Old Wine in New Bottles : Common Good in the 21st Century

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Historical Background

The recent case of **Portobello Park Action Group Association v. The City of Edinburgh Council** 2012 S.L.T. 1137; [2012] CSIH 69 has highlighted the significance of land held by local authorities as "common good". But what is common good and what is its legal origin and basis ? What precautions should be taken by purchasers of common good, or by local authorities dealing with common good ? It must surely be for the benefit of all that the mists that have developed over the subject through the passage of time be cleared.

The origin of common good can probably be traced back to the 12th century and the creation of Burghs by King David I. The creation of a Burghs was carried out by means of the Kind granting a charter in favour of a group of His subjects who formed a community residing together, typically as a small town. The classic grant was that of a Royal Burgh (although there were also grants of Burghs of Barony or Regality) and this grant carried with it a tract of land that was seen as necessary to meet the common needs of the inhabitants of the community. Thus the land could provide for grazing, the provision of water and other amenities. It could also be leased to provide an income to the Burgh. Within the built-up area the land could be used for markets and other communal urbanised activities. All land that was not granted out to individual inhabitants of the Burgh was thus for the "common good" and the expression was born. One of the offshoots of the creation of Burghs was the creation of the Burgage form of land tenure whereby landholders within a Royal Burgh held their land directly from the Crown as opposed to from an intermediate feudal superior. That tenure, which lasted until 1874 is however a different chapter. It does emphasize, however the special status of Burgh land.

These grants of Burgh land from the Crown continued throughout the mediaeval and renaissance periods. The grants themselves did not contain definite boundaries and so in some cases to ensure its rights the Burgh carried out a "riding of the marches" on a regular basis so that encroachment into the rights of the inhabitants of the Burgh, the "burgesses" could be preserved.

Nevertheless, over the centuries, and particularly in the 18th and early 19th centuries the Burgh councils began to feu or permanently dispose of Burgh land in order to raise revenue. By the first half of the 19th century this had begun to seriously affect the amount of land held by Burghs. What could be done about this ? The burgesses had always had a right to sue the magistrates of the Burgh to declare that common ground within it belonged to them as private burgesses (**Erskine's Institute** 1. 14. 23) but public awareness of burgesses' rights was

really only brought about through the far-reaching “General Report of the Commissioners Appointed to Inquire into the State of Municipal Corporations in Scotland” which was published on behalf of Parliament in 1835. This revealed the sorry state into which municipal administration within Scotland had fallen and in particular the diminution of common good land as a result. Many burgh councils were insolvent at that time or heavily in debt.

Sanderson v. Lees

Perhaps it was the financial concerns of a Burgh which triggered what still represents the leading case on common good, **Sanderson v. Lees** (1859) 22 D 24. Lees was the clerk of Musselburgh Burgh Council. **Sanderson v. Lees** was not the first case where the court intervened to prevent councils or their representatives from dealing with the common good against the wishes of their inhabitants. But it was the first in which the Court of Session was faced with a clear submission from the council that there was no common good land owned by the Burgh which was separate from other land owned by the Burgh. It was also the first case where the court gave a cogent and clear exposition of the law. The case law that has followed, right down to the present day, is founded largely on **Sanderson.**

In **Sanderson**, Musselburgh Burgh Council had title to the Musselburgh Links on a charter of novodamus written in Latin which granted,

“*Praedictis, ballivis consulibus et communitatui dicti burgi et successoribus suis communiam dicti burgi infra limites et bondas subtusmentionatas viz. Terras de Duddingstoun . . .”*

In other words it was a grant of “communia” or common good. Musselburgh Burgh Council feued out 2 acres of the Musselburgh Links to a Mr Brown allowing him to build 2 houses on the plot. Mr Brown proceeded to build walls to surround the houses which excluded the inhabitants from the links, their use of an access across the Links and obscured the view of the sea.

Mr Sanderson, a surgeon and resident of Musselburgh and member of the golf club founded in 1774 brought an action for suspension of the alienation and interdict of building work. He claimed that these actions interfered with the rights and privileges of the inhabitants of Musselburgh. It was eventually accepted by the Council that for time immemorial the Links had been used by the inhabitants for walking, exercise and golf.

