TWELVE HONEST AND LAWFUL MEN IN THE LAND OF MIST AND MALARIA: JURY REGULATION OF COMMON RIGHTS IN THE ENGLISH FENS IN THE TIME OF ENCLOSURE

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Introduction 554
I. The Rise of the Fen System, to 1620 556
A. The Geographic and Ecological Setting 556
B. Social and Historical Framework 558
II. Law in the Fens: Common Rights and Jury Regulation 563
A. Land Use in the Fens 563
B. Common Rights 566
C. Manorial Courts in the Fens 567
D. Juries in the Fens, Theory and Practice 571
1. Theory 571
2. Practice: Jury Regulation of Common Rights in the Fens. 573
E. Common Law Restrictions on Common Rights 577
III. Decline and Fall of the Fen System–1610 to 1850 581
A. Drainage 581
B. Enclosure 586
Conclusions 588

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The law locks up the man or woman
Who steals the goose from off the common
But leaves the greater villain loose
Who steals the common from off the goose.
Anonymous[1]

INTRODUCTION

In the United States, land use regulation is largely an administrative and legislative matter. At the local level, city councils act in concert with various zoning boards to make decisions about how land should be used. At the federal and state levels, agencies like the Bureau of Land Management and the National Park Service decide how to manage our public lands. Although the courts referee disputes between landowners, governments, neighbors, and interest groups, they rarely play a policy-making role in land use decisions. At the same time, almost all of the land in the U.S. is held either in fee simple by private landholders or by the government.

But what if there were a different way? Before enclosure crept across the English countryside, the regulation of land looked completely different from the property system we see today. Rather than individual ownership in fee simple, much of the land in England was held in common, either as open fields farmed communally as common pastureland, or as "waste"—undeveloped land open to those who held common rights to forage and graze.

This rural economy was based on a complex and dynamic web of relationships. Rather than owning private plots, villagers, farmers, the poor, manorial lords, the Crown, and the Church owned rights to use differing amounts of this common land in various ways at various times of the year. These rights, based largely in custom, were enforced not by an administrative agency as we would recognize it, but by juries in manorial courts.

In the English Fens,[2] a vast stretch of wetlands on the

[1] The poem from which this stanza is taken probably dates to the late eighteenth century. For an exploration of its history, see James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 33–34 n.1 (2003).

[2] In this Note, when referring to the Fens as a particular geographic place, its name will be capitalized. By contrast, when referring to the fens as an ecological or economic system, it will be spelled in lower-case type.

country's eastern coast, the common right system reached its apogee in the sixteenth and seventeenth centuries. The high ratio of undeveloped common land to arable land in the region allowed a communal, village-based way of life to persist in the Fens for much longer than it did in the rest of England. Even the poorest classes of people, the landless cottagers, could earn a decent living by exercising their rights to fish, hunt, forage, graze livestock, and make crafts from the bounty of the Fens. By the eighteenth century, however, large landowners acting in concert with Parliament and the common law courts began to strip common rights from the poorest segments of society. Over the course of the eighteenth and nineteenth centuries, the Fens were largely drained and the reclaimed land was subsequently enclosed into private lots. Not only did the system of common rights become extinct, but also the very land on which it existed became unrecognizable.

Yet despite this assault on common rights, landless commoners in the Fens found defenders in the local manorial courts, which protected their rights long after other institutions had ceased to honor them. This Note will explore how juries serving in these courts saw the value of the Fen system and attempted to preserve it in the face of attempts to enclose the Fens. As the power of manorial courts declined, it became easier for drainage and then enclosure to proceed.

This Note also makes a more general point. After decades of focus on privatization as a solution to the perceived problems associated with "tragedies of the commons," common rights are now getting more attention as possible solutions to environmental problems.[3] This Note will explore how, in one instance, people who enjoyed common rights recognized the benefits of their system and fought to preserve it.

Part I introduces the Fens and provides background on their history up to the point in the seventeenth century when large-scale drainage projects began to irreversibly change their character. Part II details the unique legal and social system that developed there, and traces how juries in manorial courts protected common rights. Part III follows the decline of the Fen system, as the open land was drained and then enclosed.

[3] *See, e.g.*, Maron Greenleaf, *Using Carbon Rights to Curb Deforestation and Empower Forest Communities*, 18 N.Y.U. ENVTL. L.J. 507 (2011) (discussing the possibilities inherent in property rights regimes for managing carbon sequestration in the world's forests).

While this Note does not attempt to prove any theory of common rights, the story of common rights in the Fens provides a valuable example for theorists and practitioners exploring the role of common rights in the contemporary world. Although residents of the Fens ultimately lost their rights and their way of life, the juries' defense of common rights provides a hint of how people used law to protect their natural resources, their livelihoods, and their way of life.

I. THE RISE OF THE FEN SYSTEM, TO 1620

A. *The Geographic and Ecological Setting*

The Great English Fens covered 1,500 square miles in eastern England, incorporating portions of the counties of Lincolnshire and Cambridgeshire and the northern corner of Norfolk. They stretched from northeast of Cambridge to the Wash and ran from King's Lynn in the south to Boston in the north. The area was a flat coastal plain that originally lay only a few feet above sea level. On the inland, western side, the Fens were bordered by sandstone hills, and there was a low ridge, or rim, of chalk and silt that insulated them from the ocean to the east. Depending on the sea level at various eras in Fen's history, this silt and rim kept seawater from invading the freshwater Fens. At other times, the water in the Fenland was brackish. This paper will focus on the Great Fens, but there are other wetland areas in England that shared similar economic, legal, and ecological features, including Dartmoor, Sedgmoor, Exmoor, the Dengie Peninsula, and Romney Marsh.[4]

The water that invaded the Fens in the winter produced vast amounts of lush grass in the summer—enough to support a great number of cattle and sheep, the latter supplying "an inexhaustible Fountain of Wool."[5] After the grass died back in the fall, the

[4] "[T]he nature of fens and marshes throughout England is pretty much the same." Dean and Chapter of Ely v. Warren, (1741) 26 Eng. Rep. 518 (Ch.) 518; 2 Atkyns 189, 189, *reprinted in* 4 THE MINING REPORTS 233 (R.S Morrison, ed., Cahllaghan & Co., 1884). For descriptions of some of these other wetlands, see Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247, 260–64 (1996).

[5] Daniel Defoe, in addition to being the author of ROBINSON CRUSOE (1719), was an avid social commentator and pamphleteer. DANIEL DEFOE, A TOUR THRO' THE ISLAND OF GREAT BRITAIN 11 (3d ed. 1742).

winter floodwaters swamped the grazing land. In this oxygen-poor environment, the microorganisms that normally decompose plant matter were inhibited from breaking down the grass. As generation after generation of plants died, they formed peat, a thick layer of moist, carbon-rich soil that can be dried out and used as fuel. Peat played a vital role in the Fen economy. In the absence of forests, it was the main source of energy for cooking and heating.[6]

The Fenland has changed enormously over the centuries. Where in medieval times there were vast open fields of grass-covered peat, broken by "mires" of permanent standing water and low sandstone "islands," they now appear as a flat, green plain, spotted with villages and a patchwork of fields.[7] Before drainage, almost the entire Fen was flooded in the winter; now the land is dry all year, and is farmed for a variety of crops, including grain, vegetables, and orchards of fruit and nuts. Instead of the wandering streams and patches of standing water of medieval times, the Fens are now dissected by long, straight drains that carry water eastwards from the uplands to the North Sea. Due to subsidence of the land, the drains now sit up to twenty feet above the level of the fields, and large diesel and electric pumps remove the seawater from the fields.[8]

While the drains have removed much of the water from the Fens and have ended the yearly floods, they have also removed much of the biodiversity that once made the Fens such a natural wonderland. Before drainage, the ecology of the Fens contained the raw materials for a significant economy: reeds and rushes for craftmaking and fuel, fish and eels, berries, and other edible plants.[9] Where this vast diversity of birds, fish, amphibians, and plants once lived, now, outside of a few nature reserves, the land

[6] Peat is a geological precursor to coal. Peat forms when organic matter sits in a wet, oxygen-poor environment, and gradually comes to resemble other forms of coal after an extended period of compaction and chemical change. SIR HARRY GODWIN, FENLAND: ITS ANCIENT PAST AND UNCERTAIN FUTURE 111 (1978).

[7] A contemporary observer described the scenery: "The upper and north part of this shire is, all over, divided into river-isles (branched out by the many flowings of ditches, channels and drains) which, all the summer long, afford a most delightful green prospect; but, in winter, they are almost all laid under water farther every way than one can see, and in some sort resembling the sea itself." WILLIAM CAMDEN, BRITANNIA 391 (Edmund Gibson trans., Rampart Press 4th ed. 1722) (1610).

[8] H.C. DARBY, THE CHANGING FENLAND 200–01, 203 (1983).

[9] J.M. NEESON, COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700–1820 158–84 (1994).

has much the same ecosystem as any other agricultural area in England.[10]

B. *Social and Historical Framework*

The Fens have been inhabited for as long as humans have been in England. There is evidence that the Romans attempted to drain the Fens, and some remnants of their roads remain.[11] During the Dark Ages, this eastern part of England was subjected to attacks by Scandinavian marauders who destroyed monasteries; some of these Vikings ended up settling in the area.[12] During the Norman conquest of England under William the Conqueror, the Fens were used as a hideout by soldiers loyal to the Saxon King Harold.[13]

Starting in the medieval period, a thriving economy emerged in the Fenland—albeit one thoroughly misunderstood by outsiders. This economy depended on both the immense biological diversity of the Fens and the unique legal structures that allowed commoners rights of access to the land. As J.M Neeson, one of the prominent historians of common rights, recounts, "They lived off grazing in summer, fishing and fowling in winter. They got flags, rushes and reeds to make mats and baskets, thatch and down; they caught eels and fish; they snared rabbits and birds; and . . . they sold them."[14] This Fenland economy, though certainly pre-industrial, generated a surprising amount of wealth.[15] Neeson's thesis is that the common rights extinguished by enclosure were quite valuable—much more valuable than most historians

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[10] DARBY, *supra* note 8, at 238.

