish Council v Lacey* (*Re Box Hill*). This judgement rejected the alternative interpretation of section 22(1)(b) that had previously been proposed by Slade J in *Re Chewton Common*.[6] The *Hazeley Heath* judgement effected a complete reversal of this position, overruling *Re Box Hill* and reinstating *Re Chewton Common*. In effect, in 1990, the judiciary finally acknowledged the importance of the 1965 Act and of the *Report* produced by the Royal Commission on Common Land in 1958. By this time, however, the damage implied by the Schedule 2(4) provisions had already been done.

(11). The 1977 judgement in *Re Chewton Common* concerned a Commissioner's refusal to register waste land because it had been severed from the manor in the early nineteenth century (1804). The key point at issue was:

> 'Whether the commissioner was right in law in deciding that the land…was not 'waste land of a manor', within the meaning of that phrase as used in the definition of 'common land' contained in section 22(1) of the Commons Registration Act 1965, although the said land has at all material times been waste land and although at one time it comprised part of the waste land of the manor of Somerford'.[7]

The Commissioner's decision was rejected on the grounds that section 22(1)(b) referred to: 'waste land which was once waste land of a manor in the days when copyhold tenure still existed'. This construction was swiftly overruled by the Court of Appeal in *Box Parish Council v Lacey* (1978), which reasserted the approach adopted by the Commons Commissioners. The reasoning of Slade J in *Re Chewton Common* is summarised in an extended quotation:

> 'In my judgement the phrase "waste land of a manor" used in relation to a particular piece of land in the context of a statute passed some forty years after copyhold tenure had been abolished does not as a matter of legal language by any means necessarily import that the ownership of the land still rests with the lord of the relevant manor. The phrase in such a context is equally consistent with the sense that the land is waste land which, as a matter of history, was once waste land of a manor in the days when copyhold tenure still existed. Though the phrase has a strong retrospective flavour, now that manors in a pre-1926 sense no longer exist, I can see no sensible reason why the legislature in 1965 should have chosen to render the registrability or otherwise of waste land as "common land" dependant on whether immediately before 1st January 1926 the lordship of the relevant manor and the land itself were still united. Likewise I can see no good reason why Parliament should have chosen to make registrability dependant on whether, at the date of registration, the waste land still happens to be owned by the lord of the manor of which, historically, it had once formed part. To hold that it did would involve the conclusion that the lord of a manor could remove waste land of that manor not subject to rights entirely out of the ambit of the Act by the simple device of conveying the lordship to another person while retaining the land, or vice versa'.[8]

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[5] *Hampshire County Council and others v Milburn* [1990] 2 All ER 257.

[6] *Re Chewton Common* [1977] 1 WLR 1242.

[7] ibid, at 1247 H.

[8] *Box Parish Council v Lacey* [1979] 1 All ER 113, at 115 a–d (quoting *Re Chewton Common* [1977] 1 WLR 1242, at 1249 C–E).

The Court of Appeal, however, was quite happy with this conclusion; as it was with the notion that, despite the demise of the manorial system over fifty years before, the land must nonetheless be shown to be 'waste land of a manor' at the time of a Commissioner's Hearing. Failing all else, it was eminently reasonable to assume that the manorial system continued to exist 'by repute'. As reported by Gadsden:

> ***Reputed manors*** In some hearings before Commissioners it has been argued that there cannot be, in strictness, any manor since the abolition of copyhold and most manorial incidents at the beginning of 1926. In his hearing of Re Box Hill Common the Chief Commissioner sought to overcome this problem by holding that there could be waste land of a reputed manor. The Court of Appeal took special submissions on the point and noted that since the Conveyancing Act 1881 a conveyance of a manor included its reputed parts. This sufficed for the Court to take the view:
>
> > "…that when 80 years later in 1965 the legislature used the simple phrase 'waste land of a manor not subject to rights of common' without further defining it, it was not drawing a distinction between manors and reputed manors, and was using the expression 'waste land of a manor' to comprehend waste land of the lord of a reputed manor".[9]

(12). This bizarre state of affairs was brought to an end by the House of Lords judgement in *Hazeley Heath*. *Box Parish Council v Lacey* was overruled; and the reasoning of Slade J in *Re Chewton Common* was reinstated. The latter is again quoted at length, in a citation concluding with the definition of waste land of a manor as: 'waste land which was once waste land of a manor in the days when copyhold tenure still existed'. The judgement then goes on to reject the counter-arguments in *Box Parish Council*, which had already been thoroughly deconstructed in the preceding analysis. It then concludes with the following three sentences:

> In the appellants' case it is submitted that in section 22(1) of the 1965 Act 'waste land of a manor' means 'waste land now or formerly of a manor' or 'waste land of manorial origin'. I agree with this submission and the reasoning of Slade J in *Re Chewton Common, Christchurch, Borough of Christchurch v Milligan* [1977] 3 All ER 509, [1977] 1 WLR 1242. I would allow this appeal and disapprove the decision of the Court of Appeal in *Box Parish Council v Lacey* [1979] 1 All ER 113, [1980] Ch 109.[10]

(13). According to *Hazeley Heath*, then, 'waste land of a manor' means: 'waste land which was once waste land of a manor in the days when copyhold tenure still existed'. This definition is not an *obiter dictum*. Nor is it a marginal part of the judgement. On the contrary, it is crucial to the judicial reasoning (the *ratio decidendi)*, which proceeds from the assumption that this definition is correct to the conclusion that the appeal in *Hazeley Heath* is to be allowed. The judgement was agreed unanimously by the Law Lords. So there were no dissenting opinions.

(14). *Hazeley Heath* is concerned with the definition of 'common land' to be found at section 22(1)(b) of the 1965 Act. And the purpose of Schedule 2(4) is to correct the mistakes made under the 1965 Act as a result of the misinterpretation and misunderstanding of this definition. It follows that the judgement in *Hazeley Heath* – and the definition of 'waste land of a manor' to be found there – could not have a more direct bearing on the present discussion.

(15). In the context of Schedule 2(4), then, 'waste land of a manor' means: 'waste land which was once waste land of a manor in the days when copyhold tenure still existed'. This raises two distinct and very different questions for the Schedule 2(4) applicant:

Question 1: Was the land 'waste land' at the date of the Schedule 2(4) application?
Question 2: Was the land at some time in the past 'waste land of a manor'?

*Question 1* is to do with the physical state of the land at the date of the Schedule 2(4) application. *Question 2* concerns its status as waste land of a manor at some time in the past. These questions fall into two very different categories. The first

[9] G D Gadsden, 1988, *The Law of Commons,* Sweet & Maxwell, 2.45, p 43; E F Cousins, 2012, *Gadsden on Commons and Greens,* Sweet & Maxwell, 3-48, p 148.

[10] *Hampshire County Council and others v Milburn* [1990] 2 All ER 257, at 262 e & j.

is a matter of physical evidence. The second is, again, primarily a matter of fact; but it is also a legal question and may involve legal arguments and methods of proof drawing on case law, precedent, authority, etc. It should be obvious, then, that to attempt to answer *Question 1* employing the kinds of legal analysis that may be appropriate to *Question 2* would involve a fundamental error of reasoning. In short, 'waste land' is not a legal expression. And *Question 1* is not a legal question. There is no legal definition of 'waste land'. And there are therefore no legal precedents or authorities that may be employed in providing a correct interpretation of this expression.

