



LAW RESEARCH BRIEFING #1

2018

'New' Commons



Professor Chris Rodgers

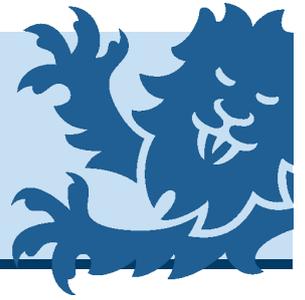


Research at
Newcastle Law School



Newcastle
University

*Can we protect areas of land for future recreation and other uses?
If so, what legal methods do we have to protect areas of 'green space'?*



The vision of 'new' commons

The legal landscape governing common land reflects ancient rights, many of them customary. Before the Commons Act 2006 much of the legislation on commons derived its impetus from a desire in the later Victorian period to halt the forward march of Enclosure and to preserve important remaining urban commons for the public.

The 'new' commons project aims to build upon the existing understanding of common rights and to use ancient customary rights to generate new areas of common that can be registered as common land, and thereby create public 'green

space' open to all for recreational use, and protected in perpetuity against development.

With new commons we are moving from a preservation agenda to one of creation, looking for innovative ways to use the legislation to create and protect areas of land for future recreation and other uses.

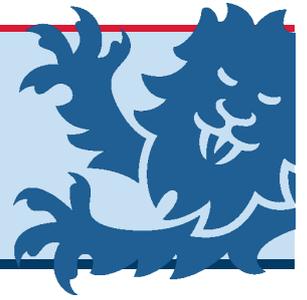
Starting Point: Two Key Elements

(1) The creation of appropriate common rights over land.

(2) The registration of that land as 'common land'.

Land is registerable as 'common land' only if common rights are created over it.

Scope of Commons Act 2006



Commons Act 2006, Part 1 deals with the registration of common land and common rights.

The Commons Act 2006 has been implemented in all other registration authorities in England for certain “corrective” applications to amend the registers. The transitional period for correction of the registers in these areas ran to 14th December 2010.

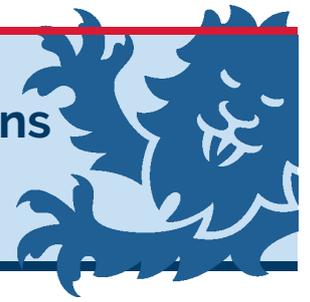
In all other areas the Commons Registration Act 1965 will continue to apply and will govern the registration of common rights and common land—until Part 1 of the 2006 Act is extended. This is important for the creation and registration of ‘new’ commons, as there are material differences between the registration provisions in the 1965 and 2006 Acts.

Commons Registration (England) Regulations 2014 (SI 2014/3038) means that the Commons Act 2006 applies in:

- Cumbria
- Herefordshire
- Hertfordshire
- Cornwall
- Lancashire (excluding the metropolitan districts)
- Blackburn with Darwen
- Devon
- Kent
- North Yorkshire

The 2006 Act will eventually repeal the Commons Registration Act 1965, but until it does there is a registration system whereby some land is governed by the 1965 Act and some by the 2006 Act.





Rights appurtenant to a dominant tenement

Under the Commons Registration Act 1965, rights in gross (i.e. those that are not attached to a dominant tenement) could be created and then registered. This enabled the right to be transferred to another person or body because it was not attached to land.



Cwmdeuddwr Common, Powys (Angus Winchester)

Section 6(3) CA 2006 provides that a right of common can be created by express grant over land if the land is not registered as a town or village green, and the right is attached to land ('appurtenant' to a dominant tenement). The right must be created over the land that is to become common land and benefit another area of land (known in legal terms as the 'dominant tenement').