[11] In fact, Godwin has shown, though careful historical reconstruction, that the fens had a much lower land level at the time of the Romans than they did even during the medieval period. For example, the Romans built bridges over rivers that no longer exist, as they have since been covered by the rising peat. GODWIN, *supra* note 6, at 79–90.

[12] CAMDEN, *supra* note 7, at 392.

[13] *Id.*

[14] NEESON, *supra* note 9, at 5 (referring to the people of the Dengie Marsh, which though it is approximately one hundred miles south of the Great Fens, shares most of the pertinent social, geographic, and legal features).

[15] Bosselman, *supra* note 4, at 272 (citing BARBARA A. HANAWALT, THE TIES THAT BOUND: PEASANT FAMILIES IN MEDIEVAL ENGLAND 70 (1986)). William Dugdale, a contemporary proponent of draining the Fens, complained that the fens "afford[ed] little benefit to the Realm, other than Fish or Fowl." WILLIAM DUGDALE, THE HISTORY OF IMBANKING AND DRAYNING OF DIVERS FENNS AND MARSHES BOTH IN FOREIN PARTS AND IN THIS KINGDOM 171 (1662).

believe.[16] In fact, in 1334 the Fenland's tax receipts were "the third highest in the kingdom."[17]

Nevertheless, life in the Fens was hard. Malaria was rampant.[18] Called "ague" by the inhabitants, it caused a great deal of suffering and mortality.[19] Additionally, the wet environment required adaptation in agricultural techniques—outsiders reported seeing Fen people tending cattle while balanced on stilts.[20]

Village life took place on the few hills and outcrops that emerged from the Fen, the only dry ground that was available.[21] The larger of these were called "islands," the largest and most important of which was the Isle of Ely described by Camden as a "pretty large city, but not remarkable either for beauty or populousness, by reason of its fenny situation and unwholesome air."[22] Smaller villages, like Waterbeach, had only a few hundred residents.[23] The villagers lived in these nucleated settlements, but went out into the fen to make their livings. In the summer, this consisted of hunting fowl,[24] grazing cattle, sheep, and other

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[16] NEESON, *supra* note 9, at 12. Economic historian David Stone describes a particular boom period in the thirteenth century, marked by an interest in land reclamation and migration to the area from other parts of England. DAVID STONE, DECISION-MAKING IN MEDIEVAL ENGLISH AGRICULTURE 27–28 (2005).

[17] JOAN THIRSK, ENGLISH PEASANT FARMING: THE AGRARIAN HISTORY OF LINCOLNSHIRE FROM TUDOR TO RECENT TIMES 45 (1957).

[18] Fen people used opium, grown locally, to treat the symptoms of malaria. GODWIN, *supra* note 6, at 157–58. Defoe reports that some men married fourteen or fifteen wives in their lifetimes—the men had grown up in the Fens and had developed immunities, but they married women from outside the region who were more susceptible. Although there may be some truth to this assertion, it is probable that Defoe exaggerated to some degree. DEFOE, *supra* note 5, at 8–9, *cited in* NEESON, *supra* note 9, at 4.

[19] *Id.* at 9.

[20] CAMDEN, *supra* note 7, at 391 ("The inhabitants of this and the rest of the fenny country . . . were . . . a sort of people (much like the place) of rugged, uncivilized manners, envying others whom they term Upland-men, and usually walking aloft upon a sort of stilts.").

[21] "The inhabitants are collected in villages and hamlets." ARTHUR YOUNG, GENERAL VIEW OF THE AGRICULTURE OF THE COUNTY OF LINCOLNSHIRE 19 (Augustus M. Kelly, 1970) (2d ed. 1813).

[22] CAMDEN, *supra* note 7, at 393. Defoe echoed this comment about "unwholesome air." DEFOE, *supra* note 5, at 76.

[23] Waterbeach had 107 families in 1664. J.R. RAVENSDALE, LIABLE TO FLOODS: VILLAGE LANDSCAPE ON THE EDGE OF THE FENS, AD 450-1850 158 (1974).

[24] Fen people were early adopters of the bird "decoy" at issue in the canonical property law case of *Keeble v. Hickeringill*, (1782) 103 Eng. Rep. 1127 (Q.B.); DARBY, *supra* note 8, at 139–41.

animals, collecting rushes and reeds for roofing and basket-making, and cutting peat for fuel and for sale.[25] In the winter, with the land submerged, activities turned to craftmaking and fishing.[26]

Whatever success the Fen economy enjoyed, it was well hidden from outsiders. In fact, most contemporary English writers looked on the Fen people with nothing but revulsion. There were at least two factors in play here, one of which was the general disdain that wealthy people had for members of lower classes.[27] Unsurprisingly, those who wrote most of the contemporary accounts of the way of life in the Fens were from the classes that had access to education, and their attitude towards Fen people was colored by the classism of the time. Encyclopedist William Camden described the "fen-men" as a people of "rugged and uncivilized manners."[28] Legal historians from later generations were equally unsympathetic—Thomas Scrutton of University College, London, for example, described the Fen people as the "least deserving class of commoners."[29] Criticism of commoners was often couched in moralistic terms, as, for instance, the Board of Agriculture's reporter in Shropshire wrote in 1794:

> [L]et those who doubt [the mismanagement of the commons] go round . . . and view the miserable huts[;] . . . a daughter kept at home to milk a half-starved cow, who being open to temptations soon turns harlot, and becomes a distrest ignorant mother instead of making a good useful servant.[30]

Contemporary commentators also derided Fen people based on their lifestyle and their perceived inferior culture. William Dugdale reports that the Fens gave "overmuch harbour to a rude, and almost barbarous, sort of lazy and beggerly people."[31] This sentiment was quite common among dry-landers of the time.

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[25] CAMDEN, *supra* note 7, at 391.

[26] *Id.* at 391–92.

[27] Social historian E.P. Thompson gives an excellent discussion of the class conflict at play in the struggles over common rights. *See generally* E.P. THOMPSON, CUSTOM IN COMMON 97-184 (1991).

[28] CAMDEN, *supra* note 7, at 391.

[29] THOMAS EDWARD SCRUTTON, COMMONS AND COMMON FIELDS 111 (1887).

[30] Quoted in L. DUDLEY STAMP & W.G. HOSKINS, THE COMMON LANDS OF ENGLAND AND WALES 55 (James Fisher et al. eds., 1963).

[31] DUGDALE, *supra* note 15, at 171, *cited in* Bosselman, *supra* note 15, at 271 n.152.

Writing a century later, for example, another proponent of drainage, W. Pennington, sarcastically derides,

> [T]he extraordinary profits, which they sometimes make by their present method of employing themselves, (for we may imagine they will now be extolled to the highest) seem to have been but of little service to most of them; as we don't find them in any better condition than the poor in other places, but, if we may judge from appearances, in a great deal worse.[32]

Pennington and others also argued that the fen system was inferior to farming enclosed fields because it was primitive—he compared Fen people to Native Americans.[33] Arthur Young wrote that "[s]o wild a country nurses up a race of people as wild as the fen; and thus the morals and eternal welfare of numbers are hazarded or ruined for want of an enclosure."[34] This economy persisted well into the 18th century, productive in its own way but insular and derided by outsiders.

Villages were the center of fen life.[35] At the risk of oversimplification, villagers could be divided into the following categories, in descending order of economic and social power.[36]

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[32] W. PENNINGTON, REFLECTIONS ON THE VARIOUS ADVANTAGES RESULTING FROM THE DRAINING, INCLOSING, AND ALLOTTING OF LARGE COMMONS AND COMMON FIELDS 33 (1769), *cited in* NEESON, *supra* note 9, at 7.

[33] NEESON, *supra* note 9, at 30.

[34] YOUNG, *supra* note 22, at 254, 488; NEESON, *supra* note 9, at 32. Arthur Young was the Secretary of the Board of Agriculture and was an avid and prolific observer of English rural life from the end of the eighteenth century into the beginning of the nineteenth. Although he was originally a supporter of enclosure, by the end of his career, after GENERAL VIEW was published, he had changed his mind and become an opponent of it. NEESON, *supra* note 9, at 13.

[35] Villages were at the center of each parish. The term parish refers to an administrative unit that included the village itself, along with its common lands, wastes, and fields.

[36] "Those who write about class structure must avoid equally the Scylla of over-simplification and the Charybdis of excessive complication." W.D. Rubinstein, *Wealth, Elites and the Class Structure of Modern Britain*, 76 PAST AND PRESENT 99 (1977), *cited in* J.H. Porter, *The Development of Rural Society*, *in* THE AGRARIAN HISTORY OF ENGLAND AND WALES 836 (G.E. Mingay ed., 1989). Additionally, Dahlman argues that class is a completely inappropriate framework to use when evaluating the early-modern rural economy. He holds that there was too much social mobility, too little evidence of conflict based on class distinctions per se, and too much evidence of cooperation between the social strata to treat class as the organizing principal of this society. CARL J. DAHLMAN, THE OPEN FIELD SYSTEM AND BEYOND: A PROPERTY RIGHTS ANALYSIS OF AN ECONOMIC INSTITUTION 52–55 (1988). The classic class-based history of enclosure and common right is John and Barbara Hammond's The

The lord of the manor was the largest landowner and generally owned legal title to the waste land surrounding the villages.[37] Many lords controlled several villages. The lord also controlled the manorial court, and was owed feudal duties by the commoners. The Church of England acted as the lord in a number of villages.[38] Other than the local lords and the Church, there was often a class of larger landowners, who owned enough land to derive a comfortable income and own significant herds of livestock. Below these were the village merchants and tradespeople, much of whose income came from their trade, though many kept livestock and pastured them on the common. Then there were the small freeholders; a farmer holding between six and eight acres was considering a "middling" farmer, while one holding two to five acres was considered poor.[39]

Next were the cottagers and laborers who held no land. They lived off the wages earned from working on others' fields and income reaped from the common. Their precarious legal status, however, meant that their right to access the common was constantly under threat. Often, they did not have the right to sit on manorial juries and so relied on members of the other classes to represent their interests. As discussed *infra*, members of these other classes often interceded on their behalf, protecting their common rights despite attempts by common law judges to restrict those rights.