(16). In these terms, the approach adopted by the Commons Commissioners involved a conflation of *Question 1* and *Question 2*; and the erroneous application of legal arguments to a question that was not a legal question. The definition in *AG v Hanmer* may be applicable in the context of *Question 2*, as may the legal rules that prevailed under the manorial system. In the context of *Question 1* these legal considerations have no relevance whatsoever.

**4. The Objectors' Case**

(17). Objectors to the applications that have been made under Schedule 2(4) have invariably assumed that the approach adopted by the Commons Commissioners was correct. They have also assumed:

- That the effects of the *Hazeley Heath* judgement are limited to the requirement that the land be 'of a manor' and that all of the other *Hanmer* criteria must be shown to apply at the date of the Schedule 2(4) application;
- That, in interpreting these criteria, the Commons Commissioners' Decision Letters may be employed as legal precedents; and
- That the task of interpretation may be informed by consulting the relevant legal authorities, in this case the more recent (2012) edition of the legal text produced by Gadsden.

It should be evident from the preceding analysis that this approach is totally misconceived; and that all of the above assumptions are false. However, given the support now afforded to objectors by the DEFRA *Guidance*, it may be helpful to take a closer look at some of the details of this approach.

*The Commissioners' Decision Letters*

(18). The Decision Letters cited by objectors are invariably taken from those discussed by Gadsden.[11] All of them pre-date the judgement in *Hazeley Heath*. They therefore incorporate the false assumption that the legal definition in *AG v Hanmer* must be shown to apply at the time of the Commissioner's Hearing. Since (it is argued) the Decision Letters may be used as precedents, this assumption is carried over into the context of Schedule 2(4). If, then, it can be shown that the *Hanmer* criteria no longer apply, the application must fail. This may be proved: (i) by producing historical evidence of a loss of legal status (e.g. an Inclosure Act); or (ii) by showing that – at the time of the Schedule 2(4) application – the land did not, for one reason or another, satisfy the *Hanmer* criteria. This approach exhibits all of the flaws described above. Again, the basic error lies in the hidden assumption that the questions at issue are legal questions. Since this is not the case, the Decision Letters may not be used as precedents and Gadsden may not be cited as a legal authority.

(19). Clearly, the Decision Letters do have some relevance in the context of Schedule 2(4). Thus, they may be important in providing information on the 'circumstances' specified at Schedule 2(4)(3)–(5). They may also provide a record of the kinds of evidence (e.g. of manorial status) that were presented at a Commissioner's Hearing. The attempt to use them as precedents, however, is totally misconceived. Even if the questions to be answered in this context *were* legal questions (which they are not) there are two very obvious reasons why the Decision Letters cannot be employed in the way that is assumed.

(20). The first is a matter of common sense. The purpose of Schedule 2(4) is to provide for the correction of the mistakes made during the implementation of the 1965 Act. The nature of these mistakes, and the actual scale of the problem, have already been discussed in some detail at paras (4)–(9) above. In fact, there are over 1800 square kilometres of land in

[11] The use of Gadsden as a legal authority is discussed further below.

England & Wales that may be eligible for re-registration under Schedule 2(4). That's about 30% of the land that is currently registered as common land.[12] In this light, the proposal that the Commons Commissioners' Decision Letters – which are the root cause of this state of affairs – should be used as a source of authority is manifestly absurd. The second point is a legal point. As is noted in both editions of Gadsden, though they were bound by the rulings of the Courts, the Commons Commissioners did not operate a system of precedent.[13] Reading from the more recent (Cousins) edition (p 630):

> As an inferior tribunal, the Commissioners were bound by the decisions of the superior courts, and thus were always required to follow them. However, each Commissioner was not bound by the decisions of other Commissioners, and differences in view have from time to time appeared in the various decisions. An example of this is the meaning of the expression "waste land of a manor".

In the present context, that's a pretty interesting example, though it need not be pursued here. What should be apparent, however, is that the notion that the Decision Letters may be used as precedents in the way they have been used by Schedule 2(4) objectors is, even if it is considered in its own purely legal terms, a very dubious idea indeed.

*Gadsden's* The Law of Commons

(21). The purpose of Pt 1 of the 2006 Act is not to repeat the mistakes that were made under the 1965 Act but to provide for their correction. This is not evident, however, from some of the Planning Inspectorate's more recent Inquiries, where the misconceptions and the mistakes of the Commissioners have re-surfaced in the case presented by objectors. These fundamental errors have not received the short shrift they deserve; and the resulting confusion has been compounded by a reliance on the legal text produced by Gadsden.

(22). The book published by Gadsden in 1988 is widely recognised as an authoritative text on the law of common land. There is no question of the truth of this. The book is an authoritative legal text.[14] However, it reflects the state of the law in the years prior to the (1990) judgement in *Hazeley Heath*. Schedule 2(4) objectors have relied on a 'second edition' produced in 2012 by E F Cousins, which presents itself as an updated version of the original. In fact, the Cousins version reproduces the relevant parts of the original text almost word-for-word. As a purported 'second edition', then, it is not worth the paper it is written on.[15]

(23). In reading the analysis produced by Gadsden (in either edition) it is obvious from the language employed that the intention was to provide a *descriptive* account of the on-going activities of the Commons Commissioners. As a consequence, the text incorporates all of the flaws described here, and – understandably enough, given the task the author had set himself – endorses each and every one of them as expressing the views of the Commons Commissioners. As a legal textbook presenting a descriptive analysis of a process of decision-making that was as yet to be completed, it could not have done otherwise. The Cousins version makes no attempt at all to review this (now completed) process in the light of the *Hazeley Heath* judgement. The Commons Commissioners, for example, may well 'have consistently held that where land is let or leased the land cannot be waste land of a manor'.[16] But this is because the Commons Commissioners were misapplying the manorial rules to a question concerning the current state of the land (Is the land 'waste land'?) that had, and has, nothing to do with its legal or manorial status.

(24). As noted at para (20) above, Gadsden was writing with the awareness that the Commons Commissioners did not necessarily agree on the matters before them and that their Decisions were not to be treated as precedents – though this, in effect, is precisely what he did in producing his definition of 'waste land of a manor'. This definition was based on a

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[12] The figures for England will be found at: www.commonsreregistration.org.uk/downloads/StatsTable.doc. A breakdown of the figures for the Pioneer Areas is available at: www.commonsreregistration.org.uk/downloads/SummaryTable(CAS).doc. The latter is based on a study of the commons registers and all of the relevant Decision Letters.

[13] G D Gadsden, op cit, 14.38, pp 403-4 & Cousins, op cit, A1-15, p 630.

[14] As noted at Cousins, p ix, the original text has been cited by the judges in a number of leading cases.

[15] A comparative analysis of the two books will be found at Appendix I below.