But it was disputed whether the Council had the right in the exercise of their discretion to alienate the Links land. The Council argued that the reference to “communia” in the grant was merely to all land vested in the Council and that if the council thought in the proper exercise of its discretion that for the benefit of the burgh as a whole the land should be sold, then it had the power to make such

a sale. They also argued that there was still enough land on which to play golf. How did the court deal with this argument ? The matter went to the Inner House.

Lord President McNeill found that the Council had encroached into the possession of the inhabitants and for that reason Sanderson was entitled to interdict. Whether any possible encroachment could be possible by the Council was something on which he reserved his view.

Lord Ivory was more clear :

> "The title no doubt, in one sense of it, is the title of the magistrates. But it is the title of the magistrates, *not as a separate body from the community* – not *qua* magistrates. It is the title to the common good, which they, as the officers of the community, have right to adminster for the community within the limits which the title which the title, as explained by possession may entitled them to. There has not been use here of one part merely of the commonty, as in the case of McDowall v. Magistrates of Glasgow. But here the rights of the community are as ancient as the rights of the magistrates, and the magistrates have right to administer this portion of the common good, *not for purposes exclusive of the members of the community*. But because it was vested in them, subject to the use of the community – that is to say, *the title is explained by possession as a title of property to certain effects in the members of the community*. The title is therefore *as much a title for the suspender as it is a title for the respondents*, and the magistrates having no conflicting possession on their part, nor having exercised powers over it, so far as regards the peculiar possession of the ground that state of matters excludes them from making use of the ground, as against the inhabitants, in a question between the inhabitants and the magistrates." (22 D 24, 28) (my emphasis)

Lord Curriehill referred to various previous cases where councils had been barred from excluding inhabitants from lands vested in the council and said,

> "It may also be mentioned that in the general report of the Commissioners of Municipal Corporations in Scotland (1835), pg. 32, after an exposure of the dilapidations which had taken place in burghal patrimonies, it is stated, "out of the wreck of common property which has escaped the destructive operation of the system we have been exposing, the remainder which still exists may be generally described as of *two different sorts*; the one of which has been considered in practice as alienable , and liable for the payment of debts; the other *such as does not properly admit of alienation or incumbrance."* And with reference to the last class of subjects it is added that "the property not usually saleable consists of public buildings such as churches, town halls, and market places and common greens or grounds set apart for the general use or enjoyment of the inhabitants.", (22 D 24, 30) (my emphasis)

He then noted that the importance of inveterate usage was to explain the meaning and purpose of ancient writings upon which it has followed. So if there was any doubt about the nature of the grant, the possession was a circumstance to allow interpretation of the rights of the parties.

Lord Deas agreed with Lord Curriehill and the Lord President, and said that the question was "whether this ground has been so dedicated to these particular purposes [walking, recreation e.t.c.] that it cannot be applied to other purposes inconsistent therewith. He agreed that there were instances of property owned by the council which the council could not alienate and which could not be touched by the council's creditors and that in this respect there was no distinction between a Royal Burgh and a Burgh of Barony or Regality. The finding of immemorial possession referred to in the wording of the charter made it difficult to see a stronger case of dedication to the common good but there could be immemorial possession after a charter containing no such reference which could have the same effect. Finally the previous grants of common good land could not affect the inalienable status of the remaining parts.

In short, the court sustained the reasons for suspension and granted the interdict against the Council.

The Meanings of "Common Good"

Sanderson made it clear that the phrase "common good" of a Burgh could be interpreted as meaning the whole property of a Burgh, but if so it was of two types :

(1) property which is alienable and subject to the diligence of and attachment by creditors

(2) property which is not alienable at common law and which is not subject to attachment by the council's creditors but which has been dedicated to the common good of the inhabitants of the burgh in question for particular uses

While to-day the phrase "common good" is typically used in a narrow sense to refer to the second type, it is worth noting the broader use of the phrase, if only to avoid any misunderstanding. The broader use is still reflected in current and important statutory provisions.

The first type is subject to the powers of a council at common law and at statute (under ss. 69 and 74 of the Local Government (Scotland) Act 1973) to do anything including the disposal of any property or rights which is conducive or incidental to the discharge of their functions, including the making of disposals of land for (subject to exception) the best consideration that can reasonably be achieved.

The second type is not subject to such powers unless the council obtains the consent of the Court of Session or sheriff court.