Village Labourer. JOHN LAWRENCE HAMMOND & BARBARA BRADBY HAMMOND, THE VILLAGE LABOURER, 1760-1832: A STUDY IN THE GOVERNMENT OF ENGLAND BEFORE ENCLOSURE 855 (2d ed., 1912).

[37] NEESON, *supra* note 9, at 96.

[38] The archetypical example of the phenomenon is the Isle of Ely, controlled by its bishop. The Bishop of Ely was lord of several villages, including Littleport. *See* Dean and Chapter of Ely v. Warren, (1741) 26 Eng. Rep. 518 (Ch.); 2 Atkyns 189 (Ch.) (reprinted in 4 THE MINING REPORTS 233 (R.S Morrison, ed., Cahllaghan & Co., 1884)) (treating the Ely bishopric as the lord of the manor). Even when the local Bishop didn't act as the manorial lord, the church often held rights to tithes from the people of the village. These rights were tradable, however, and at the time of enclosure, compensation had to be made to the titheholder. G.E. MINGAY, PARLIAMENTARY ENCLOSURE IN ENGLAND, 1750-1850 48 (1997).

[39] THIRSK, *supra* note 17, at 134. Because of the richness of the common land, commoners could keep a cow on as little as two acres. With six to ten acres, a commoner could keep as many as ten sheep as well as a cow. NEESON, *supra* note 9, at 59.

II. LAW IN THE FENS: COMMON RIGHTS AND JURY REGULATION

A. *Land Use in the Fens*

The history of the Fen's drainage and enclosure can be understood only in the context of the existing legal and regulatory framework. Contrary to Garrett Hardin's ahistorical account of the "tragedy of the commons," the Fen commons were not a lawless free-for-all. Instead, they were governed by a highly ordered, highly regulated system of usage rights.[40] According to economist Elinor Ostrom's typology of common rights systems, the Fens would probably be categorized as a "common property resource"—much of the land was held in common and there was open access to those with common rights, but outsiders were largely excluded.[41]

The structure of the legal regulation of common rights springs from the way that Fen people used the land. Land ownership was complicated before enclosure—economist Carl Dahlman argues that the term

> "private property" in land is probably a more far-reaching concept than ownership in fee simple was interpreted to mean in the open field village: even a freeholder would have to pay dues and fines to the lord. . . . On the other hand, a tenant was usually empowered to make decisions that we nowadays associate with private ownership.[42]

[40] Hardin's article imagines a world where each herdsman has the freedom to add a cow to a pasture that can only support a finite number. Because each herder reaps the full benefit of an additional cow, while only experiencing a fraction of the harm that it causes, "[T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. But this is the conclusion reached by each and every rational herdsman sharing a commons. . . . Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." Although this article is analytically insightful and has provided a conceptualization for many environmental problems, this Note demonstrates how, at least in the Fens, the actual commons were a much more successful society than the nightmare Hardin describes. Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243–44 (1968).

[41] For a useful discussion of the concept of a common pool resource in the context of forests, see ELINOR OSTROM, CTR. FOR INT'L FORESTRY RESEARCH, SELF-GOVERNANCE AND FOREST RESOURCES 1 (Occasional Paper No. 20, 1999), *available at* http://www.cifor.cgiar.org/publications/pdf_files/OccPapers/OP-20.pdf. See also the discussion of agistment, *infra* note 56.

[42] Dahlman is referring to villages elsewhere in England, but his point about

In addition to paying dues and fines, Fen people were subject to the orders of the jury regarding crop-selection, field rotation and grazing.[43]

Land in the Fens, as in much of England before enclosure, fell into four broad categories: closes, open field arable, commons, and waste. Closes were areas already enclosed. Before drainage, these were mostly small fields closed off from the common in order to protect a specialty crop from grazing animals. Arthur Young points out that Fen people, uniquely in England, allowed farmers with contiguous holdings within the open field to enclose them unilaterally.[44] Owned in fee simple, closes represented early examples of the ownership pattern that would prevail after enclosure.

Open fields were the face of agriculture in much of England, but were far less important in the Fens than in other regions.[45] Unlike in the commons, the open fields were farmed for a variety of crops—they were "open" in the sense that they were not enclosed. Villages, in the Fens and elsewhere, had between three and seven large open fields, each up to several hundred acres. Although unbroken by fences or ditches, they were divided up among the farmers of the village, with tenants and freeholders holding strips of land within the open field. These strips were rarely contiguous and a farmer's holdings could be scattered in small chunks throughout the field.[46] They were highly regulated, and most villages rotated each field through the years, letting one field lie fallow and planting the others with a series of crops.[47] Although outside the scope of this paper, the regulation of crops,

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the complexity of land ownership applies equally in the Fens. DAHLMAN, *supra* note 36, at 21.

[43] NEESON, *supra* note 9, at 2, 120-22, 126. Manorial courts established the "stint," which was a regulation on how many animals could graze each acre of common. Rising population during the seventeenth and eighteenth centuries resulted in increases in stinting. *Id.* at 115-16.

[44] Elsewhere in England, landowners wishing to enclose their holdings needed, at a minimum, approval from other landholders in the village. YOUNG, *supra* note 21, at 101.

[45] *See* THIRSK, *supra* note 17, at 23, 28–31.

[46] This scattering is often seen as not only inefficient, since farmers had to walk between strips in order to cultivate them (often trampling their neighbors' crops in the process), but also difficult to explain historically. DAHLMAN, *supra* note 42, at 31–36.

[47] Arthur Young reports that the fields in the Lincolnshire fens were so fertile that they rarely required a fallow period. YOUNG, *supra* note 34, at 20.

the allocation of grazing rights to the fallow fields and unused strips within the fields, gleaning, and even the paths between the strips of cultivated land kept the juries quite busy.[48] In much of England, particularly the Midlands, open field farming dominated the landscape until enclosure. In the Fens, however, largely due to the paucity of dry land, open fields represented a much smaller part of the economy. Instead, the commons and wastes were the focus of much economic activity.[49]

The commons, owned communally by the village, [50] were pastures where the Fen people could take advantage of the rich grass to graze their animals. Young reports one area as being "nearly white with sheep."[51]

Wastes were areas not amenable to pasturing because they were too wet, rocky, or otherwise unsuitable, but which were used for hunting, fishing, or harvesting the many valuable plants that grew in the Fen.[52] The largest wastes, like 21,000-acre Holland Fen, were shared between groups of villages that bordered them.[53] There is some overlap in the literature between what is called "waste" and what is called "common," but these are the categories that will be used in this Note. It was this higher ratio of commons to open field arable that allowed the Fen economy to become so vibrant. Villages that could common their animals and harvest goods from the Fen could subsist on much less land than those in the uplands.[54]

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[48] For instance, the case of *Steel v. Houghton et Uxor* extinguished the right to glean the fields after the harvest. (1788) 126 Eng. Rep. 32, *cited in* THOMPSON, *supra* note 27, at 139–41.

[49] *See* THIRSK, *supra* note 17, at 23, 28–31. The term "common" is somewhat confusing in that it has many meanings within the society described in this Note. In the context of classifying land uses, it refers to areas of pasture where herds of livestock were grazed communally. Used as a verb, it also referred to a particular right to use the common, for instance "cottagers had the right to common a few sheep." Of course, as an adjective, the word can also refer to a person without a noble title.

[50] DAHLMAN, *supra* note 36, at 23.

[51] YOUNG, *supra* note 21, at 258.

[52] "[A] modern day observer . . . would most likely find . . . that the non-arable, although strangely referred to as the waste by the local inhabitants, had economic uses . . . that made it an important element in the system of production." DAHLMAN, *supra* note 36, at 20–21.

[53] THIRSK, *supra* note 17, at 25.

[54] YOUNG, *supra* note 21, at 19; THIRSK, *supra* note 17, at 28–31, 41–44.

B. *Common Rights*

The relationship between a villager's property interest and his rights to the common was a continually shifting target. In general, a villager's land holdings were proportional to his share of the common, such that large landholders had the right to common larger flocks and herds. This was not a transferable right, however. The village common belonged only to the village, and taking in stock from other villages, known as "agistment," was forbidden in nearly every case and carried a stiff fine.[55] Since almost all regulation of the fen was local, there was great variation in rights between villages. For instance, in Holland Fen in the sixteenth century, there was a unique arrangement in which freeholders and the lords had allotments of land in the waste that they enclosed to graze animals in the summer, and which reverted to common status after the harvest.[56]

Common rights were not general rights of access to the common. Instead, each right specified a particular activity. They came in a grand panoply of forms, including estover (the right to collect firewood from a forest), pannage (the right to let pigs forage for acorns[57]), lops and tops (the right to collect the discarded limbs from a tree felled by the lord to use as firewood), and common of shack (the right to graze animals on the open fields after the harvest). There were also the right of turbary (to cut peat for fuel) and the right to collect furze (also known as gorse), a winter feed for livestock.

While villagers who held land often held one or more of these

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[55] In the sixteenth century, some lords began fully exercising their ancient rights of "brovage," which is roughly equivalent to agistment—that is, bringing in outside cattle to graze on the village common. THIRSK, *supra* note 17, at 115; HAMMOND & HAMMOND, *supra* note 36, at 855. As population increased in the eighteenth century, pressure on the fens increased, causing increased enforcement of the rule against agistment. The Articles of Agreement in Cottenham, which established the management of the fens in that village from 1596 to 1842, forbade agistment by the landlords or their tenants. *Articles of Agreement*, Art. XII, *reprinted in Common Rights at Cottenham & Stretham in Cambridgeshire*, *in* XII CAMDEN MISCELLANY 193, 203 (W. Cunningham ed., 1910). The rule against agistment is also an example of how Fen villages managed their common lands for the benefit of the villages and excluded outsiders.

[56] THIRSK, *supra* note 17, at 26. Not to be confused with the region of the Netherlands, Holland Fen is a region of Lincolnshire.