[16] Gadsden, op cit, 2.54, p 45 & Cousins, op cit, 3-53, p 151.

wide reading of the Decision Letters. And the intention, at least in part, was to provide practical advice for those who might become involved in the process he was describing. That process was brought to an end some time ago. It is a mark, then, of the shoddiness of the Cousins 'edition' that the unreconstructed analysis to be found there is recommended as 'important in deciding the status of purported waste land before a Commissioner or when considering whether the land has ceased to be within registrable status'.[17] This spurious re-hash of the original text ignores the fact that the Commons Commissioners were abolished in 2010.[18] It also ignores the fact that it has been impossible since 2006, when section 13(a) of the 1965 Act was repealed, for common land to be de-registered on the basis that it has 'ceased to be within registrable status'.[19] Frankly, to describe a book that is riddled with absurdities and inaccuracies of this kind as an authoritative legal text is beyond a joke. For the purposes of the present discussion, though, the more serious problem lies in the absence of any attempt to comprehend the implications of the *Hazeley Heath* judgement. As a result, what was originally intended as a descriptive account of the Commissioners' activities presents itself as a seemingly authoritative statement of the meaning of the expression 'waste land of a manor'. Taken at face value, this specious construction has a particularly pernicious effect in the context of Schedule 2(4). Not surprisingly, this has not gone unremarked by objectors.

(25). It is perhaps significant that the second 'edition' was produced by a former Chief Commons Commissioner; who may, as a result, have encountered difficulties in undertaking the required re-assessment of the work of his colleagues and predecessors. This is no excuse, however, for a book that is falsely presented as an up-to-date version of an authoritative legal text. Given the crucial importance of *Hazeley Heath* in the context of Schedule 2(4), the Cousins book has in this context a value equivalent to the absurdities it describes.

(26). A comparative analysis of the two 'editions' will be found below at Appendix I. It may be helpful here, though, to take a look at one or two examples of the way the book has been used as an authoritative legal text. Probably the most egregious is the question of leasehold. According to Cousins, 'the Commissioners have consistently held that where land is let or leased [it] cannot be waste land of a manor'.[20] This axiom is derived from the manorial rules. *It therefore has no relevance in considering the current state of the land*. However, it seems to possess a peculiar force; and has typically been confused with the notion that the existence of a legal occupier (usually a leaseholder) affords sufficient proof of 'occupation'. If this were true, the only land capable of registration under Schedule 2(4) would be land without an owner or occupier – which is clearly absurd. In the light of the *Hazeley Heath* judgement, the legal status of the land at the time of the application is irrelevant. And any legal questions there may be relate to its past status as waste land of a manor. It might, then, be shown that the land was leased at some point in its history (say in the early C19$^{th}$); and that this was the time at which it ceased – in terms of the then manorial rules – to be 'waste land of a manor'. However, it would also need to be demonstrated that the land was not 'waste land of a manor' *prior to* this date. In effect, what is required to be shown by the objector is that the land was *never* manorial waste.

(27). A second example involves the question of cultivation. The Decision Letter most often cited here concerns Chislehurst and St Paul's Cray Commons, which have been Metropolitan Commons since 1888. Subsequent to that date, they have been administered by a Board of Conservators and are subject ('in perpetuity') to a scheme of management whose primary purposes are: (i) the protection and preservation of the land; and (ii) the maintenance of the commons as amenities for public recreation and enjoyment. This land should have been exempted from registration under s.11 of the 1965 Act; and the case should clearly never have been brought before a Commons Commissioner. Indeed, the Decision Letter is little more than an historical curiosity that was the product of a series of mishaps and misunderstandings. Nonetheless, it is cited in both Gadsden and Cousins in support of the assertion that 'an intention to maintain a site on a regular basis would seem to be sufficient to destroy the waste land status'.[21] With this Decision in mind, conservation

[17] Cousins, op cit, 3-49, p 149.

[18] Ibid, A1-01, p 619.

[19] Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings)(England) Order 2006 (SI 2006/2504), Article 2(h)(i).

[20] Cousins, op cit, 3-53, p 151. For a critical analysis of this part of the text, see: Appendix I, pp [vi]-[vii] below.

[21] Ibid, 3-51, p 150.

management schemes involving light grazing and the cutting or burning of vegetation have been re-conceptualised by Inspectors at Schedule 2(4) Inquiries as 'non-intrusive' or 'low-level' cultivation. The kinds of activity involved are no greater in their intensity, level or intrusiveness – and are typically a good deal less so – than the past and present uses of the waste by commoners and owners or their tenants. These not only include quite intensive regimes of grazing; but also the taking of peat, turf, wood, furze, bracken, reeds, stone and earth by common right. Nor should the 'traditional' management practices of sporting owners or tenants be forgotten (gripping, draining, burning). In their more intensive form, these practices have been widespread since the mid-nineteenth century without having had any noticeable effect on the status of the land as waste land. Contrary to the views of former Chief Commons Commissioner Squibb, the land described by Schedule 2(4) is not some kind of untouched wilderness. It is the land that was once 'waste land of a manor' which, in the absence of any fundamental change – such as its conversion *by cultivation* to arable or improved grassland – has retained its physical characteristics up until the present day. The idea that 'low-level' activities intended to conserve or enhance the natural or semi-natural characteristics of this land have the effect of destroying its status as waste land is a nonsense that is almost solipsistic in its absurdity.

(28). The flawed case presented by objectors, and now validated by the decisions of the Planning Inspectorate, is based on the fundamental errors outlined above; and, in particular, on a failure to understand the wider implications of the judgement in *Hazeley Heath*. To repeat: it simply does not matter that the land that is the subject of a Schedule 2(4) application may have been inclosed at some point in its history or that it has ceased to be 'waste land of a manor'. Nor is it of any consequence that the land now has an owner and therefore a legal occupier; that it may be occupied under a lease; that the owner or leaseholder has 'exclusive' rights to deal with it in certain ways; or, perhaps, a duty to do so under some form of legal agreement. All of these possibilities follow *of necessity* from the fact that the land in question has, at common law, ceased to be common land; and that it has, with the passage of time, been shorn of its manorial status. In short, there is no essential *legal* difference between the land that is capable of being registered under Schedule 2(4) and any other kind of land. To quote Gadsden (referring to section 22(1)(b) of the 1965 Act): '…one modern statute includes within the definition of common land a class of land which is subject to no third party rights and is almost indistinguishable from other un[e]ncumbered freehold land except by reference to its physical characteristics'.[22] The only other distinguishing feature of 'waste land of a manor not subject to rights of common' is its past manorial status.

**5. Making a Case for Re-Registration**

(29). It has already been shown that, in making a Schedule 2(4) application, there are two basic questions to be answered relating to: (i) the physical state of the land at the time of the application; and (ii) its past status as waste land of a manor. Providing an answer to the second question may be relatively straightforward. In the case of North East Lancashire, for example, there is an early C19th map produced for the Honor of Clitheroe on which the boundaries of the constituent manors of the Honor are quite accurately depicted and which also shows the extent of the manorial waste.[23] Similar information may be found by consulting a Tithe or Inclosure map or a private estate map.

(30). In some cases, it may prove more difficult to establish the historical status of a particular piece of land. However, it should be remembered that this is a question of probability (the 'balance of the probabilities'); and though the evidence will typically be challenged by objectors, there should not usually be too many problems in demonstrating that the land once formed part of a manorial area. It then remains to be shown that it was waste land at the time of the Schedule 2(4) application. If a positive answer can be given to this question – if, i.e., the land was once manorial land and has retained the characteristics of 'waste land' up until the date of the Schedule 2(4) application – it is very unlikely indeed that it was not once 'waste land of a manor'. For this conclusion to be contested, it would be necessary for the objector to show that the land had *never* been 'waste land of a manor'.

