CHAPTER I.

Of the Nature of a Common and the Rights thereon.

In popular language a common is an open piece of rough ground, generally traversed by a road and several footpaths. It is covered with turf and dotted with gorse and bushes, and generally has a few trees growing here and there. There is nothing to prevent any passer-by from wandering over any part of the common; and it is looked upon in a general way as public property. The parishioners and neighbours, however, are aware that, while anyone can wander over the common, it is not lawful for anyone from a distance, any stranger to the neighbourhood, to turn out cattle upon it, or to cut the bushes or trees. Rights of this character are confined (we are speaking in popular language) to those living in the neighbourhood of the common, generally to those living in the parish.

The term "common," however, as meaning a piece of land, is not a legal term. The distinguishing feature in law of that kind of land which is ordinarily referred to as a common, or as common land, is, that it is land subject to a right of common. What, then, is a right of common? A right of common is the right to take a profit out of the land

of another man. The most usual and widely known right of common is that of common of pasture, *i.e.*, the right to take grass and other eatable products of a common by the mouths of cattle turned out thereon. Another right is that of cutting and carrying away, generally for use in the house or land of the person taking it, furze or bushes growing on the common. Another right is that of digging sand, gravel, or loam on the common, and taking it away for similar uses.

The persons who take these rights are called commoners.

Land which is ordinarily known as a common may therefore be defined as land the soil of which belongs to one person, and from which certain other persons take certain profits.

Common rights are mostly attached to, or enjoyed, with certain lands or houses. Thus a right of common of pasture usually consists of the right to turn out as many cattle as a certain farm or plot of ground belonging to the commoner can support in winter. Such cattle are said to be levant and couchant, that is, up-rising and down-lying, on the land, and no doubt in early days the cattle which were turned out on the common were actually stalled and fed on the land to which the right was attached. But at the present day a commoner may turn out any cattle belonging to him, wherever they are kept, provided they do not exceed in number the number which can be supported on the land in winter, that is to say, which can be supported by the stored summer produce of the land together with any winter herbage it produces.* In many places this measure of the number of cattle which may be turned out is replaced for practical purposes by a rule or bye-law specifying the number of

* Robertson *v.* Hartopp, 43 Ch. Div. 516, and the authorities there cited.

cattle or sheep which may be turned out to the acre, *e.g.*, two sheep to the acre. This rule does not generally affect the strict legal measure of the right, which is still levancy and couchancy.

Common of pasture which is attached to land in the way we have described is said in law to be common of pasture appendant, or appurtenant, to such land. Into the distinction between "appendant" and "appurtenant" it is not necessary at this moment to enter.

Where common of pasture is not appendant or appurtenant to land, it is said to be common of pasture in gross; and in this case it consists of the right to turn out a fixed number of cattle. This right is comparatively rare.

Common of pasture is often confined to what is known in law as "commonable cattle." Commonable cattle are defined in the old books as "horses and oxen to plough the land, and cows and sheep to compester (*i.e.*, manure) it."* The animals which were necessary to farm the lands of the parish or vill were those which had the enjoyment of the common. But by special usage, common of pasture may be enjoyed by other animals, such as donkeys, pigs, and geese. A goose green or goose common is an ordinary feature of rural England.

Just as common of pasture is usually appendant, or appurtenant, to particular land, so rights of cutting bushes, gorse or heather, or of lopping trees—known in law as rights of common of estovers or botes (from the Norman-French *estouffer*, and the Saxon *botan*, to furnish)—are usually attached or appurtenant to certain lands or houses. Thus, a right of taking gorse and bushes or of lopping

* Tyringham's case, 4 Rep. 37*a*; and see Second Institute, 85.

trees for fuel, called fire-bote, is limited to the taking of such fuel as may be necessary for the hearths of a particular house, and no more may be taken than is thus required.