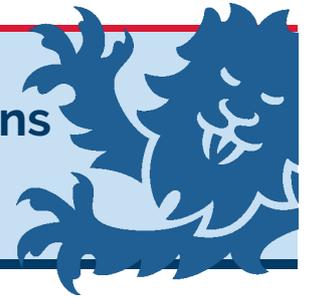
The requirement that the rights are appurtenant to a dominant tenement may be problematic for 'new' commons. When the land is registered as common land, it will also become 'access land' under the Countryside and Rights of Way Act 2000, which confers the 'right to roam' on members of the public. The creation of private property rights over the land (a right of common or *profit a prendre* to take the produce of the land) is a 'trigger' to secure recreational rights of a public interest nature.

Exchange and Deregistration of land as Common?

Rights can be transferred to new common land under Part 1 of the CA 2006 by exchange, followed by the deregistration of pre-existing common land. This might have limited utility for the realization of 'new' commons.

The manner in which common rights are created is central to the definition of common land under the Commons Act 2006 (CA 2006).





Rights acquired by prescription over land?

Common rights cannot now be acquired by prescription over land to which section 6 of the CA 2006 applies.

Previously, 20 years use of a 'right' might result in a new private right of common being created over the land. Pending the extension of Part 1 of the 2006 Act to the whole of England there is a theoretical possibility that claims to rights that matured by prescription after registrations became final under the 1965 Act may be made. Prescriptive rights maturing after Part 1 is brought into force will not be registerable, however. This is very unlikely to be of relevance to 'new' commons.



Ribblehead, Scales Moor (Angus Winchester)

Severance of appurtenant rights

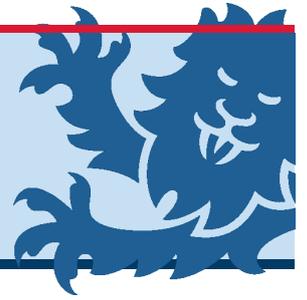
The severance of appurtenant common rights from the land that they benefit is prohibited by section 9 of the CA 2006. In other words, it is now impossible to sever rights from the dominant land and 'convert' appurtenant rights into rights in gross. This means that the rights will remain attached to the dominant tenement, and can only be transferred if the whole or part of the land which they benefit is itself sold or transferred. The section is retrospective and applies to prohibit the severance of all rights of common 'which would [otherwise]... be capable of being severed from that land' on or after 28 June 2005.

There are exceptions.

Severance can in future be effected if the rights are transferred to a public body as permitted by Schedule 1(1) of the CA 2006. This allows commons rights to be held by Natural England, Natural Resources Wales or by a Commons Council. There is a procedure for giving notice to the owner of the land over which the right is exercisable and to 'such persons as they consider represent the interests of persons exercising rights of common over the land'.



Nature of 'New' Common Rights



The rights that are created over the land intended to form a 'new' common must be of a type that are recognised as common rights in English Law if they are to trigger the registration of land as 'new' common land.

Who can hold common rights?

Because a profit is a right to take the produce of the land, it cannot be held by a fluctuating body of persons—it is an individual property right.

But a body corporate or other statutory body with legal personality can hold common rights.

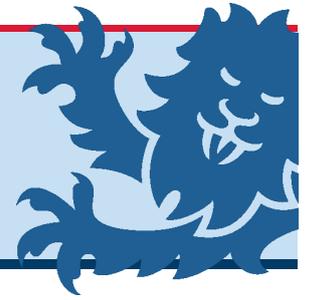
Common rights are a *profit a prendre* (i.e. a right to take the produce of the land). It is a profit in common where the holder of the profit shares it with the owner of the soil (hence "in common"). The types of right that will be recognized by the courts as profits is not a closed list, and 'new' types of analogous rights will be recognised from time to time.

Can we plant our own orchard on the land?

A common right cannot be created to pick produce that is planted and grown by commoners. A common right is one to take what is naturally growing on the land or is planted by the owner of the soil.

Creating a 'new' common is not a legal model for holding communal gardens or orchards.