[57] This was a relatively unimportant right in the Fens, as pigs were a very minor part of the economy. THIRSK, *supra* note 17, at 139.

common rights, the common rights of those without interests in land were far murkier. Landless inhabitants did have rights, however: for instance, in the Fen manor of Whittlesey in the seventeenth century, 378 landless families had rights to 7,000 acres of fen land.[58] In Peterborough, occupiers of cottages had the right to graze animals on the common, whereas the absentee owners of the cottages did not.[59]

C. *Manorial Courts in the Fens*

Before enclosure, the manorial courts were the most important legal institution in the Fens. The importance of the manorial court in daily life is summarized by Wilcox:

> While the [court leet] operated in a humbler sphere than the county courts, and by a law of its own, it was both a focus of community life and an active agency of government. The principle of authority was personified for the countryman in the manorial steward . . . the law which affected him most nearly was the custom of the manor. . . . To him the manorial system was the government of his daily life.[60]

The manorial courts were the principal body that regulated the customary rights in the Fens. Meeting as often as every few weeks, they issued the orders that drove agricultural life. They regulated almost every aspect of the open fields including the time of harvest, choice of crops, the rotation of crops through the fields, and the commoning of animals on the fields in wintertime. They also regulated the commons and the wastes: the stint, or how many acres of land were required to common a cow or a horse, how much turf or furze could be collected per household, the numbers of fish and fowl that could be taken. Almost every economic decision a Fen person made fit into a framework decided by the manorial court.[61]

Manorial courts are as ancient as the feudal system in

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[58] NEESON, *supra* note 9, at 72.

[59] *Id.* at 84.

[60] W.B. WILCOX, GLOUCESTERSHIRE: A STUDY IN LOCAL GOVERNMENT, 1590–1640 267 (1940), *cited in* Christopher Harrison, *Manor Courts and the Governance of Tudor England*, *in* COMMUNITIES AND COURTS IN BRITAIN 43, 44 (Christopher Brooks & Michael Lobban eds., 1997).

[61] For instance, juries controlled activities as technical as animal breeding and preventing infection in the herds. NEESON*, supra* note 9, at 126, 131–32.

England, with some predating the Conquest.[62] By their heyday in the thirteenth century,[63] however, they had adopted a fairly stable form. In many cases, they arose as a way for lords to preserve their power by providing an alternative to the King's courts. By presenting the manorial courts as the face of local justice, they could prevent some of the erosion of the lord's authority in an age of increasing royal power.[64] Legal historian Maureen Mulholland notes, "It is customary to speak of 'manorial courts,' but the term is a general one, covering several different courts."[65] While early forms of manorial courts, such as the court of the honour, had faded away by the period of enclosure, the court leet, the halmote, and the court baron still played a role.[66] In fact, Harrison sees a revival of activity in the manor courts in the sixteenth century.[67] In the Fens, manorial courts persisted even longer. At Peterborough, the court was active into the eighteenth century, and in the Northamptonshire fen village of Maxey cum Membris, the court was issuing orders into the 1760s. Manor courts generally persisted until the fields they regulated were enclosed, rendering them superfluous.[68]

Before describing the varieties of manorial courts, it is important to note that the delineations between them are far from clear. Modern scholars seem to use them somewhat interchangeably,[69] but what they had in common is probably more important than their differences. Manorial courts were personal in the sense that, like many feudal institutions, they derived from the lord's personal relationship with his subjects. Before the fifteenth century or so, attendance was mandatory at court for villeins, and

[62] The question of whether manorial courts and common rights predate the Conquest was of great interest to nineteenth century scholars, for whom the distinction determined whether common rights derived from a grant from the lord of the manor, as Coke and Blackstone believed, or from a Germanic tradition of owning land in common. SCRUTTON, *supra* note 29, at 5–10; Harrison, *supra* note 60, at 48.

[63] Harrison, *supra* note 60, at 45–46.

[64] MARK BAILEY, THE ENGLISH MANOR C. 1200–C. 1500, 168 (2002).

[65] Maureen Mulholland, *The Jury in English Manorial Courts*, *in* "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND:" THE JURY IN THE HISTORY OF THE COMMON LAW 63, 64 (John W. Cairns & Grant McLeod eds., 2002).

[66] Mulholland, *supra* note 65, at 66–67.

[67] Harrison, *supra* note 60, at 49.

[68] NEESON, *supra* note 9, at 110 n.1.

[69] Mulholland, *supra* note 65, at 66–67.

often for free men as well.[70] This duty, known as "suit of court," was related to the tradition of using the entire court to decide cases. Only the development of the jury in the late medieval period removed the burden of mandatory attendance at court as a "suitor."[71] There was no judge in manorial courts; they were administered instead by the lord's steward.

There were three varieties of manorial courts, each serving slightly different functions. The court leet was a criminal court, meeting twice a year, which made presentments for violation of the law.[72] The court leet enforced the regulation of the commons, and those who overstocked the common were liable to fines levied by its jury against them.[73] Historically, it operated not as a court whose power derived from the lord's inherent rights, but from a grant from the King to the manorial lord.[74]

The court baron regulated the relationship between the lord and the land. Originally composed only of free tenants, it was responsible for the positive regulation of the land. It had the power to decide custom, and "therefore created manorial law in the process."[75] The converse of the court baron was the halmote,

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[70] BAILEY, *supra* note 64, at 170. Villeins were peasants that were tied to the land and could not move away without their lord's consent. Over the course of the late Middle Ages, the villeins' tenures were converted into copyholds, tenures which were recorded in the manorial court and which provided greater legal rights against the lord. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 177 (6th ed. 2006).

[71] Mulholland, *supra* note 65, at 67.

[72] Presentment was a form of "communal accusation" against wrongdoers. Beckerman sees the development of presentment, which arose as the wager of law declined in importance, as a regressive process. Lords gained more power to coerce conformity with manor custom, at the expense of individual rights. The fact that there are very few records of acquittals shows that the rights of defendants were not well-protected. *See* John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 LAW & HIST. REV. 197, 229–30, 239–242 (1992). Both Beckerman and Harrison, however, see a decline in the use of the manorial courts as instruments of oppression by the fifteenth and sixteenth centuries. *Id.* at 241; Harrison, *supra* note 60, at 50.

[73] Presentment "was employed widely as a means of detecting and punishing offenses against agrarian bylaws." Beckerman, *supra* note 72, at 245. Commoners lost the ability to enforce the customary laws against overstocking in 1769. Hall v. Harding, (1769) 98 Eng. Rep. 271, 275; 4 Bur. 2426–33; NEESON, *supra* note 9, at 88.

[74] Mulholland, *supra* note 65, at 66.

[75] *Id.* at 65.

which was the customary court for non-free tenants.[76] Over the course of the late medieval and early modern periods, as the distinction between free and unfree tenants waned, the two courts largely merged and became in many villages a single manorial court for civil matters. In fact, in 1748, the fen village of Waterbeach impaneled a jury at a "Court Leet General Court Baron and Customary Court,"[77] joining all three forms of manorial court into one.

In addition to creating the law and issuing orders, manorial juries actively policed the Fens. They appointed officers, known as "fen reeves," to patrol the common fields and detect violators. The court at Maxey cum Membris employed three fen reeves throughout the eighteenth century and supplemented them with additional field keepers during busy times of year.[78]

The common rights enforced in the manorial courts existed in a society where different legal systems survived alongside one another. While the Crown Courts applied common law, the manorial courts in villages regulated local affairs using customary law. The sixteenth century jurist Edmund Coke, among other traditional legal historians, saw a hierarchy in which common law superseded local customary law.[79] Social historian E.P. Thompson argues that customary rights were more robust than Coke suggests and that common law courts could only overturn custom where it was unreasonable or clearly contrary to the law.[80] Blackstone, writing in the eighteenth century, applied a seven-factor test to determine when customs gained the power of law. He looked to 1) antiquity, 2) continuity, 3) whether there was a peaceable user, 4) reasonableness (including a lack of conflict with the common law), 5) certainty, 6) compulsoriness, and 7) consistency.[81] It is far from clear, however, that the customary law enforced in the manorial courts bent to the law expounded at the common law courts.

Customary law was more robust than it might sound to modern ears: it was more than simply the way that things were always done. Customary rights and obligations were like the

[76] *Id.*
[77] RAVENSDALE, *supra* note 23, at 82–83.
[78] NEESON, *supra* note 9, at 141.
[79] THOMPSON, *supra* note 27, at 128–29.
[80] *Id.* at 129.
[81] 1 WILLIAM BLACKSTONE, COMMENTARIES *76–78, *cited in* THOMPSON, *supra* note 27, at 129.

conductor of the symphony of everyday life in the Fens, dictating the rhythms of the seasons. They directed who could forage in the common during the winter, how the open fields were planted, and when they were harvested. The customary law directed who could graze animals on the common and how many of each animal farmers could have. The customary law also governed the ancient dues that the villagers owed the lord and the obligations that villagers owed each other and the village at large. Customary rights were enforceable and fines were common for those who violated them. For instance, court rolls from Downham, in the Cambridgeshire Fens, show that in the year 1311 fines were assessed for interfering with other peoples' rights to sedges; the bailiffs even promised an investigation into who was illegally cutting sedges on the common.[82]

D. *Juries in the Fens: Theory and Practice*

1. *Theory*

"Trial by jury is about the best of democracy and the worst of democracy."[83] Jeffrey Abramson's observation succinctly diagnoses the problems and promises of the jury system as an arbiter of justice, whether to determine grazing rights or to weigh the life or death of a criminal defendant. A jury expresses the inherent contradictions of a society governed by the people. Are all people represented on the jury, or only certain types of people? Does a jury's local knowledge and grounding in "real life" outweigh its local biases and prejudices? Is it a representative body chosen to represent the "competing perspectives of community groups," or is it a deliberative body that through debate and reason somehow discovers truth?[84] And yet the Fen society was emphatically not a democracy. A clear hierarchy based on nobility, land ownership, and social status determined individuals' decision-making power. How does jury regulation reflect the structure of such a stratified society?

One of the most important questions for addressing the

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[82] BAILEY, *supra* note 65, at 210–12.

[83] JEFFREY ABRAMSON, WE, THE JURY 1 (2d ed, 2000). Max Weber saw juries as weakening the rationalism on which modern law should, in his view, be based. MAX WEBER, 2 ECONOMY AND SOCIETY 892–95 (Guenther Roth & Claus WIttich eds., 1978).