Similarly, wood taken for the repairs of buildings (house-bote) or of hedges (hedge-bote or hey-bote) must be limited in quantity with reference to the requirements of the house, farm-buildings, and hedges of the particular property to which the right is attached. And heather taken for litter cannot be taken in larger quantities than would be necessary for manuring the lands in respect of which the right is enjoyed. It would be illegal to take the wood or heather from the common and to sell it to anyone who had not himself a right to take it.*

In the same way a right of taking sand, gravel, clay, or loam, must be exercised with reference to the repair of the roads or the improvement of the soil of the particular property to which the right is attached.

As in the case of common of pasture, rights of taking wood, heath, or sand, gravel, clay, or loam, may be enjoyed without reference to any lands or houses, that is, in gross. But in this case they must be limited by some distinct measure, as, for example, by a certain number of cart-loads.

Such is, speaking generally, the nature of rights of common. There is much legal learning connected with the subject—the different classes of persons entitled to exercise such rights, the manner in which they may be exercised, the effect of such rights in preventing inclosure and restraining other acts of ownership on the part of the owner of the soil of the common. Much of this learning will henceforth be of less importance, owing to the passing of the Law of Commons

* See the leading authorities on rights of estovers and similar rights, cited in Chap. V.

Amendment Act, 1893,* which forbids, save with the sanction of the Board of Agriculture, the most usual form of inclosure of common land. So far as the rules and principles of law relating to the subject still have a practical bearing upon the preservation of commons, they will be noticed when we deal with the means of resisting inclosure and otherwise protecting commons.

It will be seen that there is no reference in the legal definition of a common to any interest enjoyed by the public or nation at large. The public enjoyment of a common has arisen in practice from the fact that the owner of the soil of the common could not inclose it, because other persons had rights of common upon it, while the commoners could not inclose, because the common does not belong to them. From century to century the common has lain open to all comers, because no one who had any legal interest in the common could inclose it.

Most commons are what is known as "waste land of a manor." The Lord of the Manor is owner of the soil of the common. The trees and bushes on the common belong to him, subject to any rights of lopping or cutting which the commoners may possess; but, if there are such rights, the lord cannot destroy the trees or bushes so as to prevent the use of them by the commoners. The gravel, sand, and subsoil, again, belong to the lord; and even the grass on the common is his, though the commoners have the right to take it by the mouths of their cattle. The lord can turn out cattle of his own (or his tenants can turn out their cattle) to feed on the grass together with the commoners' cattle, though not in such numbers as to make the feed worthless to the commoners. It follows from the large interest possessed by

* 56 & 57 Vict. c. 57.

the lord that he can prevent any inclosure of the common, or any building upon it. Not a single tree can be felled upon the common without his leave.

Unfortunately, however, the Lord of the Manor has been often the enemy rather than the protector of a common. He wishes to inclose, in order to enlarge his fields or his game-preserves; or he seeks to make a profit by taking and selling wholesale the gravel, sand, or surface-soil of the common; or he digs clay and makes bricks upon the common. In these cases it is necessary to protect the common by means of the rights of common. These, in the case of an ordinary manorial common, are usually enjoyed by the freehold and copyhold tenants of the manor. But other persons are not infrequently entitled to rights; and before it is inferred that no rights exist, the history of all the land in the parish should be examined. We shall see subsequently the several grounds on which rights of common may be claimed, how the common may be protected by means of such rights, and how the local authorities are enabled to assist in the work.

There are other cases where the lord himself does not inclose or destroy a common, but neglects to prevent encroachments and depredations by others. It is no doubt a burden upon the lord to have to defend land from which he is making little or no profit; and it is very desirable that this duty should be assumed by some local authority. Recent enactments furnish local authorities with powers for this purpose.

In former times Parliament favoured the inclosure of commons, for the sake of increasing the food-producing area of the country. It passed a series of Acts providing means by which the lord and a majority of the commoners could inclose the whole common, even though some of the commoners objected. The latest of these Acts, those passed

between 1845 and 1868, are not repealed, though their provisions are much modified by an Act of recent years, the Commons Act, 1876. No inclosure of a common can now be made under the Inclosure Acts without the consent of the Board of Agriculture and of Parliament. It will be hereafter explained what proceedings are taken in order to obtain the approval of the Board and of Parliament to an inclosure of this kind, and how the local authorities can protect a common from such an inclosure.