Nature of 'New' Common Rights



Existing categories of common right:

Pasturage: this is the right to take grass by the mouths of sheep, horses, cattle or other animals

Pannage: a more limited right to graze pigs in woodland or forests, usually in the autumn. Strictly it is limited to allowing pigs to eat fallen acorns and beech mast. Should be registered as pasturage.

Estovers: the taking of timber, gorse, ferns, bracken and heather. Usually annexed to a building and limited to taking what is necessary for repair or for use in association with that dominant tenement. Sometimes referred to as 'hearth rights'.

Sole Profits: exist where the owner of the soil has no residual interest in the produce of the land. The profits can be granted to a number of people simultaneously and shared. These are registerable under CA 2006.

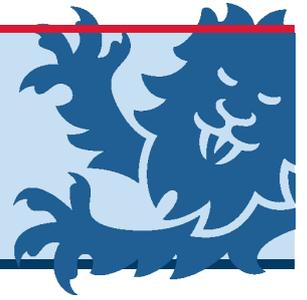
Vesture: gives a right to take all agricultural produce excluding timber.

Herbage: gives a right to cut grass or other produce.

Of these rights the most important and useful for creating a 'new' common will be a grant of *estovers*. This could include e.g. the right to pick berries and other fruit from wild bushes, to take fallen branches or wood.

Once a right of *estovers* has been granted over the land, this will trigger the potential registration of the land over which they are to be exercised as common land. It is only necessary to create *one right of common* over the land for it to become registrable as common land under the 1965 or 2006 Acts. This will also mean the land will become 'open access land' under Part 1 of the Countryside and Rights of Way Act 2000, preserving it for open-air recreation by the public.





Query 1

To create 'new' common rights and thereby seek to register land as a 'new' common must I own nearby land (a 'dominant tenement') which will benefit from the creation of the rights?

If Part 1 of the 2006 CA Act is in force in the area concerned then you must have a dominant tenement initially (benefitting land) in order to create the rights. A common right to be held in *gross* can still be created by express grant *ab initio* in areas where Part 1 of the 2006 CA Act is not in force. But not by severance.

Query 2

The prohibition on severance in section 9(1)(b) of the 2006 Act only applies to a right that 'would apart from this section be capable of being severed from that land'. What about new rights of common that are unquantified and cannot be severed?

If new common rights are created over land to create a 'new' common once Part 1 is in force, then the option of transferring the rights post-creation to a commons council or to Natural England or Natural Resources Wales will not be available. They will remain appurtenant rights, and will only be transferable with the land that is benefitted by the right. This has implications for how we structure the effective management of the rights and the 'new' common in the long term.





Professor Christopher Rodgers is a Professor at Newcastle Law School. His research interests lie in property law, agricultural law and environmental law. Recent works include *Contested Common Land: Environmental Governance Past and Present* (with A.Winchester, E. Straughton, M. Pieraccini), Earthscan Publishing, 2011 and *The Law of Nature Conservation: property, environment and the limits of law* xxix and 321pp. (Oxford University Press, 2013).

The Realising New Commons project was funded by the Economic and Social Research Council.

 christopher.rodgers@ncl.ac.uk

 [@Chrisrodgerslaw](https://twitter.com/Chrisrodgerslaw)
[@CommonsLand](https://twitter.com/CommonsLand)

 www.ncl.ac.uk/nuls

 Rodgers C, Mackay D, 'Creating 'new' commons for the twenty-first century: innovative legal models for 'green space'' (2017) *Journal of Environmental Planning and Management*: DOI:10/1080/09640568.2017.1333407

This document is intended for guidance purposes only. The content of this document is based on the guidance and legislation available at the date of issue (16th April 2018), however Newcastle University makes no representation or warranty in respect of its content, including its accuracy or suitability for any purpose and does not take responsibility for any costs, losses or claims arising as a result of reliance on such content or any subsequent changes in legislation following the date of issue.

© 2018 University of Newcastle upon Tyne, all rights reserved