[84] ABRAMSON, *supra* note 84, at 8.

competence of juries to decide land use matters is the question of local knowledge. Because land use is inherently a local issue, there may be advantages for a local body to make decisions about it. Surprisingly to modern lawyers, this argument was also applied to criminal cases until quite recently: Patrick Henry defended the idea of the ideal juror as someone "who reside[s] near [the defendant], his neighbors, and who [is] well acquainted with his character and situation in life."[85] In the context of the Fens, jurors who are intimately familiar with the land at issue—those who have worked in the fields and hunted the wildlife—may be more familiar with the issues presented by questions about how to regulate them, and may be able to reach better decisions.[86] Yet this advantage has a flip side. By making decisions at the village level, juries may implement policies that privilege local interests at the expense of regional or national welfare. They may also discriminate against locally unpopular groups.

American and British law has moved away from the conception of a jury as pre-endowed with local knowledge.[87] Rather than allowing juries to bring their local expertise to bear on a case, the norm is now to attempt to isolate juries from the facts of the case as much as possible and to attempt to create a jury that is impartial by virtue of its ignorance.[88] This "tabula rasa" view of the ideal jury is a relatively recent development tracing back only to the early twentieth Century.[89]

For much of British and some of American history, the jury was self-informing. Rather than being a collection of decision-makers brought together to hear evidence and find facts, the jury itself consisted of the witnesses to the controversy in question. In fact, a predecessor of the jury was "compurgation," a contest of which litigant could amass the most "oath-helpers" who would swear that one of the parties' version of events was correct. The

[85] JONATHAN ELIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 579 (1888), *cited in* ABRAMSON, *supra* note 84, at 8.

[86] Note that this argument does not weigh against the possibility of a local administrative agency regulating land use. A local board could have the same (or superior) specialized knowledge of the locality.

[87] Stephan Landsman, *The History and Objectives of the Civil Jury System*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 25–43 (Robert E. Litan ed., 1993).

[88] ABRAMSON, *supra* note 83, at 17.

[89] *Id.* at 45–49.

party who could produce the most such oath-helpers won the case.[90] By the late medieval period, however, the jury had taken on a more recognizable form. Although it consisted of people who were often familiar with the people or general situations in the case, it decided fact and law after hearing evidence presented by witnesses.

The best way to achieve an impartial jury, of course, is to convene one made of people who have no knowledge of the issues or people in the case. This is much easier in a large, populous country like the contemporary United States, where even neighbors may not know each other. In the small, insular villages of early modern England, this was quite a different proposition. In the Fens, as discussed *supra*, villages of a few hundred people had courts that met as often as every few weeks, sometimes with mandatory attendance.[91] Even if the Fen people valued anonymous juries , they would have been impossible to achieve.

Another question surrounding the use of juries is their democratic legitimacy. There are at least two theories of how juries function in a democracy: on the one hand, they can be seen as a representative body, each juror embodying the views of different segments of society. On the other, they can be seen as deliberative—an institution in which individuals come together to debate, and where reasoned argument takes the day.[92] Each view has its advantages and disadvantages, and the fact that not all parts of society were represented on wetland juries has implications for both conceptions.

3. *Practice: Jury Regulation of Common Rights in the Fens*

The role of the jury emerged slowly over the course of the late medieval period. As older institutions like compurgation and wagers of law faded away, the idea of compulsory attendance at court began to look less appealing to all members of society: peasants resented the imposition on their time,[93] and lords realized

[90] BAILEY, *supra* note 65, at 173. Although this system seems primitive compared to modern trials, it is surely superior to the systems it replaced: trial by combat in civil cases and trial by ordeal in criminal cases. *See* Beckerman, *supra* note 72, at 210–11.

[91] BAILEY, *supra* note 64, at 169–70.

[92] ABRAMSON, *supra* note 83, at 8 (arguing for the deliberative view).

[93] Tenants could be required to attend court as often as every three weeks. Beckerman, *supra* note 72, at 201.

they could get better results through presentment, which required fewer people in attendance.[94] The Great Revolt of 1381 sped this process along.[95] Although some of the more arcane feudal practices disappeared, the practice of attaint and amercement, in which a jury could be imprisoned or fined if its verdict is reversed by another (twice-larger) jury, persisted into the late middle ages. Naturally, the risk of being attainted or amerced increased the burden of becoming a juror.[96]

There was great variety in the composition of juries in manorial courts. Modern scholars tend to contradict each other when they try to make generalizations about the participants. Mulholland describes manorial juries as "elected" at the beginning of each court session, though she does not specify who the electors were.[97] Beckerman asserts that "[t]he jurors did not represent a cross-section of the community in a social or economic sense, nor were they freely elected. However, as leaders of the village and the more prosperous and influential villagers . . . , they were agents or representatives of the township."[98] On the other hand, Harrison, writing on the Staffordshire villages of Cannock and Rugely, reports that

> the jury [of fifteen] was roughly representative of the geographical jurisdiction of the court. The jurymen themselves were a very mixed bunch. In theory, they should have been freeholders, in reality they were often copyholders, even cottagers[;] . . . [n]o one family or individual dominated the jury.[99]

Part of this discrepancy comes from the variation between villages, each of which ran their courts differently.[100] Another comes from the lack of records—much of the business of manor

[94] "The lord had an obvious vested interest in maintaining his courts, because they gave him power and money. What of the peasants? They got cheap, convenient and relatively efficient justice." Harrison, *supra* note 60, at 48–49; *see also* Beckerman, *supra* note 72, at 241 ("If lords were the main beneficiaries of presentment procedure, however, they were not the only ones. Peasants derived benefits from the order and stability of the seigniorial regime even as they bridled at its constraints . . . .").

[95] Harrison, *supra* note 60, at 48–49.

[96] Mulholland, *supra* note 65, at 69.

[97] *Id.* at 68.

[98] Beckerman, *supra* note 72, at 241.

[99] Harrison, *supra* note 60, at 52.

[100] "There was no such thing as a typical Tudor manor court." Harrison, *supra* note 60, at 46.

courts was in Latin and very few of the large numbers of court rolls have been translated, leaving scholars with an incomplete picture.[101]

In Cottenham, Cambridgeshire, field orders were made by twenty appointed order-makers, all copyholders.[102] The system was established in 1596, in a settlement between the landowners and tenants, known as the "Articles of Agreement." The commoners essentially bought out the manorial lord's feudal rights to the common and governed it themselves.[103] Appointment of the order-makers was divided among the various landowners in the village. The order-makers issued orders by majority rule and the Lord had no power to disobey them.[104] It also specified who had common rights, and what those rights consisted of. Interestingly, the Articles specifically disempowered the manorial courts of the local lords from making any orders concerning common rights in Cottenham and from hearing any disputes that arose out of the order-makers' actions.[105]

This system of self-government lasted until Cottenham's enclosure in 1842. It was also not unique in the Fens: similar arrangements were reached at Stretham, Willingham, and Waterbeach.[106] What makes the Cottenham settlement interesting

[101] Many of the best sources, including Ravensdale and the Selden Society's Court Baron, focus on particular villages—Waterbeach and Landbeach in the former, and Ely in the latter. These are invaluable for examining the procedures in those particular villages, but make generalizing difficult.

[102] *Articles of Agreement*, *supra* note 55, Art. XII, at 208–10.

[103] W. Cunningham, *Preface* to *Common Rights at Cottenham and Stretham*, *in* CAMDEN MISCELLANY, *supra* note 55, at 173, 183. Cunningham sees a connection between the self government in Cottenham and similar villages and the growth of local self-government in the New England colonies, which were established not long after. He ignores the fact that the order-makers were not democratically elected and were instead appointed by various named members of the landholding class and their descendants. *Id.* at 183.

[104] The order-makers had almost plenary power, but were prohibited from specifically assigning numbers of milk-cows ("milch kine") to specific villagers. *Articles of Agreement*, *supra* note 55, Art. XXIII, at 210–11. Since the Articles were approved by an order of the Chancery court, a lord who disobeyed an order would presumably be liable to a Chancery action. *See* Cunningham, *supra* note 103, at 179.

[105] *Articles of Agreement*, *supra* note 55, Art. XXV, at 212–13.

[106] Cunningham, *supra* note 103, at 184–85. In Stretham, it appears that the majority of commoners could make orders. *Common Rights in Stretham: Extracts from a Decree Made by the Court of Exchequer Trinity Term 5 James 1 Confirming an Award Made between Sir Miles Sandys Lord of the Manor of Stretham (Cambridge) and the Tenants and Commoners of the Manor*, *reprinted*

historically is the existence of essentially a written village constitution that specified the powers of the order-makers, how they were appointed, and limited their power in certain circumstances. The origins of most other villages' systems for managing their commons are lost to antiquity. They either developed as unwritten customs over the century, or the records are missing or remain untranslated from the archaic court-Latin and early-modern English.

Despite the patchy sources, there is clear evidence that the manorial jury played a vital role in regulating common rights in the Fens.[107] Most importantly, there is evidence of juries protecting the rights of the poorest members of society to use the commons. For instance, in many Fen villages, especially where the common was particularly large, landless cottagers had the right to graze cows and sheep on the common—something that was almost unheard-of outside of the Fens.[108] Since cows were an important source of food and income for Fen people, this was an important right.

In fact, some Fen villages reserved certain common rights to the poorer classes. Many Fen communities restricted the right to gather furze, a plant that was important as a fuel, to those households earning less than five pounds per year or having less than ten acres of land.[109] Part of the reason for this was that as a proportion of income, resources from the common were more important for the poor than for the well-off; it was worth the time for a poor cottager to go out and collect furze, whereas people of higher status could simply purchase it or other, higher-quality fuels.[110]

Likewise, in Soham and Kirtling, in the Cambridgeshire Fens, rights to pasture horses and cows on the commons were restricted to those making *less* than a few pounds per year.[111] These examples demonstrate how manorial courts provided for the

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in COMMON RIGHTS AT COTTENHAM & STRETHAM IN CAMBRIDGESHIRE (W. Cunningham, ed., 1910), *in* CAMDEN MISCELLANY, *supra* note 55, at 253, 259.