It is the second type which has given rise to its own body of "common good" law, and generally when "common good" is referred to it is to this second type. But the reader must bear this double meaning in mind when reading the cases.

Identification of (inalienable) Common Good

How is common good land identified ? With his usual lucidity, Lord McLaren provides the starting point in **Murray v. Magistrates of Forfar** (1893) 20 R 908, 918 – 919 when he said,

"It appears to me that in the most extended view which can be taken of the constitution of public rights of this description, there are at least three ways in which a public use of burgh property may be acquired. [1] The land may be appropriated to public uses in the charter or original grant; [2] the land, after it is vested in a public body such as a town-council, may be irrevocably appropriated to public uses by the act of the town-council itself; and again [3] it may be so appropriated, or rather the inference may be drawn that it was originally appropriated to public uses from evidence that the land has been so used and enjoyed for time immemorial." (my numbering)

Much, and perhaps most common good land originates from old charters from the Crown to the Burgh going back to the 17th century and beyond. Many are in Latin. Whether the land in such old charters is common good will depend on the wording (e.g. if some equivalent to "communia" or "common good" itself is used) and/or the nature of the possession which followed (e.g. as in **Sanderson**).

Subsequent use for "time immemorial" can be used to construe a charter to find the grant one of common good land – so possession can be significant – this is the point referred to in **Murray**. What is meant by "time immemorial" ? In **Murray** Lord McLaren equated this with the period of positive prescription for the acquisition of public rights of way. This was at that time the period of 40 years. Now that it has been reduced to 20 years, has "time immemorial" at common law for common good creation altered also ? It would seem reasonable that it should as there is no reason why public rights for the use of council land be any more difficulty to acquire than the public rights of way. But the matter is open for argument.

From the 19th century onwards grants to Burghs ceased to be directly from the Crown given the lack of free land available which had not been granted to private landowners. Instead grants tended to be from private, often wealthy benefactors who wished leave something for the community and executed a deed in favour of

the authority or one that could be construed to that effect. The grant in the **Portobello Park** case would appear to be one such. The nature of the grant as common good was not in dispute in that case. However the approach to the old charters in identifying the intention of the granter and whether the grant includes common good land applies to more recent grants also.

One of the burning issues in the 20th century cases was whether the grant was one to the Burgh for the property to be held as common good or to the Burgh to be held in public trust for beneficiaries. The problem arose with words of grant such as "to be held in trust for the community" or the like are used. This was the issue in **Magistrates of Banff v. Ruthin Castle** 1944 S.C. 36 where the court concluded that no trust had been created and the land had been disponed to the two burghs as *pro indiviso* common good.

Some of the *indicia* of common good grants include :

(i) the mention in the grant of the ground to be for the inhabitants of the burgh. Thus a grant to 'the Lord Provost, Magistrates and Council of the City of Edinburgh and their successors in office as representing *the community* of said City.' of the Hermitage of Braid was said to be "precisely the way in which any property would be conveyed to the common good" (**McDougall's Trs v. Inland Revenue Commissioners** 1952 S.C. 260, 266 & 277).
(ii) the mention that it is to be used for specified purposes involving public access. Thus specified use for a public hall, public refreshment and recreation rooms in connection with the adjacent swimming pond was of common good (**Cockenzie and Port Seton Community Council v. East Lothian District Council** 1997 S.L.T. 81); and
(iii) a prohibition on alienation (**Wilson v. Inverclyde Council** 2003 S.C. 366)

Appropriation by the Council to the Common Good

This was mentioned in **Murray,** but no example was given of what would be required for such appropriation by the council of land held by it but not dedicated to the common good. It is thought that at the very least some formal document would have to be executed which dedicated the land to be held for the common good and benefit of the whole community and inhabitants of the area of the former Burgh.