[22] Gadsden, op cit, 1.01, p 1. See also: 1.16, p 9; and Cousins, op cit, 1-04, p 17; 1-38, p 40.

[23] Barclay's Map of the Honor of Clitheroe (1810), Lancashire Record Office (DDHCl/26/11/1).

(31). The crux of the matter, then, is the meaning of the expression 'waste land'. As has already been argued at length, this is not a legal expression. Rather, it is to be understood as an economic or geographical concept concerning the use of the land as a natural resource. By and large, it describes land which, because of its physical characteristics (geology, relief, climate, vegetation, soil, altitude, aspect), can only be exploited in an extensive way, for its natural produce – so that in agricultural terms, for example, the land is effectively incapable of sustained 'improvement' or intensive use. Hence its use in the past as common land; and hence the recognition in the *Report* of the Royal Commission on Common Land (reiterated in the *Hazeley Heath* judgement) of the public interest in its preservation and protection as a shared, ecological resource.

(32). This definition may seem a little vague, though the maps of 'open country' produced under Part 1 of the Countryside and Rights of Way Act 2000 (C&RoW Act) offer a reasonably good guide. Perhaps now, though – having established where the legal arguments are applicable and where they are not – it is also permissible to turn to the *Hanmer* criteria for similar guidance. *Not* in the sense that the legal definition in *AG v Hanmer* has any bearing on the matter (which is not a legal matter); but in the sense that the *Hanmer* criteria may be employed as exclusively *physical* descriptors.

(33). If the description of the land as 'open, uncultivated and unoccupied' is to be properly applied in the present context, it must be understood that none of these terms has any legal connotations or implications; and that they are to be used in producing a purely *physical* description. So that, for example, 'openness' has nothing to do with the question of whether or not the land may have been subject to inclosure at some point in its history. Nor is the word 'unenclosed' (meaning 'not surrounded by walls or fences') of any particular relevance. In this context, 'open' must be taken to mean just what it says: that the land is physically 'open'. If it is surrounded by, or is contiguous with, enclosed land it will of necessity be fenced or walled off from the latter. This does not mean, however, that it is therefore 'enclosed' by walls or fences and cannot be considered to be open.

(34). In practical terms, the maps of 'open country' may be taken as a benchmark. This is not, it should be noted, to suggest an alternative 'legal test'. Given that 'openness' is defined under the C&RoW Act in terms of the physical characteristics of the land, it is simply a matter of common sense. The maps of 'open country', in other words, may be used as a practical guide in just the way that the *Hanmer* criteria may be used as a practical guide – though neither of these sources is 'definitive'. It is quite reasonable, for example, to refer to a small (and even a very small) piece of waste, whether it be fenced or not. This is not a question that is provided for in either the *Hanmer* criteria or the Countryside & Rights of Way Act. It is, again, a matter of common sense.

(35). Inspectors at past Inquiries have rejected the maps of 'open country' on the grounds that: (i) the definition on which they are based is peculiar to the 2000 Act; or that (ii) the right of access conferred by the Act is 'weaker' than – and thus must give way to – the 'exclusive' rights of the owner or occupier. These two points have typically been conflated by Inspectors; and the second has proved particularly fertile as a source of confusion (is the question at issue here one of 'openness' or of 'occupation'?). Both are totally misconceived; and are the result, once more, of a failure to distinguish between issues that are legal issues and those that are not. The purpose of the criteria employed in implementing the 2000 Act (i.e. the mapping criteria) was to provide a working definition that could be used in mapping the land that could properly be described as 'open' in terms of its physical characteristics. What matters in the context of Schedule 2(4) is the existence of the maps and the record they provide of the physical state of the land. This has nothing at all to do with the rights conferred by the 2000 Act; let alone with the relative 'strength' of the public right of access and the 'exclusive' rights of owners or occupiers.

(36). Given the exclusion of improved or semi-improved grassland, the maps of 'open country' also provide an accurate record of uncultivated land. Their use in the context of Schedule 2(4) is therefore wholly appropriate. This, again, is not to suggest that the maps are definitive or possess some kind of legal status; but that they have a direct relevance as a practical guide in just the same way that the *Hanmer* criteria have relevance as a practical guide. Neither of these two

definitions has any legal purchase or priority. What is apparent, though, is that the 2000 Act definition carries with it none of the archaic legal baggage that has caused so many problems in the past.

(37). Finally, 'occupation'. If this word is to be used as a purely physical descriptor, it has nothing to do with the existence or non-existence of an owner or other legal occupier. The question to be answered is whether or not the land is *physically occupied* in the ways suggested by the examples given in the DEFRA *Guidance*. These include (1) quarrying; and (2) the cultivation and reseeding of moorland. As is apparent from the second example, in the context of a *physical* description there may be some overlap between the terms 'uncultivated' and 'unoccupied'. Since they are being used as an approximate guide, however, this doesn't really matter (though it *might* matter in a *legal* context). It does, however, point up once more the relevance of Natural England's maps of 'open country', which provide a usable (though clearly not a definitive) record of land that is not physically occupied.

**APPENDIX I**

**(Gadsden: A comparative analysis)**

[1]. The following analysis examines the treatment in Gadsden of the issues surrounding the definition of 'waste land of a manor'. There are two 'editions' of the book, the first published in 1988 and the second in 2012. As noted above, in considering the *Hanmer* criteria both editions offer the same analysis and both rely on the same Decision Letters. All of these Decision Letters pre-date the judgement in *Hazeley Heath*. Despite its date of publication, then, the second edition of the book displays no awareness of the *Hazeley Heath* judgement or the implications of the 2006 Act. Take, for example, the paragraph introducing the section concerned with 'waste land of a manor not subject to rights of common', which comments on the 'curious' effects of the 1965 Act:

> 3-46. The second head of the definition of land which could have been registered as common land under the provisions of the CRA 1965 was "waste land of a manor not subject to rights of common." It seems probable that the intention of the legislators was to include all land which had its origin in waste of a manor, was unoccupied and unused, and might be considered a prime candidate for amenity use. If that was the intention, it is clear that it failed in its purpose largely due to the technical wording used in the statute. *The curious position which has resulted is that the apparent intention of the CRA 1965 has been frustrated in that some, but by no means all, land over which no person has been registered with common rights was included as common land for the purposes of the statutory scheme under the 1965 Act*.[1]

The first part of the paragraph is from the original. The words in italics were inserted by Cousins. No reference is made to the 2006 Act or to the Schedule 2(4) provisions as a possible remedy. The text then goes on to regurgitate the notion, current at the time when Gadsden was writing, that land subject to leased or tenants' rights of grazing could not and should not be registered under section 22(1)(b) of the 1965 Act as 'waste land of a manor':

> 3-52. *Unoccupied*: It is quite clear that in describing waste land in the case of *AG v Hanmer* Watson B did not imply that the land was not used for grazing purposes. At the very least, the wastes were used by the tenants of the manor at the time. Thus the land was being used by persons, holding title under the lord, as copyholders exercising customary rights of common, and tenants or termors exercising contractual rights in common. It was possible to argue that the CRA 1965 in providing for the registration of waste land not subject to rights of common ought to have included land which had ceased to be subject to copyhold rights and was subject only to tenants' rights in common. It has been argued elsewhere that the rights of tenants and termors have much greater strength since the 1925 property legislation than they apparently did in the 19th century. Thus it is somewhat anomalous to treat them today as though they are little more than rights *in personam*, but in the event, the CRA 1965 expressly excluded the rights of tenants or termors from registration.[2]

