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Land of myths and (occasional) legends?

An attempt to map out some unclear areas of the law regarding common good land

by Roddy McGeoch, 17 October 11

Setting the scene

Even if the legend "hic sunt dracones" (here be dragons) was not in such common parlance among cartographers of old as some modern commentators might lead us to suppose, it has often occurred to me, over the course of the last year, that these words of warning might seem not at all out of place on maps of Scotland's more ancient burghs. Not, at least, if the individual perusing them happens to be a solicitor engaged to advise as to the status and quality of the title to some long-held piece of property which is about to be sold or leased by the local authority.

The task can be a challenging one, and particularly so when the property concerned had come (or come back) into the council's hands only in the 19th or 20th centuries. A relative lack of guidance in the form of either statutory provision or authoritative case law, coupled with a paucity of available information as to the history of the property in question and the circumstances in which it was acquired, can often render it rather difficult for one to state with any confidence that a given property formed (or, as the case may be, did not form) part of the common good from the date of its coming into local authority ownership.

In many cases the absence of crucial evidence (usually in the form of long-lost minute books and/or financial records of the old town councils) may in fact mean that the original status of the property is impossible to determine. We then – rightly or wrongly – have to adopt something of a legal default position: applying the principles of the available law (with its presumption in favour of common good) to the demonstrable facts, such as they may be, in order to determine, first, whether the property in question is deemed to form part of the common good, and then, if it is, whether it may be freely let or sold. The resultant determinations might not reflect the original reality, but they ought, at least, to provide a relatively solid platform on which to build a case for the way in which a proposed disposal should be handled, and for the validity of the purchaser's/tenant's title.

It will be noted that this last statement is expressed in rather guarded terms. This is no accident. The court reports are not exactly replete with disputes involving common good issues, and there are a number of areas in which the case law does not, as yet, provide ready answers. It is unclear whether this is attributable to cause or effect, but the unfortunate reality is that this once integral part of Scotland's burghal history is one which, in more modern times, has largely passed the populace by.

Indeed, the textbook Local Government Law in Scotland, by C M G Himsworth, published as recently as 1995, contains but a single paragraph on the topic of common good law (focusing solely on the breadth of discretion local authorities have in the application of common good funds). It is really only within the last decade or so that the significance of our common good heritage – and, in particular, the extent of our common good property holdings – seems to have come back into the public consciousness (or at least some recesses of it).

While most of today's "common good activists" (for want of a better expression) undoubtedly mean well in promoting the interests of their townsfolk, many of them seem to have a rather unclear – or even, on occasion, somewhat romanticised – notion of precisely what the common good actually is, what its property holdings ought to comprise, and how they should be administered. There are also those who seem only too happy to reinforce some of the misconceptions which appear to abound. It is sometimes difficult to tell whether this arises through simple error, misguided idealism, or outright political mischief-making.
Whichever it might be, even when they are not soundly based in law, the views such people can express (often in a public forum – and consequently, more often than not, disproportionately volubly) can and do inevitably create confusion and, sometimes, inappropriate expectations in the minds of their audiences – which can comprise councillors, would-be purchasers and members of the public

alike. This can considerably increase the perceived risk of legal challenge whenever a local authority property is about to be disposed of in the face of any degree of local opposition based on an argument (even if ill founded) that the property is part of a particular town's inalienable common good.

Title concerns in practice

Despite the laudable efforts of a few who have taken an interest in raising awareness (most notably Andrew Ferguson, solicitor with Fife Council and author of Common Good Law, the first textbook on the topic), the law of common good in Scotland remains largely unappreciated – if not just misunderstood – not only by the public at large but also by a substantial section even of the property specialists within our own profession. When this is allied to the (entirely justifiable) "safety first" approaches exercised by innately risk-averse practitioners, issues which sometimes really ought not to be problems at all may quickly become the focus of great concern.