Appropriation and Disposal of Common Good

The **Sanderson** case established beyond doubt that common good land could not be alienated by a council. From Lord Curriehill's quotation of the Commissioner's report the clear indication was given that the restrictions on the Council cover not merely alienation but also "incumbrance". In **Sanderson** itself the council's proposals were seen as an "encroachment" onto the rights of the inhabitants. This was confirmed in the well-known case of **Grahame v.**

Magistrates of Kirkcaldy (1879) 6 R 1066. **Grahame** is an illustration of the fate of much common good. The original grant was in 1644 from the Crown and covered the Burgh Muir or as it came to be known, the South Links of Kirkcaldy. In the mid 18th century the council unilaterally reserved to the inhabitants a third of the ground for their use as a drying green and guaranteeing free access. The remainder and even part of the reserved ground was gradually feued off. Only a small piece was left and the councillors decided to sell it to themselves as police commissioners to allow stables to be built for use by the Police. Boldly, an inhabitant came forward and sought to interdict the building work on the basis that the ground had been used "as commonty" since time immemorial and that the building work was an encroachment on the rights of the community. That was how the court saw the matter with Lord-Justice Clerk Moncrieff describing it as "a claim by or on behalf of the community to have their own property left undisturbed". The Outer House granted an interdict although the stables had been erected before the grant, no interim interdict having been sought. The Inner House then upheld this.

Other examples of restriction on encroachment by the council itself can be seen most clearly in relation manmade structures forming part of the common good. Thus in **Crawford v. Magistrates of Paisley** (1870) 8 M 693, it was held by the Inner House that the steeple at Paisley Cross could not be taken down by the Council except on grounds of necessity (which in that case was established during the course of the interdict action brought by an inhabitant). In **Waddell v. Stewartry District Council** 1977 S.L.T. (Notes) 35, an interim interdict against the demolition of Gatehouse of Fleet town hall was allowed to remain in place. The **Portobello Park** case itself involved the council seeking to build a school on ground used by the community as a park. The school would still have been owned by the Council. However given the precedents in question, it should not have come as a surprise that the inhabitants' association were granted a declarator of unlawfulness and reduction of a resolution appropriating the land for use as a school to be erected.

What is more, it is also clearly established in the case law that incumbrance can include legal and not merely physical steps. Thus a 10 year lease of ground for a commercial was held to be an unlawful grant over common good in **Murray** and a 99 year lease was held to be unlawful in **Magistrates of Banff** and to have given rise to the need to obtain the permission of the court in **East Lothian District Council v. National Coal Board** 1982 S.L.T. 460.

The common feature in all of these cases is that the inhabitants would lose their rights of use or access to the common good in question. It can be taken from this that where ground forms part of the common good, it cannot be appropriated even by the council, for a use which excludes the users within the community who make use of the heritable property in question.

<u>Title and Interest to Enforce the Restriction</u>

As we have seen, the whole basis of common good is that it is held for the inhabitants of the Burgh for which it was granted or dedicated, or "burgesses" in the broadest sense. The practical difficulty arises from the abolition of the Burghs by the Local Government (Scotland) Act 1973, with effect from 16 May 1975. Clearly inhabitants living within the boundaries of the old Burghs have a title to enforce their right to use Burgh common good within their current local authority area. What about other inhabitants who are not within the old Burgh boundaries ? The terms of section 15 (4) of the Local Government (Scotland) Act 1994 suggest that outwith the four major cities the inhabitant has to reside within the final boundaries of the Burgh for whom the common good was granted. However for the four major cities it is enough that the inhabitant resides within the current city boundaries. Aside from individuals, it is well established that local Community Councils or indeed local bodies of benefited individuals can enforce the restrictions on common good ground (see **Cockenzie & Port Seton Community Council v. East Lothian District Council** and **Portobello Park** (above)).

Common Good Orders

Once the nature of common good property had been identified in the 19th century various pieces of legislation were passed to enable councils to exercise their standard powers in relation to common good land. Eventually this culminated in s. 75 of the 1973 Act which provides,

> "(1) The provisions of this Part of this Act [ss. 69, 73 & 74] with respect to the appropriation or disposal of land belonging to a local authority shall apply in the case of land forming part of the common good of an authority with respect to which no question arises as to the right of the authority to alienate.
>
> (2) Where a local authority desire to dispose of land forming part of the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorize them to dispose of the land, and the Court or sheriff may, if they think fit, authorize the authority to dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to dispose of land accordingly.
>
> (3) The Court of Session or sheriff acting under subsection (2) may impose a condition requiring that the authority shall provide in substitution for the land proposed to be disposed of other land to be used for the same purpose for which the former land was used."