The authority for this analysis is claimed to be the Decision of Chief Commons Commissioner Squibb in *Re Arden Great Moor*. As we shall see, this Decision is deeply flawed.[3] There is, in fact, nothing in the 1965 Act to support the views expressed here. The suggestion is that 'land which had ceased to be subject to copyhold rights and was subject only to tenants' rights in common' should (perhaps) have been capable of registration as 'waste land not subject to rights of common'. Unfortunately, it could not be so registered because 'the CRA 1965 expressly excluded the rights of tenants or termors from registration'. This may well reflect the thinking of the Commons Commissioners at the time when Gadsden produced the original text. It is, however, utterly illogical. If tenants' or termors' rights could not be registered under the 1965 Act as rights of common (which they could not) then there is plainly no reason why the manorial waste that was subject to these rights should not have been registered under the Act as 'waste land of a

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[1] Cousins, op cit, 3-46, p 146.

[2] Ibid, 3-52, p 150.

[3] *Re Arden Great Moor, Arden with Ardenside, N Yorks* (1977) 268/D/209. See pp [v]-[vi] below.

manor not subject to rights of common'. In fact, many such areas were registered, and there is no reason why land in this class that was provisionally registered under the 1965 Act should not be re-registered now under Schedule 2(4).

[2]. The discussion that follows mirrors the treatment of the *Hanmer* definition in both editions of Gadsden. As noted above, the two 'editions' of this part of the book are almost identical in form and content. The section and page references used in the headings are taken from the second (Cousins) edition.

***['Open': Cousins, 3-50, p 149]***

Decisions cited:

*Re Rush Green, Harleston, Suffolk* (1979) ~ 234/D/84 ..... [Squibb]

[3]. The discussion in Gadsden of the term 'open' is both ambiguous and inconclusive. The second edition of the book, however, reproduces the original text with only one significant change. In the final two sentences, the word 'inclosure' is substituted for the word used in the original ('enclosure'):

> Inclosure of waste is probably the most unequivocal act possible to indicate an intention to take the land into demesne. If waste land was not subject to rights of common on 1 January 1926 there was no statutory bar to inclosure.

If this was intended as a clarification it is not at all helpful. The term 'inclosure' implies the extinguishment of common rights; and though waste land that was not subject to common rights on 1 January 1926 might subsequently have been enclosed (fenced or walled around) it would not be possible for it to have been inclosed.

[4]. The Decision Letter cited in this section is not particularly relevant to the definition of 'openness' but is concerned with the question of whether waste land of a manor that was taken into the lord's demesne might then be abandoned and so revert to its former state. The Letter, however, is quite helpful in demonstrating the approach adopted by Chief Commons Commissioner Squibb. Thus, it was accepted at the Hearing that the land under discussion was waste land of the manor in 1914 and that it had not since been severed from the manor. However, it had been ploughed, drilled and cropped in 1969 and 1973 and was thereby occupied, taken 'in hand' (*in propriis manibus)* and thus brought into the manorial demesne by a process of approvement. The land had subsequently been neglected and at the time of the Hearing (Feb 1979) it was 'open and uncultivated'. However, the question to be answered was whether it had retained its status as demesne land or whether that status had been lost by abandonment. The commissioner was not prepared to accept the latter. The land was therefore demesne land. At the time of the Hearing, then, it was not 'waste land of a manor' and could not be registered as such under the 1965 Act.

[5]. In the light of the *Hazeley Heath* judgement, it should be apparent that an analysis of this kind (quite apart from its inherent absurdity) cannot be valid. The notion that the rules applicable 'in the days when copyhold tenure still existed' should be applied at a Commissioner's Hearing to determine whether the land is still 'waste land of a manor' is totally misconceived. What *ought* to have been considered at this Hearing was whether the land was 'waste land'; and whether or not it had been 'waste land of a manor' at some time in the past (as it clearly had in 1914). The misapplication of the manorial rules that is evident here – in a context where they are clearly irrelevant – has already been discussed in some detail at pp 1–4 above.

***['Uncultivated': Cousins, 3-51, p 150]***

Decisions cited:

1. *Re The Drives, Puncknowle, Dorset* (1972) ~ 10/D/7 ..... [Squibb]
2. *Re Norris Mill Moor, etc, Puddletown, Dorset* (1973) ~ 10/D/35-7 ..... [Squibb]
3. *Re (1) Huntsham Hill & (2) The Old Quarry, Goodrich, Hereford* (1973) ~ 15/D/1-3, 6 ..... [Baden Fuller]
4. *Re Knackers Hole Common, Puncknowle, Dorset* (1972) ~ 10/D/4 ..... [Squibb]
5. *Re Chislehurst and St Pauls Cray Commons, Bromley, Greater London* (1974) ~ 59/D/9-10 ..... [Squibb]

[6]. In considering the question of cultivation, the second edition of Gadsden adopts the text and citations in the original. There are no changes. *Decision No 1* concerns land that was subject to rights of grazing that ceased to be exercised in 1962 when it was ploughed up by the owner. Though the purpose of this action and the subsequent use of the land are not described in the Decision Letter, it was judged by the Commissioner to be cultivated. *Decision No 2* covers land leased to the Forestry Commission in 1924 that had subsequently been planted with trees. It was decided that (though this would not apply to natural woodland) the existence of a plantation was enough to show that the land was both cultivated and occupied; though no authority is offered in the Decision Letter for the contention that the preparation of the ground for planting amounts to cultivation in the context of the *Hanmer* definition. Finally, as leased land the plantation area must be considered to be part of the manorial demesne:

> The word "demesne" is not confined to the land occupied by the lord of the manor, but includes land let for a term of years. As Lord Lyndhurst CB said in *Att.-Gen v Parsons* (1832) 2 Cr & J 279, 308, it is usual and correct to apply the word "desmesne" to "the lands of a manor which the lord of the manor either actually has, or potentially may have, *in propriis manibus*".

It has already been shown above that the interpretive approach adopted here by Chief Commons Commissioner Squibb (who is responsible for virtually all of the Decision Letters cited by Gadsden and Cousins) involves a misapplication of the wrong set of rules; and that, in the light of the *Hazeley Heath* judgement, this approach produces results that are without any validity. There is however a further point. Even if it is considered on its own terms (i.e. in terms of the manorial rules), the reasoning behind these Decisions has no foundation in either law or logic.