[107] *See generally* NEESON, *supra* note 9 (pointing out dozens of instances of juries issuing orders, imposing fines, and regulating all aspects of economic life in the fen commons).

[108] As usual, this right was limited to inhabitants of the village. *Id.* at 68, 72.

[109] *Id.* at 175.

[110] Neeson points out, however, that many of the middle-class commoners also valued the right to collect furze quite highly. *Id.* at 175–77.

[111] *Id.* at 74.

poorest members of society. Rather than let them rely on the charity of the better-off villagers, the juries gave them the legal right to obtain income from the Fen. Villagers in Welton made this exact argument during enclosure in 1754: because access to the common provided a livelihood for the poorest members of the village, its removal would result in those poorest people being placed on the poor rolls. Support for the poor was paid by landlords, so without the Fen system of providing common rights to the poor, the other villagers would be forced to support them through higher rents.[112]

E. *Common Law Restrictions on Common Rights*

The system of providing common rights to the landless and land-poor class came under attack in the common law courts, starting in the seventeenth century.

The first most important collision of common law and customary law was *Gateward's Case*.[113] Robert Smith brought a trespass suit against Stephen Gateward for grazing too many animals on the common of the village of Stixwold, Lincolnshire, just north of the Fens.[114] In finding for Smith, the Court of Common Pleas established the principle that inhabitants of cottages (often called messuages) did not have rights to the common merely by dint of their habitation in the cottages. A villager had to show a separate legal rationale in order to exercise common rights, either a fee or copyhold, or a prescriptive right supported by some version of the Blackstone test.[115]

One justification for this rule was that in much of early modern English law, rights inhered in *things and places*, not in *persons*.[116] Thus the right of common was attached to the cottage itself, not its inhabitant; only the cottage's owner could exercise the right. The court also applied an early version of the Blackstone test, stressing the importance of continuity and certainty in order for a customary right to be enforced, "Such common will be

[112] *Id.* at 85.

[113] Gateward's Case, (1607) 77 Eng. Rep. 344 (C.P.D.); 6 Co. Rep. 59b.

[114] *Id.* at 344.

[115] *Id.* at 344 ("What estate shall he have who is inhabitant in the common, when it appears he hath no estate or interest in the house (but a mere habitation and dwelling), in respect of which his ought to have his common? For none can have interest in common in respect of a house in which he hath no interest.").

[116] THOMPSON, *supra* note 27, at 135–36.

transitory, and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance."[117] Foreshadowing the arguments to come over drainage and enclosure, the court added that "no Improvement can be made in any wastes; if such common (custom) should be allowed . . . [to] have common in the wastes of the lord himself, if such prescription should be allowed, which would be inconvenient."[118] In other words, the court thought that it would create too much of a disincentive to improve waste land if inhabitants were allowed to have common rights: they would have to be compensated for the loss of those rights, and since inhabitants' rights would be "transitory," it would be difficult to calculate the correct compensation.

Gateward's had severe implications for cottagers in villages that were being enclosed, as those found not to have *legal* common rights were not compensated for the loss of the common, even if they had been using it as a matter of custom for generations.[119] In Cottenham, for instance, provision was made for inhabitants to have common rights in the Articles of Agreement of 1596: "[N]o person . . . shall use or enjoy any of the Commons or Liberties of Commonage. . . for any longer time than his family be or shall be inhabiting or resident in Cottenham. . . ."[120] Thompson, however, notes that cases like *Gateward's*, although they restricted the enforceability of common rights in the common law courts, did not have a revolutionary effect on day-to-day life in the villages. Manorial courts continued to enforce the old customs, such that inhabitants of Peterborough and Whittlesey maintained common

[117] Gateward's Case, 6 Co. Rep. at 59b–60a.

[118] *Id.* at 60a–60b.

[119] "The *occupiers* of common right cottages, it should be noted, who enjoyed common rights by virtue of their *tenancy* of the cottage, received no compensation because they were not, of course, the owners of the rights. This was a perfectly proper distinction between owner and tenant, and involved no fraud or disregard for cottagers on the part of commissioners." J.D. CHAMBERS & G.E. MINGAY, THE AGRICULTURAL REVOLUTION: 1750–1880 97 (1966). Writing 25 years later, Mingay moderated his stance on the justice of depriving cottagers of their common rights without compensation, writing that "the *consequences* of the Commissioners' generally fair interpretation of the responsibilities laid on them . . . might well prove unfair to many people in the village and disastrous to some." MINGAY, *supra* note 38, at 58.

[120] *Articles of Agreement*, *supra* note 55, Art. XV, XXVI, at 204–05, 213.

rights throughout the century, long after *Gateward's*.[121]

But when a landless commoner chose to take a controversy out of the manor court system, he could find himself stripped of rights.[122] In fact, a case reaching the common law courts was not uncommon. When people failed to obey the jury's orders or pay the fines levied against them, the jury could take the case to quarter-sessions, the lowest level of common-law court.[123]

An example of this commons-stripping in the Fens themselves is *Dean and Chapter of Ely v. Warren*.[124] This case concerned the right of turbary—to cut and carry away peat for fuel.[125] The court ruled that the right of turbary could not apply to tenants at will or occupants, and applied only to those with an interest in land:

> The nature of the common of turbary is very well known . . . , but here the custom is laid not only in the tenants but in the occupants, which is a very great absurdity; for an occupant who is no more than a tenant at will, can never have a right to take away the soil of the lord.[126]

The question of what land this holding applied to presented some interesting points on the role of juries in regulating the Fen commons. The Lord Chancellor concluded the opinion with an interesting bit of dicta:

> Before the act of parliament in 15 Car. 2, ch. 17, for the improvement of the great level of the fens, the lands in question were common, and then they might have taken away turf; but being severed by this act (*vide* sec. 38), and annexed to particular tenements, it might very probably lead the tenants into a mistake, that they had the same right to dig turf after severance as before.[127]

Here, the Chancellor seems to be making the unobjectionable point that once land is enclosed and drained, landowners acquire the right to exclude others from cutting turf. This, however, is

[121] *See supra* notes 58 & 59 and accompanying text.

[122] Thompson, ever the socialist, sees *Gateward's* as an example of "class expropriation." THOMPSON, *supra* note 27, at 134–35.

[123] NEESON, *supra* note 9, at 150.

[124] Dean and Chapter of Ely v. Warren, (1741) 26 Eng. Rep. 518 (Ch.); 2 Atkyns 189, *reprinted in* 4 THE MINING REPORTS 233 (R.S Morrison, ed., Cahllaghan & Co., 1884).

[125] Turbary was very important in the Fens, given the lack of forest. Peat was often the only fuel available for heat and light in the long, damp winter.

[126] *Dean and Chapter of Ely*, 4 MINING REPORTS at 234.

[127] *Id.*

inconsistent with the rest of the decision, which maintains the common right for copyholders and freeholders. If the land was enclosed, there would be no common of turbary for copyholders either. It seems most likely that the Chancellor misunderstood the nature of land use in the Fens. He cited a 1663 act for the drainage of the Bedford Level for the proposition that the drained land was enclosed prior to the case.[128] But the Act he referred to only *allows* the commons to be enclosed—it does not require it.[129] It is possible, therefore, that the land at issue was not enclosed at the time of the case.[130] Although it is established that some villages in the Bedford Level were enclosed shortly after drainage,[131] it is possible that Ely was not enclosed in 1741, and thus the commons would still have been available for peat-cutting and still regulated by the manorial jury. Further, the Denver Sluice, which kept much of the area drained, collapsed in 1713, returning it to its undrained state.[132] It is possible, therefore, that the local regulators treated the re-flooded fen near Ely as if it had not been drained and enclosed, and reestablished common rights.[133] Thus the jury was probably maintaining the Fen system by regulating the open fields and, in the absence of large new enclosed areas of arable land, allowing the villagers to supplement their income with the wealth of the common lands. It was only when the common-law courts became involved that the inhabitants' right of common was extinguished.

[128] *Id.* The opinion cites to § 38 of the Act, but that section does not pertain to enclosure. The Chancellor is likely referring to § 35, which allows owners of commons and wastes to enclose portions of the drained land, with the enclosures to be administered by the Commission that was established to manage the drainage. An Act for Settling the Dreyning of the Great Levell of the Fenns Called Bedford Levell, 1663, 15 Car. 2, c. 17, § 35.

[129] "And to the end that Owners of the Comons and Wasts in the said Levell . . . may improve the same by making Divisions and Inclosures Bee it provided. . . . That it shall and may bee lawfull for any Person or Persons . . . that are . . . Lords of Mannors of have . . . Rights of Comon in the said Wasts to improve sett out inclose divide and sever such Proportion . . . as to them may . . . severally . . . belong. . . ." An Act for Settling the Dreyning of the Great Levell of the Fenns Called Bedford Levell, 1663, 15 Car. 2, c. 17, § 35.

[130] It does not help that the facts of the case are missing from the report.

[131] Soham, a few miles away, was enclosed in 1664. DARBY, *supra* note 8, at 122.

[132] *Id.*

[133] Thirsk notes that after the Civil War, much land reverted to common status, despite having been previously enclosed. THIRSK, *supra* note 17, at 125–27, 205–08.

Another case illustrating the stripping of inhabitants' common rights was *Bean v. Bloom*, [134] arising in the town of Luddham, Norfolk, a marshy area somewhat southeast of the Fens. Here, inhabitants were found not to have a right to cut rushes from the marsh to use as bedding for cattle.