It had clearly been established in the case law that the standard powers of a council to dispose and appropriate land, even if set out in a statute, were

insufficient to allow them to alienate or physically or legally encumber common good land. The purpose of section 75 is two-fold. Firstly it expressly excludes the standard powers of appropriation and alienation contained in sections 69, 73, and 74 where "any question arose" as to the right of the council to alienate. In other words even if there is only a question as to whether land is common good (in the narrow sense), the council's powers are excluded. The purpose seems clear. Councils should err on the side of caution and seek the authority of the court for their proposed action rather than putting their inhabitants to the expense of having to pursue preventative litigation. Secondly, section 75 allows councils to apply to the court for permission to overcome the restrictions in relation to common good land. **Portobello Park** contains a useful commentary on the section at paragraph 31. Unfortunately the wording of the section is not without its difficulties.

Can a common good order under section 75 be granted for "appropriation" of common good to other local authority uses ? In other words do the references to "disposal" in subsections (2) and (3) cover unlawful actions with the common good which do not involve the grant of rights to third parties ? In **Portobello Park** what was sought was a declarator of unlawfulness and reduction. The council did not seek an order under section 75 (2). Nevertheless the court expressed the view that because sections 73 and 74 distinguished between powers of appropriation and disposal, the court's power to grant authority under section 75 (2) related only to disposal and not appropriation. That is a clear, albeit *obiter* view with textual support. However it does to be at odds with the purpose of section 75 (2) and potentially lead to strange results. The mischief behind subsection (2) was to provide relief to a council against the absolute prohibition in subsection (1) and the common law underlying it. The remedy for the mischief was that the court should be give a power to allow disposal if it thought appropriate but with the power to impose conditions and to provide for safeguards for the benefited inhabitants, one of which could be the provision of substitute land for the same use. It is, however, difficult to see why on the face of it the remedy should be restricted to disposals, presumably to third parties who would have no regard to the public interest, and exclude appropriations within the council which would still be subject to the council's public functions. There is no apparent reason for such an outcome. It could enable evasion through a council "disposing" land to a third party and then re-acquiring it by some means free of the common good restrictions. In these circumstances it could be argued that there is a drafting error which might be curable by the court through the reading in of the words "appropriate or" or the equivalent into subsections (2) and (3) on the basis of the principles of statutory interpretation in **Inco Europe Ltd v First Choice Distribution** [2000] 1 W.L.R. 586.

<u>The Discretion of the Court</u>

In granting common good orders under section 75 the court has an overriding discretion "if they think fit authorize . . subject to such conditions as they may

impose" and "may impose a condition requiring that the authority shall provide in substitution for the land proposed to be disposed of to be used for the same purpose for which the former land was used". It has been said that "the guiding consideration must be what, on the information before the court, appears to be for the greatest benefit to the inhabitants who share the common good of Dumbarton" (**West Dunbartonshire Council v. Harvie** 1997 S.L.T. 979, 981; aff'd 1998 S.C. 789). Overall the object of the court's discretion is to ensure that the community is not less well off than before because of the disposal.

Thus in the **West Dunbartonshire** case the court found that a park with football pitches should not be sacrificed for the building of a new sheriff court where the park amenity and facilities would be lost. Substitute land or facilities may be required by the court. What is required as a substitute or what conditions may be imposed will depend on the use of the land or buildings for which consent is sought. The less use that is made, the less may be required and if little or no use is being made, it may be a sufficient condition that proceeds be put into a common good fund "for the benefit of the community" and applied in consultation with the community council (**Stirling D.C.** 19 May 2000, unreported – a derelict ex-museum/community hall; and **Kirkcaldy D.C. v. Burntisland Community Council** 1993 S.L.T. 753 – caravan site). Everything will depend on the contribution that the land is making to the community.

Practical Points

Anyone dealing with or having a relationship with council land, and in particular within an old Burgh should be aware of the special status of common good land. Councils and prospective purchasers, lenders, and tenants should be aware of the possibility that council land is common good and check the foundation deed, even if it means going back centuries. If there is any question that the land may be common good then a common good order under section 75 will be necessary to avoid possible interdict, declarator or reduction of the disposition at the instance of the inhabitants, lease or security and missives will require to provide for it as much as they would for planning and other statutory consents.

As for the inhabitants of the locality, they should be aware of the potentially special nature of the land which they use, maintain their uses of it, and remind councils of the need for its upkeep. And should there be any threat to such land or its use, the **Portobello Park** case highlights that the court will be prepared to safeguard their ancient, but living rights.