[7]. Wherever Mr Squibb employs the word 'demesne' or the phrase '*in propriis manibus*' ('in hand') in his Decision Letters, their use is said to take its authority from the judgement in *AG v Parsons*.[4] This judgement was concerned with a royal grant of rights of 'free warren and free chase' (hunting rights). The purpose of the judgement was to determine the extent of the land affected by the grant. Should it apply only to the manor of Aulton? Or did it extend to the Hundred of Aulton and therefore include other lands that were held in fee by the lord of the manor? The point at issue, then, was whether the word 'desmesnes' in the grant could 'admit of the large construction for which the defendant here contends – that is, "all the lands within the hundred," etc, of which Sir Richard Tichborne was seised in fee'; or whether it was 'to be confined to what were within his manor, and whereof he was lord'. After considering a catalogue of different interpretations (including Bracton, Fleta, Spelman, Coke and Blackstone), the conclusion was that '[u]pon these authorities, we think we are fully warranted in saying, that, though the word "demesne" may in some cases be applied to any fee-simple lands a man holds, yet it is more correct and usual to apply it to the lands of a manor, which the lord of that manor either actually has, or potentially may have, *in propriis manibus*.' There is no attempt here to provide a definitive interpretation of the word 'demesne' or of the phrase '*in propriis manibus*'. The purpose of the judgement is to decide which interpretation of the word 'demesne' should be adopted *in this case*. The judgement is that the reference in the grant is to the demesne lands of the manor of Aulton. Now, it may be true that demesne land is, by definition, land that is held *in propriis manibus* ('in hand'). And this may be apparent from the way these words are used in *AG v Parsons*. It does not follow, however, that (as is assumed by Mr Squibb) land that is held *in propriis manibus* is of necessity demesne land. Unoccupied waste land, for example, is not suddenly and miraculously transformed into occupied demesne land simply by virtue of the fact that it is taken 'in hand'.

[8]. What does seem to be clear (following e.g. the Blackstone definition cited in *AG v Parsons*) is that the demesne of a manor is the land occupied by the lord of the manor. This accords with the dictionary definition of manorial demesne; and appears to be accepted, at least in part, by Mr Squibb (see passage quoted above at para [6]). An alternative, and perhaps more enlightening, definition is provided by the Cumbrian Manorial Records Website.[5] This site was created by the History Department at Lancaster University as part of a joint project with The National Archives (TNA); and has been adapted by TNA as the basis of its own manorial documents webpages. Here, the

[4] *Attorney General v Parsons* (1832) 1 LJ Ex 103, 2 Cr & J 279, 2 Tyr 223.

[5] www.lancs.ac.uk/fass/projects/manorialrecords/index.htm.

definition of 'demesne land' is given as 'the home farm'. The demesne, then, includes the land occupied by the manor house and farm buildings. It also comprises the lord's arable and his improved pasture or meadow (including, e.g., his strips in the open fields or his shares in the meadow lands). This land is 'occupied' by virtue of its having been built upon or improved as farmland. It is clearly held '*in propriis manibus*' ('in hand'); but it does not follow from this that any land that is held '*in propriis manibus*' is therefore demesne land. If, for example, an area of waste land that was no longer subject to rights of common was taken 'in hand' by the lord, it would not qualify as 'demesne land' *unless it had also been occupied by virtue of its development or improvement*. Similarly, if land was leased out by the lord of the manor it must clearly be land that he held '*in propriis manibus*'. Again, there is no implication that it must *of necessity* be demesne land. It might just as well be unoccupied waste. The significance of a lease in the context of the manorial rules is that the lord had no right to lease out the waste land of the manor that was subject to rights of common. The existence of a lease, then, could be taken *in these particular circumstances* as proof that the land in question was not part of the manorial waste. There is, however, no implication that land subject to a lease is therefore part of the demesne.

[9]. *Decision No 3* (Re Huntsham Hill) also relates to the planting of trees and provides a rider to *Decision No 2*. The relevant section is at the bottom of page 4 of the Decision Letter:

> Mr Falconer described in a general way how young trees were in 1965 and 1966 planted on most of the Tract [CL 127]. I was supplied with a map outlining these plantations: "DF.1967, BeP68, and JL.P67"; on this map the most easterly part, the most westerly part (both by the River) and the strip along the south boundary (the highest part) of the Tract are shown as "Scrub". Within the planted area there are patches where planting was impossible because the ground was too steep or too rocky or because it was otherwise impracticable or uneconomic to plant. The word "uncultivated' does not appear in the 1965 Act; although the judgement of Watson B [i.e. the *Hanmer* judgement] is relevant and helpful, it would I think be wrong to treat his definition of "waste" given in 1858 as if it was set out in the 1965 Act. Land may continue to be waste notwithstanding that some trees are planted on it and land may cease to be waste if trees are cultivated on all of it.

As with *Decision No 2,* no authority is cited for the notion that a forestry plantation is 'cultivated' land; what is implied is that this *might* be the case but only on the condition that *all* of the land was afforested. The suggestion is, then, that there is a distinction between 'planting' a small number of trees and 'cultivating' a more extensive area. This latter, however, would still be a 'plantation'; and the meaning of the word 'cultivation' needs to be stretched more than a little to encompass the notion that a plantation of trees is cultivated land.

[10]. *Decision No 4* (Knackers Hole Common) provides a further qualification related to the *purposes* of the cultivation. In this case, an application was made in 1960 under section 194 of the 1925 Law of Property Act to fence the land so that it could be cleared of scrub, ploughed and laid down as permanent pasture; though it was made clear at the time that there was no intention that it should not continue to be used in future as a public open space. The land was therefore judged to be 'uncultivated'. This Decision is pretty hard to reconcile with *Decision No 5*. Though both are exceptional cases, the latter is unique. The land in *Decision No 5* (Chislehurst and St Pauls Cray Commons) had been a Metropolitan Common since 1888, was subject to a management scheme and was controlled by of a Board of Conservators. This land should clearly have been exempted from registration under section 11 the 1965 Act. One of the section 11 conditions, however, was that no rights of common should have been exercised over the land for a period of 30 years. Though this was in fact the case, the exemption was opposed by a number of local residents who claimed the opposite. As a result, the section 11 application was refused by the Minister; and the land was subsequently registered by the Conservators under the 1965 Act. The latter then had second thoughts and proceeded to object to their own application. The case was heard by Mr Squibb. His Decision was that the land had been managed by the Conservators in such a way that it could no longer be considered to be waste land. In a word, the management amounted to 'cultivation':

> In my view, uncultivated land is land that is left in its natural state, subject only to such restrictions on the growth of vegetation as necessarily follow from grazing and the exercise of other rights of removing the natural produce of the land. If there is no such restriction, the features and aspect of the land must inevitably change.
>
> Whatever may have been the natural features and aspect of the land at the time of making the Scheme, they would have been altered by natural causes since the cessation of the exercise of the rights of common. The work carried out by the Conservators' employees has not had the effect of totally preventing such alteration, for much of the land has become wooded, but the work has had the effect of maintaining the land in such a condition that it is capable of enjoyment by members of the public. The land still retains what could be described as a natural aspect, but it is really an artificial aspect; the measure of the Conservators' success is the extent to which the artificiality has been concealed. Nevertheless, the Commons as they can be seen today are as artificial as one of the landscapes created by "Capability" Brown in the eighteenth century.