Section 75(2) of the Local Government (Scotland) Act 1973 enables the court to authorise the disposal of common good property in circumstances where "a question has arisen" as to the council's right to effect an alienation. This phraseology might suggest that the court process is appropriate only in cases of genuine doubt but, sensibly, it has been judicially interpreted as including a right for the courts to sanction the sale of property which is indubitably inalienable (see East Lothian District Council v National Coal Board 1982 SLT 460).

While most local authorities now are alert to their obligations in relation to common good properties, some intended transactions involving common good property can still be hampered by unexpected difficulties – for example, where a purchaser or funder seeks to insist on the selling council following the statutory court approval procedures, even where the local authority is of the view that concerns expressed are unwarranted and that the property concerned is plainly not inalienable.

The need to provide a "clean" title, free from the risk of judicial challenge at the hands of locals opposed to the sale should, of course, be fully understood and appreciated – but the same cannot sometimes be said of a purchaser's/lender's perception of the actual risk involved in proceeding with a transaction involving a common good property without invoking the statutory consent procedure.

Concerns as to the time that the court process may take, coupled with the prospect of significant attendant cost (not to mention the potential for political embarrassment), will generally render the intended transaction considerably less attractive on all sides and may sometimes scupper it altogether, particularly where time is a significant factor and another, albeit presumably less suitable, site is available.

This is an area in which, perhaps understandably, feelings can run high and views can quickly become entrenched. Ultimately, however, in such circumstances it serves neither party's interests well when a concern based on a simple misapprehension of the legal position arises.

It is therefore to be hoped that this article may help to clarify and perhaps remove some of the more commonly held misconceptions – or at least stimulate some debate to that end.

Appreciating the history

In considering the legal aspects of any transaction with possible common good implications, an appreciation of the historical background is often the key to a proper understanding of the legal position. Without that contextual overview it can be difficult to reach a properly informed conclusion.
In greatly simplified terms, the concept of common good can be traced back as far as the 12th century, and first found statutory expression in the form of the Common Good Act 1491. It has its roots in the Crown or local feudal barons at various times having granted lands and associated revenue-raising rights to the ancient burghs in an effort to help develop Scotland and its larger settlements (and thus perhaps themselves), both economically and socially. Initially, sums raised through leasing or feuing parts of the towns' properties so received were combined with tolls and market fees etc recovered by the burghs, and used primarily for the payment of taxes. Any surpluses held in any individual burgh were customarily retained and redeployed for the general benefit (or "common good") of that burgh and its inhabitants.

Regulation and reform of municipal authorities began to take shape in earnest in the early to mid-19th century. With layer upon layer of statutory discretions and obligations created and imposed in a series of legislative reforms and initiatives, intended to afford the inhabitants of all of the Scottish burghs a degree of equality via the provision of certain basic services and amenities, came rights to levy rates with which to finance them. For the first time, money thus began to come into the town councils'

coffers in the form of taxes payable by the householders of the burghs, simply by virtue of their residence there, rather than through the traditional route, the fruits of the towns' landholdings and feudal toll-levying powers. This new income was applied for the specific statutory purposes for which it was collected, rather than being applied for the general purposes of the burgh. As such, it was not regarded as part of the common good.

Over time, as the town councils' statutory obligations and powers increased, a greater and greater proportion of each burgh's income was derived from rates (and, more latterly, from the rates support grants and other specifically targeted funding provided by central government and certain of its departments). This income had to be spent on the provision of the relevant statutory local authority services – including the purchase, construction and maintenance of associated buildings or other facilities – and thus had to be accounted for separately from the common good income and assets.

While the town councils remained in existence, their ratepayers and the inhabitants of the burghs were, broadly speaking, one and the same (although, of course, not every individual resident would have been a ratepayer). This led, in many cases, to some blurring of the lines. A town council's powers and duties in the guardianship and deployment of the common good funds were considerably less restrictive than in relation to the administration of the rates and other public funds. It was (and remains) competent for common good monies to be utilised to subsidise the provision of a statutory local authority service, provided it was done in the general interests of the town's inhabitants.