CHAPTER II.

Of the Inclosure of a Manorial Common by the Lord of the Manor.

It has been stated in the preceding chapter, that the Lord of a Manor sometimes attempts to inclose the common or waste of his manor without obtaining any Parliamentary authority for so doing. These attempts have been a fruitful source of litigation in the past. During the last thirty years a most determined effort to inclose the commons in the neighbourhood of London without Parliamentary authority was made by the Lords of Manors. It was resisted by the commoners in many costly law-suits, which confirmed old legal decisions and settled many new points of law. The general result of these suits was to show that a lord could not legally inclose without obtaining an Act of Parliament. But this general conclusion depended upon many propositions of law of a technical character, and in each case, in order to obtain the benefit of these decisions, it was necessary to examine with great care and at considerable expense the history of the common and the extent and nature of the common rights. In future, the protection of a common against inclosure by the lord without Parliamentary authority will be rendered much more easy and less expensive, by reason of a recent enactment already referred to—the Law of Commons Amendment Act, 1893.* This Act is of such importance with reference to the whole subject of in-

* 56 & 57 Vict. c. 57. This Act was introduced and passed through the House of Lords by Lord Thring, at the instance of the Commons Preservation Society.

closure without the sanction of Parliament, that it is convenient to commence the consideration of the subject by an examination of its provisions.

By this statute, then, it is thus provided:—

Sec. 2.—"*An inclosure or approvement of any part of a common* purporting to be made under the Statute of Merton and the Statute of Westminster the Second, or either of such statutes, shall not be valid unless it is made with the consent of the Board of Agriculture.*"

Sec. 3.—"*In giving or withholding their consent under this Act the Board shall have regard to the same considerations, and shall, if necessary, hold the same enquiries as are directed by the Commons Act,* 1876, *to be taken into consideration and held by the Board before forming an opinion whether an application under the Inclosure Acts shall be assented to or not.*"

It will be seen that the kind of inclosure with which this Act deals is an inclosure or approvement under certain Acts of Parliament known as the Statutes of Merton and Westminster the Second.

The Statute of Merton,† which was passed in one of the early Parliaments of Henry III., before the people of England, as distinguished from the Barons, were represented, is to the following effect:—

"*Also because many great men of England (which have enfeoffed knights and their freeholders of small tenements in their great manors) have complained that they cannot make their profit of the residue of their manors as of wastes woods and pastures, whereas the same feoffees have sufficient pasture as much as belongeth to their tenements, it is provided and*

* We shall examine, as we proceed, what lands are included under the term "common." We are at present considering only the case of manorial waste.

† 20 Hen. III. c. 4.

granted that whenever such feoffees do bring an Assize of Novel Disseisin for their common of pasture, and it is knowledged before the Justices that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenements into the pasture, then let them be contented therewith; and they of whom it was so complained shall go quit of as much as they have made their profit of their lands wastes woods and pastures."

Turned into modern English, this statute provides, that a Lord of a Manor may inclose part of his manorial common, if he can prove that he has left sufficient pasture for the freehold tenants of his manor.

The Statute of Westminster the Second* (passed in the year 1255) was an extension of the principle of the Statute of Merton.

It recited that statute, and then proceeded thus:—

"*And forasmuch as no mention was made between neighbour and neighbour many lords of wastes woods and pastures have been hindered heretofore by the contradiction of neighbours having sufficient pasture, And because foreign tenants have no more right to common in the wastes woods or pastures of any lord than the lords' own tenants, It is ordained, That the Statute of Merton provided between the lord and his tenants from henceforth shall hold place between lords of wastes woods and pastures and their neighbours, [so that the lords of such wastes woods and pastures, saving sufficient pasture to their tenants and neighbours, may make approvement of the residue].† And this shall be*

* 12 Ed. I. c. 46.

† In the passage in brackets I have slightly departed from the order of the English translation. The Latin runs thus:—"Ita quod domini hujus-modi vastorum boscorum et pasturarum salva sufficienti pastura hominibus suis et vicinis appruare se possint de residuo."