In the Fen village of Chippenham in 1830, a group of villagers attempted to claim that the compensation given to them at enclosure for their right of turbary and shack was insufficient. The landowner had enclosed the villages' common fen in 1791 and compensated the *owners* of the cottages in the village, but not the tenants. The cottagers claimed that they had customary rights to the fen, and one day in August invaded the fen and began to dig for peat. The landowner brought them to court at the King's Bench. Although the result of the case is lost, this story demonstrates the importance of common rights to the cottagers and the fact that the landowner believed that he would be vindicated in the common-law courts.[135]

This chipping away at common rights made it much easier for enclosure to proceed. With the landless and land-poor stripped of their rights, the "winners" at enclosure had to compensate fewer people. This reduced the costs of enclosure. Of course, many commoners did not take this lying down—riots were common when the fences went up.[136]

III. DECLINE AND FALL OF THE FEN SYSTEM – 1610 TO 1850

A. *Drainage*

Change came to the Fens slowly but inexorably. By 1610, a network of "ditches, channels and drains" had already begun to spread throughout the area.[137] Calls to drain the Fens go back centuries. Proponents usually argued that the land could be put to a much more efficient economic use if drained and farmed. Although navigation canals through the Fens date back to Roman times, it was not until the seventeenth century that large scale draining projects were undertaken.[138]

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[134] Bean v. Bloom, (1774) 96 Eng. Rep. 547 (S.C.); 2 W. Bl. 926

[135] NEESON, *supra* note 9, at 76.

[136] *See id.* at 277–95; *see also* THOMPSON, *supra* note 27, at 115–26.

[137] CAMDEN, *supra* note 7, at 391.

[138] GODWIN, *supra* note 6, at 135. Attempts to drain the fens took place

Prompted by particularly bad summertime floods in the first decades of the century, Dutch engineer Cornelius Vermuyden, at the behest of the Earl of Bedford, constructed the first major drains in 1631.[139] These consisted of long straight channels, controlled by sluices. They conveyed water from the Fens to the sea along a slight gradient.[140] Windmills powered paddle-wheels that lifted water out of the fields and deposited it in the channel. Windmill technology in the seventeenth and eighteenth centuries could only lift water five or six feet at a time, which limited the efficacy of the drains.[141] The capital for these drains was staked by a group of so called "Gentleman Adventurers," wealthy men who were awarded large allotments of drained land as a return for their investment. This massive construction project was spurred by the Drainage Act, passed by Parliament in 1600.[142]

Agrarian historian Joan Thirsk argues that the incentive structure of the Fen economy led to this drainage. "Short of mineral resources, the richest seams of untouched wealth that a landlord could hope to find on his own estate in the seventeenth century were the unimproved commons. . . . [L]arge areas of fen common existed in these manors which brought no profit to the manorial lord."[143] It was therefore in the landlords' interest to drain the fens and collect income from farming the land; the landlords were less affected by the commoners' loss of the economic use of the fens.[144] G.E. Mingay, on the other hand, points out that the call for drainage and enclosure, especially in the eighteenth century, often came from freeholders of mid-sized farms, who saw the communal regulation of agriculture as a burden and who valued enclosure because it gave them the power

throughout the sixteenth century but were largely sporadic and ineffective. DARBY, *supra* note 8, at 45–51.

[139] GODWIN, *supra* note 6, at 136–37; DARBY, *supra* note 8 at 64–67.

[140] Ensuring a sufficient gradient for the water to actually flow was a constant burden on those that attempted to drain the fens. DARBY, *supra* note 8, at 96–97.

[141] Windmills were the only option for draining wetlands until the 1820s, when steam engines came into use. *Id.* at 107. Defoe describes one windmill with 12 sails, which could move 1,200 tons of water in a half-hour. DEFOE, *supra* note 5, at 25.

[142] This Act provided that a majority of commoners, along with the lord of the manor and local landowners, could decide to give land to those who paid for its drainage. DARBY, *supra* note 8, at 50–51, 56.

[143] THIRSK, *supra* note 17, at 109.

[144] *Id.*

to make more choices about their own operations.[145] At the local level, juries played a role in regulating the ditches that kept what arable land there was in the fens free of water. For instance, the jury at Hemmingford Abbots is recorded as levying money for a horse to help dredge the ditch that drained the village's fields.[146]

As a way to solve some of the administrative difficulties of draining the Fens, the Crown established Commissions of Sewers to regulate drainage. Beginning in the thirteenth century, the King appointed Commissioners to rationalize the tangle of local customs regarding who had to pay for maintenance of the drains which cut across the many different jurisdictions in the Fens.[147] Blackstone recognized the Commission of Sewers as one of England's courts of record with limited jurisdiction, alongside the insurance courts and the palace courts.[148]

Following reforms under Henry VIII,[149] the Commission gained powers "judicial, executive and even legislative in character."[150] Legislatively, it had the power to "make and ordeyne statutes ordenaunces and [provisions]" in order to conserve the drains.[151] Executively, it had the power to survey the drains, to requisition labor to repair them, and to appoint officials to carry out these tasks.[152] And judicially, the Commission had the power to fine those who failed to pay their fees.[153] Most relevantly to this paper, the Commission used a jury of "honest and lawful men" to find facts relating to their powers.[154]

Since responsibility to pay for the maintenance of drains was assigned not only on the basis of land ownership, but also on the basis of how much common right a citizen of the Fens had,[155] these

[145] MINGAY, *supra* note 38, at 32–33, 38.
[146] NEESON, *supra* note 9, at 23 n.57.
[147] DARBY, *supra* note 8, at 36.
[148] WILLIAM BLACKSTONE, 3 COMMENTARIES, at *71–76.
[149] A Generall Act Concernynge Commissions of Sewers to be Directed in All Parts Within this Realme, 1531–2, 23 Hen. 8, c. 5.
[150] DARBY, *supra* note 8, at 42.
[151] *Id.*; 23 Hen. 8, c. 5 §§ 1, 4.
[152] DARBY, *supra* note 8, at 42; 23 Hen. 8, c. 5 § 1.
[153] 23 Hen. 8, c. 5 § 5.
[154] BLACKSTONE, *supra* note 148, at 73. Despite these powers, the Commission only had the power to regulate existing drains, not to create new ones. DARBY, *supra* note 8, at 42; 23 Hen. 8, c. 5 §§ 1, 7.
[155] The Commission and other local governing authorities existed in largely this form into the twentieth century. DARBY, *supra* note 8, at 194–97. In the seventeenth century, the Act that authorized the creation of the drainage and

juries were in charge of valuing common rights. Thus, although the Commission did not directly regulate common rights, its powers extended into their realm. So the Commission regulated the drains, which were somewhat tangential to the main business of life in the Fens until the great drainage projects of the eighteenth century, while most of the administration of the commons took place in the manor courts of the many Fen villages.[156]

As a result of drainage and the resultant reduction in common land as the drained fields were converted to arable land, commoners had to reduce the numbers of livestock that they kept by up to two thirds.[157] Riots by commoners who found themselves dispossessed of their way of life were frequent throughout the drainage process. Young reports that much of Vermuyden's work was destroyed by riots (disguised as a football game!) during the Civil War.[158] Mingay points out that the Fens were particularly prone to violence at the time of enclosure.[159] In the confusion following the Civil War, much of the land originally allotted to the Adventurers reverted to commoners and the land remained undrained until the end of the 18th century.[160]

Drainage proceeded slowly throughout the rest of the seventeenth century and into the beginning of the eighteenth century. By the late eighteenth century, coincident with a surging population, drainage again became popular.[161] By the middle of the nineteenth century, most of the Fen was drained and

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creation of the Bedford Level, the first major drainage project of the century, gave the Corporation established to govern it roughly the same powers as the Commission established by the 1531 Act. DARBY, *supra* note 8, at 42.

[156] Since several villages often had access to the same stretch of fenland, a central manorial court would often administer rights for the nearby villages. The court in Maxey cum membris regulated eight other smaller villages. NEESON, *supra* note 9, at 112 & n.4.

[157] THIRSK, *supra* note 17, at 118–19.

[158] YOUNG, *supra* note 34, at 256.

[159] MINGAY, *supra* note 38, at 53 ("Drainage schemes . . . were particularly productive of violent opposition, and the more extensive the scheme the more widespread and long-lived was the hostility it created.").

[160] Thirsk argues that the vehemence of local opposition to the draining is what kept the attempts of the 1620s and 30s from reaching fruition. Only the combination of higher grain prices and a more equitable distribution of the drained land allowed drainage to proceed after the 1760s. THIRSK, *supra* note 17, at 125–27, 205–08. Darby, however, describes the mid-seventeenth century drainages as "satisfactory enough," particularly in the southern parts of the Fens. DARBY, *supra* note 8, at 95.

[161] THIRSK, *supra* note 17, at 197–201.

enclosed.[162]

A surprising side effect of the drainage began to make itself known within a few years of draining each additional parcel: the peat, which formed the soil for all of the newly productive arable land, began to shrink. Without water flooding the land every year, chemical and physical changes also occurred which caused the ground to quickly subside.[163] The results of this subsidence have been dramatic. Today, the channels that were built hundreds of years ago now sit twenty feet above the surface of the fields, supported by dikes and embankments.[164] As the fields sank, they required increased investment in infrastructure to keep them dry. This expense caused the profits from drainage to be far lower than anticipated by its promoters.

Another risk presented by drainage was that of flooding. A dike "blew out" in 1713 with deadly results, and floods recurred as the dikes and channels proved occasionally inadequate to handle floodwaters.[165] Darby argues that drainage actually made conditions in the Fen worse at the end of the eighteenth century, as floods increased in severity and frequency due both to the subsidence, which caused floodwaters to be deeper than they were previously, and the reliance on wind power to drain the flooded areas.[166]

[162] *Id.* at 208–09 (pointing out that although engineering problems so plagued the drainage operations that the economic benefits of drainage were not realized, efforts to drain the fens continued throughout the eighteenth and nineteenth centuries).

[163] The physical changes consisted of the peat drying up and shrinking. The drier soil was then more likely to blow away in the wind after being plowed. Additionally, at the microscopic level, the introduction of oxygen to the wet, oxygen-poor environment that had preserved the peat allowed microorganisms to begin to decompose the plant matter, metabolizing it and releasing its carbon into the air as carbon dioxide. GODWIN, *supra* note 6, at 124–26.

[164] A cast iron post was driven all the way into the ground in Holme Fen in 1848, at the time of drainage. One hundred and fifty years ago its top was at ground level, and its base rested on the clay substrate; today the post extends fifteen feet above the ground. Nick Higham, *BBC Springwatch, Wetland Recovery*, BBC NEWS, May 23, 2007, news.bbc.co.uk/2/hi/science/nature/6685321.stm.