On the basis of this Decision, it is suggested by Gadsden that 'an intention to maintain a site on a regular basis would seem to be sufficient to destroy the waste land status'. It should, in fact, be acknowledged that this is a wholly exceptional case. The Decision Letter is little more than an historical curiosity that was the product of a series of mishaps and misunderstandings. As such, it cannot and does not have the kind of implications suggested.[6]

***['Unoccupied': Cousins, 3-52, pp 150-1]***

Decisions cited:

*Re Arden Great Moor, Arden with Ardenside, N Yorks* (1977) ~ 268/D/209 ..... [Squibb]

[11]. Once again, the second edition of the text is based almost word for word on the original. And no attempt is made in the Cousins edition to consider the implications of the *Hazeley Heath* judgement or the 2006 Act. The significance of this omission will be seen in the discussion that follows of the Decision in *Re Arden Great Moor*. The analysis in the text is based solely on this one Decision Letter. The latter is, without doubt, the most important Decision that is cited in either edition of the book. It lays bare the case that has been presented in these *Briefing Notes* in a way that is so blatant that it cannot be ignored.

[12]. The Decision Letter, produced by Chief Commons Commissioner Squibb, first proceeds under what he refers to as 'the old authorities' (i.e. the legal rules that applied under the manorial system). Arden Great Moor is described as 'open and uncultivated' moorland with an area of 2168 acres. It is admitted that it was once waste land of the manor of Arden. By 1900, however, all of the land in the manor had been taken 'in hand' (*in propriis manibus*). The Moor had thus become part of the lord's demesne and could not be considered to be waste land under the *Hanmer* definition. At this point in the argument, however, it is noted by Mr Squibb that he is confronted with the recent judgement in *Re Chewton Common*; and though uncertain of its 'direct authority' in the present case, he feels that he must – in the light of this judgement – lay aside the 'manorial considerations' (i.e. the flawed interpretive approach that he has invariably adopted in the past) in coming to a Decision. The conclusion, then, that the land forms part of the lord's demesne and cannot therefore be registered as 'waste land of a manor' must be dismissed.

[13]. Mr Squibb then proceeds to consider whether the land (already acknowledged to be 'open and uncultivated') is occupied; and decides that it is because the owner's tenants enjoy rights of grazing over the moor as part of their tenancy agreements. These constitute an income ('a benefit') that is taken from the moor by the owner. The land is therefore occupied – a conclusion that is claimed to follow 'from the judgement of Slade J in *Re Chewton Common*'.

[14]. It is hard not to dismiss this specious nonsense out of hand. The use of Arden Great Moor was, in fact, no different in kind to the use made of waste land of a manor that is subject to rights of common. It is claimed, nonetheless, that the tenants' rights in this case are 'fundamentally different from rights of common'; because the latter are 'a burden on the land' whereas the former constitute 'a benefit' to the owner. This ignores the fact that under the manorial rules the lord took 'a benefit' from the *unoccupied* waste when he took the balance of the grazing

[6] The land is clearly a prime candidate for registration as 'statutory common land' under Schedule 2(2) of the 2006 Act.

left by the commoners; and that he might, under the same rules, lease or licence this benefit. It also ignores the fact that the owner of Arden Great Moor might take exactly the same benefit directly by grazing his own stock on the land. Why, then, should this (or the existence of tenants' rights) be thought to constitute 'occupation'? When the land was no more 'occupied' than it had been at any time in the past?

[15]. It seems to the writer that the distinction made here between a burden and a benefit can only be entertained if it is considered in terms of the rules that applied under the manorial system; and that it is, in fact, nothing more than a re-statement of the earlier argument that the land had been taken '*in propriis manibus*' and was therefore part of the lord's demesne. As has already been shown at paras [7]–[8] above, this argument is invalid. There is, in fact, no justification for the assumption that land taken 'in hand' by the lord of the manor is thereby occupied; and that it must, as a result, be considered to be part of the demesne.

[16]. In terms of the judgement in *Re Chewton Common*, Arden Great Moor is 'waste land which was once waste land of a manor in the days when copyhold tenure still existed'. In effect, Mr Squibb is contending that land in this category can only qualify as waste land if *no benefit whatsoever* is taken from it by the owner. The land, then, must be completely untouched. Otherwise, it is occupied. This position is as bizarre as it is absurd. 'Waste land' – as opposed to 'waste land of a manor' – must, of necessity, be capable of definition without reference to the manorial system. Nor is there any difficulty in arriving at such a definition; or any implication that such land must be untouched, or neglected or ownerless (in effect, a species of wilderness). As already suggested, the only plausible explanation for this particular absurdity lies in the (now covert and possibly unconscious) misapplication of 'the old authorities' – or, rather, what are purported to be the old authorities – to circumstances in which they no longer have any relevance.

[17]. Mr Squibb's Decision Letter on Arden Great Moor is dated 31 Oct 1977 and was produced less than a year after his Decision in *Re Box Hill Common*.[7] The judgement in *Re Chewton Common* was made in the Spring of 1977. It was, however, overruled in early 1978 by the Court of Appeal in *Box Parish Council v Lacy*.[8] This latter judgement was in turn overruled by the House of Lords in 1990 when *Re Chewton Common* was reinstated by the judgement in *Hazeley Heath*. In the years following the Arden Great Moor Decision, then, Mr Squibb would have continued to apply 'the old rules' up until his retirement in 1985 and his replacement as Chief Commons Commissioner by Mr Langdon Davies. The negative implications of this should be evident from the foregoing analysis.

***['Tenanted & Leased Land': Cousins, 3-53, p 151]***

Decisions cited:

1. *Re Hardown Hill, Whitechurch, Canonicorum & Chedeock, Dorset (No 1)* (1974) ~ 10/D/45–55 [Squibb]
2. *Re Land to the North of Pipers Green, Brockley Hill, Stanmore, Greater London* (1974) ~ 59/D/7 [Squibb]
3. *Re Waste Land, Carperby, N Yorks* (1977) ~ 268/D/96 [Squibb]
4. *Re Twm Barlwm Common, Risca and Rogerstone, Gwent* (1986) ~ 273/D/106–107 [Langdon Davies]
5. *Re Burton Heath, Wool, Dorset* (1981) 210/D/476–82 [Hesketh]

[18]. Apart from one or two stylistic changes, the relevant part of the text in both editions of Gadsden is exactly the same. It is claimed that '[t]he Commissioners have consistently held that where land is let or leased [it] cannot be waste land of a manor'. The three Decision Letters cited in support of this statement, however, were all produced by one person: Chief Commons Commissioner Squibb (which will perhaps come as no surprise). Again, no attempt is made in the Cousins edition to reassess these Decisions in the light of the *Hazeley Heath* judgement.

[19]. In the case of *Decision No 1* (Hardown Hill), it is noted in the Decision Letter that the land in question ('High Bullen') was waste land of the manor in 1841; and that, up to this point, it had been subject to rights of common. At

[7] *Re Box Hill Common, Box, Wiltshire* (1977) 241/D/ 56–60.

[8] *Box Parish Council v Lacey* [1979] 1 All ER 113, in which the Decision in *Re Box Hill Common* was considered on appeal.

the time of the Hearing, although there were no rights of common, the land was still unenclosed and uncultivated. From 1897 onwards, however, it had been let to tenant farmers. It must therefore have been subject to an act of inclosure during the period 1841–97 and thus brought into the manorial demesne. It could not, then, be registered under the 1965 Act. In *Decision No 2* (Land North of Pipers Green), it is acknowledged that the land was manorial land. It had, though, been included in a lease dated 1580 and must therefore have been part of the demesne. In *Decision No 3* (Waste land, Carperby, OS No 4 (W portion)) the land was part of the manor of Carperby; and was said by Mr Squibb to be land that 'could fairly be described as waste land'. However, it had 'for many years past been let to tenant farmers' and must therefore be demesne land.