[165] The dike that collapsed was the Denver Sluice, which helped control the channels draining the Bedford Level, a large section of the Fens that was drained in the 1660s. GODWIN, *supra* note 6, at 136–39; DARBY, *supra* note 8, at 119–20.

[166] DARBY, *supra* note 8, at 146–47.

B. *Enclosure*

"Talk of drainage did not, of course, proceed very far before there was talk also of enclosure."[167] Many landlords and freeholders thought it wasteful to return the newly drained land to the open field system common in English agriculture at the time (discussed *supra*), and began pushing for enclosure.[168] By the eighteenth century, the prevailing method used by landowners to enclose common land was to seek a Private Act of Enclosure from Parliament.[169] Parliament would approve such an Act if a supermajority (three quarters or four fifths, by value) of landowners in a given parish agreed.[170] When the villagers gathered at a public meeting to decide whether to refer a Bill to Parliament, however, the votes were allocated by value of land owned, not by head. Thus, in some parishes, a few large landowners could push through enclosure over the objections of the majority small freeholders. In the Fens, with its relatively higher proportion of small freeholders, this was less common.

After Parliament passed the Act, the landowners would appoint a board of commissioners to oversee the process.[171] After a long period of negotiation and investigation, the commissioners would divide the land up and allot it in parcels to the freeholders of the parish in proportion to their holdings before enclosure. It is important to note that unlike the juries that regulated economic life in the Fens, the commissioners were often not local to the Fens. During the period from 1760 to 1820, when parliamentary enclosure was at its peak, there was something of a professional class of enclosure commissioners, who often administered several enclosures at once.[172] As a result of this characteristic of the

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[167] THIRSK, *supra* note 17, at 212.

[168] Mingay argues that as the proportion of open field land increased in a parish, landowners increasingly wished to enclose. MINGAY, *supra* note 38, at 58–59. Some Fenland enclosures predated draining. For example, Young points out that the Fenland had a unique custom of allowing freeholders to enclose their holdings in the open fields if they wished. Some farmers took advantage of this by consolidating their strips into farms of five or more acres and then enclosing them. YOUNG, *supra* note 34, at 101.

[169] MINGAY, *supra* note 38, at 16-17. By contrast, many enclosures done prior to the eighteenth century were accomplished by agreement between landowners. *Id.* at 11.

[170] *Id.* at 60.

[171] *Id.* at 69.

[172] One Fenland commissioner was involved in nine enclosures at once.

Enclosure Commissions, the people apportioning the land and determining the sticky issues of who had rights[173] to an allotment often did not have the deep local expertise of the manorial courts that had been regulating the Fens for centuries.

Perhaps the most important implication of the system that apportioned land after enclosure was that only landholders and those who could demonstrate legal rights to the common were compensated or given allotments.[174] As discussed above, the large numbers of cottagers, laborers, and small freeholders who depended on the wealth of the Fen in order to augment their income levels to subsistence levels were left without recourse after enclosure—the fen was gone, and with it, their way of life. Thirsk points out, however, that rising prices during the Napoleonic wars provided a demand for labor that somewhat softened the blow to commoners.[175] Nevertheless, the economy based on "local resources . . . and skill in making use of them, of living in a place which had meaning and significance for its inhabitants, of work that still, for the great majority, completely satisfied their creative impulses, of governing themselves through their fellows" was destroyed after enclosure.[176] The transition to wage labor from the Fen economy would have been jarring to the Fen commoners. They were accustomed to making their own hours and working when and how they pleased. Becoming hired hands on other people's larger farms must have been a severe psychological shock, even if they could support a roughly equivalent standard of living.[177]

The impacts of drainage and enclosure were decidedly mixed. On the one hand, the total economic output of the Fen area probably increased, at least in the long run.[178] On the other hand,

YOUNG, *supra* note 34, at 106; MINGAY, *supra* note 38, at 70–80.

[173] MINGAY, *supra* note 38, at 75–76.

[174] Neeson ties the reluctance of Parliament and commissioners to adequately compensate commoners to the Malthusian economic theories popular at the time. NEESON, *supra* note 9, at 50–51.

[175] THIRSK, *supra* note 17, at 217

[176] STAMP & HOSKINS, *supra* note 30, at 45 (quoting W.G. HOSKINS, THE MIDLAND PEASANT 193–94 (1957)).

[177] Many contemporaries saw enclosure as one solution to what they saw as the excessive independence and lack of work ethic of Fen people; enclosure was a way to tame the "*Great profanum vulgus*" in the Fens. PENNINGTON, *supra* note 32, at 37; *see also* NEESON, *supra* note 9, at 18–34.

[178] Of course, it is possible that improved technology could have led to increased economic output in the absence of drainage. There is a large literature

the loss of the common rights was incredibly destabilizing for the commoners.[179] Further, the inability of windmill-powered drainage to prevent floods meant that the economic benefits of drainage and enclosure were not fully realized until the introduction of steam power in the mid-nineteenth century.[180]

CONCLUSIONS

There are some conclusions that can be drawn from the story of common rights in the Fens. The first is that the more local the decision-maker, the more protective of common rights and customs it was. Thus for a century and a half after *Gateward's Case*, juries protected the rights of occupants and cottagers to the rights of the common in many (but not all) villages. The maintenance of this custom, though against common law, demonstrates that local people understood that it contributed to a thriving economy based on the biodiversity and richness of the fens. This value sprang not only from the economic productivity of the fens, but from its relative equality and quality of life—the fens produced a culture that provided more economic options for its less fortunate and achieved a greater level of self-government than other contemporaneous areas in England.

Conversely, when people from outside the fen gained decision-making power, they did not understand the implications of upsetting this balance. The common-law courts that confronted the fen system expressed disbelief at the common rights in the Fens, and attempted to impose property rules that were developed in other contexts.[181]

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examining the economic effects of enclosure in England. Some mid-twentieth century historians found that enclosure increased efficiency; for this point of view, see, e.g., CHAMBERS & MINGAY, *supra* note 119, at 79–80. This perspective has been challenged, however. Economist Robert Allen analyzed Arthur Young's data and found that enclosure resulted mainly in a transfer of wealth from tenants to landowners without an increase in efficiency; unfortunately, his analysis excluded the Fens. Robert C. Allen, *The Efficiency and Distributional Consequences of Eighteenth Century Enclosures*, 92 ECON. J. 937, 937–38, 950–51 (1982).

[179] "In the fenlands of Lincolnshire, more perhaps than in any other part of the county, the agricultural revolution was a true revolution." THIRSK, *supra* note 17, at 235.

[180] DARBY, *supra* note 8, at 173–77.

[181] *E.g.*, Dean and Chapter of Ely v. Warren, (1741) 26 Eng. Rep. 518 (Ch.) 518; 2 Atkyns 189, 189, *reprinted in* 4 THE MINING REPORTS 233 (R.S Morrison, ed., Cahllaghan & Co., 1884). *See supra* notes 124–28 and accompanying text.

Further, even those who lived in the Fen did not understand the consequences of draining. These consequences included shrinkage of the peat, unpredictable hydrology that flooded neighboring villages, and the loss of the fertility brought to the fen by yearly floods. Especially before steam power came to the Fens and allowed them to be more or less permanently drained, the attempts at drainage probably made things worse, leading to lower productivity and more frequent and damaging floods.

The flip side of local control is provincialism—the inherently conservative nature of local control, along with incentives to preserve a long-established way of life in the village may have restricted the ability of juries to take action that would have been better for the region (or the country) as a whole. In the long run, economic growth probably increased as a result of enclosure. Given the freedom to make individual choices about crops and farming techniques, freeholders could increase their production without having to obey the orders of the manorial court — powers the court was reluctant to give up. Especially once steam power ensured that freeholders were reasonably free from periodic inundation, this benefit probably outweighed the loss of the value of commons. Of course, this was little consolation to the cottagers and laborers who lost their common without compensation. Further, although the idea of preservation of natural ecosystems for its inherent value would not take root until the mid-nineteenth century at the earliest, drainage did destroy the fen ecosystem forever. Reclamation efforts are only now beginning to restore some of the fen ecology.

Another conclusion can be drawn by comparing the social class of the decision-makers. In at least some villages, juries were drawn from a cross-section of society, representing cottagers, freeholders, and gentry. Conversely, the enclosure commissioners and common law judges were almost all from the wealthier, educated strata. Not surprisingly, these officials were far less solicitous of the common rights of landless commoners than were the more economically diverse juries. If sources could be found, it would be interesting to compare villages with only local leaders on the jury to those with a broader jury pool, and determine if the latter had broader common rights than the former. Certainly juries were more protective of common rights than commissioners and judges were.

These lessons can be applied to areas around the world where

interests in land are still based in customary law. For instance, in Ghana, customary law in villages is facing pressure from rapid urbanization, creating conflict between customary systems and state courts.[182] In Papua New Guinea, the transition from customary land title to legal title has caused conflict.[183] Maron Greenleaf has argued for common property rights in indigenous forest communities as a way of preserving forests and sequestering carbon.[184]

In these contexts and others, the experience of the Fens could be instructive. Without carefully understanding the value of common rights regimes, and the economic and social systems they are a component of, attempts to reform or replace them will be fraught with extreme uncertainty. Surely the judge in *Gateward's Case* did not expect his decision to lead to monumental changes in the geography of the Fens. Decision-makers, when faced with long-established and complex systems like the one in the Fens, should understand that upsetting those systems will have hugely unpredictable consequences. Further, common rights can be part of a solution to complicated problems of management of common property resources: in the fens, at least, one group of people discovered a way to create an economically productive, relatively egalitarian culture based on self government. While far from being a utopia, human societies have done much worse.

[182] JANINE UBINK, IN THE LAND OF THE CHIEFS: CUSTOMARY LAW, LAND CONFLICTS, AND THE ROLE OF THE STATE IN PERI-URBAN GHANA 17–18 (2008).

[183] *See generally* Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 LAW AND SOC'Y REV. 759 (1991).

[184] Greenleaf, *supra* note 3.