[20]. It should be evident from what has gone before that none of these Decisions has any validity. The land in Decisions 1 & 3 should clearly have been registered under the 1965 Act as common land. The admission by Mr Squibb at *Decision No 3* that the land 'could fairly be described as waste land' is quite remarkable. In effect, it is an admission that 'waste land' is capable of definition without reference to the manorial rules. *Decision No 2* is perhaps more doubtful (the land was also shown at the Hearing to be part of a highway). The point, however, is that no attention is paid in the Decision to the current state of the land; or to question of whether it was *at some time in the past* 'waste land of a manor'. The existence of a lease in 1580 may have some bearing on this, though it does not show that the land was necessarily part of the demesne at that time and is certainly not conclusive evidence.

[21]. *Decision No 4* (Re Twm Barlwm Common) is cited in both editions of Gadsden as expressing a view contrary to *Decision No 3*. It was produced by Mr Langdon Davies in 1986 in the period immediately after he took over from Mr Squibb as Chief Commons Commissioner. According to the Decision Letter, the existence of a lease is not in itself enough to show that the land is 'occupied':

> The fact that [the land] has been let is a relevant consideration but is not conclusive. A tenancy merely gives a right to occupy. If a tenant never goes to the land he has taken it may well be unoccupied. If he does make use of it the question of whether the land is occupied is a question of fact.

A lease, then, is not in itself to be seen as evidence of 'occupation'. This is a matter of fact and will depend on the nature and intensity of the use. This does not seem to the writer to go far enough. The question that needs to be answered in this context is why it should be thought that the existence of a lease has any implications at all.

[22]. It was assumed by Mr Squibb that land that was leased was by definition part of the demesne and could not therefore be registered under section 22(1)(b) as 'waste land of a manor'. It has already been shown that this assumption is false (see paras [7]–[8] above). The point, however, is not only that this assumption is false; but that it involves the further and equally false assumption that the rules to be applied by the Common Commissioners under the 1965 Act – and, if this position were in fact correct, now to be applied under Schedule 2(4) – are the manorial rules ('the old authorities'). It should, by now, be pretty obvious that this is not the case.

[23]. There is, however, a further misconception that is also of some interest in the present context. Under the manorial rules, it was not possible for the lord to lease waste land of the manor that was subject to rights of common; so that *in these circumstances* the existence of a lease was proof that the land was not manorial waste. In spite of the fact that the manorial rules do not apply in the context of Schedule 2(4), the notion that this particular rule is still extant seems to have persisted amongst many landowners (or their legal advisors) as a powerful conviction. It should be evident from the foregoing that this conviction has no basis in law.

[24]. *Decision No 5* (Burton Heath) is listed above for the judgement in *Re Burton Heath: Bellord v Colyer* (1983), in which the effects of a sporting lease on the status of land that is 'waste land of a manor' are considered.[9] The judgement is cited in support of the view that 'the existence of a sporting tenancy over a waste is not only consistent

[9] *Re Burton Heath: Bellord v Colyer* [1983] Lexis, Enggen Library, Cases, *per* Nourse J, at pp 7–8.

with its character as parcel of the manor but also may be supportive of such status'. The relevant part of the judgement is as follows:

> Finally I must turn to the uncoloured land…this land, together with all the other land comprised in the register unit except Hyford Cottage, has been the subject of a yearly tenancy of shooting rights in favour of a company called East Burton Estate Limited ever since 1958. That tenancy is not referred to by the Commissioner in his decision, but Mr Shillingford has told me that the tenancy agreement was before him at the hearing. He has also told me that the shooting tenancy and its effect was the substantial basis of the Trustees' case in relation to the uncoloured land. It therefore seems to me that I can take due cognisance of the shooting tenancy and that it would be quite pointless for me to remit the case to the Commissioner for amendment in this respect. The agreement is in what appears to me to be a familiar form. Not unnaturally, it imposes no obligation on the tenant either to fence or to cultivate the land. It contains covenants by the tenant to exercise the sporting rights in a fair and sportsmanlike manner; to preserve all game and, as far as possible, to prevent poaching and to warn off all trespassers; to take all reasonable means to destroy vermin, and, in exercise of the shooting and sporting rights, not to do or permit to be done any spoil, waste or damage whatever to the land. None of those covenants is such as to impose upon the tenant any obligation to do something which is inconsistent with conditions (b) and (c).[10]
>
> Furthermore it appears to me that the agreement, so far from being inconsistent with the land's remaining manorial waste, is in reality consistent with that state. Waste land, particularly marshy land of the character which some of this appears to be, will hold game much better than grassland and much better than most cultivations of arable land. Further, the exercise of the shooting tenant's rights under an agreement of this kind and his entry upon the land must, in the nature of things, be infrequent and spasmodic. In the result, I think it would be impossible to say that the shooting lease had the effect for which the Trustees contend in relation to the uncoloured land. I think that it would be impossible to say that the land did not remain both open and uncultivated and also unoccupied. Accordingly, on the evidence it appears to me that conditions (b) and (c) are satisfied in regard to that uncoloured area of land.

The implications of a sporting tenancy are said by Gadsden to be 'in contradistinction' to those of a lease of the land. This is presumably intended to mean that the two forms of lease have opposite effects. In the light of the analysis presented here, this statement cannot be true. The leasing of an area of land has no effect on, and is wholly consistent with, its status as 'waste land'. Similarly, the existence of a sporting lease is perfectly consistent with the status of the land as either 'waste land' or 'waste land of a manor'. Nor is there any reason to believe that land used for sporting by the owner is, in this respect, any different in kind.

[10] These two conditions relate to waste land of a manor as being: (b) open and uncultivated and (c) unoccupied.

## Schedule 2(4)

*Waste land of a manor not registered as common land*

(1) If a commons registration authority is satisfied that any land not registered as common land or as a town or village green is land to which this paragraph applies, the authority shall, subject to this paragraph, register the land as common land in its register of common land.

(2) This paragraph applies to land which at the time of the application under sub-paragraph (1) is waste land of a manor and where, before the commencement of this paragraph—

(a) the land was provisionally registered as common land under section 4 of the 1965 Act;

(b) an objection was made in relation to the provisional registration; and

(c) the provisional registration was cancelled in the circumstances specified in sub-paragraph (3), (4) or (5).

(3) The circumstances in this sub-paragraph are that—

(a) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act;

(b) the Commissioner determined that, although the land had been waste land of a manor at some earlier time, it was not such land at the time of the determination because it had ceased to be connected with the manor; and

(c) for that reason only the Commissioner refused to confirm the provisional registration.

(4) The circumstances in this sub-paragraph are that—

(a) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act;

(b) the Commissioner determined that the land was not subject to rights of common and for that reason refused to confirm the provisional registration; and

(c) the Commissioner did not consider whether the land was waste land of a manor.

(5) The circumstances in this sub-paragraph are that the person on whose application the provisional registration was made requested or agreed to its cancellation (whether before or after its referral to a Commons Commissioner).

(6) A commons registration authority may only register land under subparagraph (1) acting on—

(a) the application of any person made before such date as regulations may specify; or

(b) a proposal made and published by the authority before such date as regulations may specify.