So, for example, when the rates monies available for maintenance of a public library were insufficient to cover costs (at one time the library rate was subject to a statutory cap of 1d in the pound), they could be topped up with monies from the common good fund. Similarly, properties being bought to fulfil a statutory local authority function could be paid for from common good funds (and sometimes, for accounting purposes, this would be effected in the form of a short-term loan which would be recouped from the rates account in the following year). However, the converse was not permitted and (save in one particular set of circumstances, touched on later in this article) the common good funds and the general rates funds still had to be kept apart and separately accounted for. That remains the case today.

The Local Government (Scotland) Act 1973 provided for the transfer of property which was held as part of the common good to island or district councils on the reorganisation of local government in 1975, and (per s 222(2)) in administering that common good property, these new councils were required simply to "have regard to the interest of the inhabitants of the area to which the common good formerly related".

The Local Government etc (Scotland) Act 1994 in turn transferred and vested common good property in the new unitary authorities on their establishment in 1996 – with the only specific statutory guidance as to their administration still to be found (at s 15(4)) in the same form of wording carried forward from the 1973 Act.

Assessing the legal issues

In the context of property law, and of most significance to conveyancers, there is one facet above all others which sets certain common good properties apart from the rest of the assets in the local authorities' portfolios: some common good properties are deemed inalienable, and thus may not be sold or leased without the approval of the court (which will generally only be granted when it can be demonstrated that the disposal is both appropriate and beneficial to the inhabitants of the relevant town).

The characteristic of inalienability generally arises by operation of law and is regarded as a restriction on the quality of the relevant titles. It appears to exist purely as a consequential adjunct to an underlying right of the inhabitants of the former burghs to have and use certain properties for certain (or general) purposes. These property rights, and the attendant restrictions on alienation, may be either expressly created in the original conveyances by which the burgh councils took title, or established either by irrevocable dedication to public uses by the town council or by public use, as of right, for a particular purpose (or for general purposes) "from time immemorial" (per Lord McLaren in Murray v Magistrates of Forfar (1893) 20 R 908 (at 918-919); (1893) 1 SLT 105).
Inalienable common good properties are therefore generally restricted to:

(1) Places of customary public resort (parks and recreation grounds, public streets, market places etc, normally held under the more ancient titles); and

(2) Administrative buildings/places necessary to sustain the "dignity of the burgh" (i.e. essential for its administration and social viability, such as town halls, public halls, clock towers etc).

However, not all of such properties will be inalienable. Furthermore any such inalienable property may become alienable – for example, if a suitable replacement facility has been provided, or if the need for the property to be used for a particular function or purpose has otherwise disappeared. See, for example Magistrates of Kirkcaldy v Marks & Spencer Ltd 1937 SLT 574, where the council vacated the then existing town hall in Kirkcaldy and transferred its civic functions to another building in the town – and was thus held to be free to sell the former municipal buildings. This was followed in the more recent case of Cockenzie and Port Seton Community Council v East Lothian District Council 1997 SLT 81, involving the proposed demolition of the Pond Hall in Port Seton when the civic and recreational facilities provided there had already been relocated (this was a case where a s 75 consent had not been sought, the community council petitioned for judicial review on the grounds that it should have been, and the judge made it clear that the property had plainly lost its inalienable status, following the Kirkcaldy case, so a s 75 application was not necessary); and was further reinforced by the judgments in Wilson v Inverclyde Council 2003 SC 36; 2004 SLT 265.

In these circumstances, then, court approval is not required to enable a lease or sale to proceed. Nor is it required if the property was not inalienable in the first place – and in order for it to be considered potentially inalienable, (a) the property must first form part of the common good, and (b) the inhabitants of the former burgh must have an underlying right to use it. These, therefore, are the areas requiring close scrutiny before a decision can be made as to whether or not it might be necessary to follow the s 75 approval route.

Part of the common good?
So – first – when might a piece of council land not be part of the common good?
Essentially there are three basic tests to be applied (per Lord Wark in Magistrates of Banff v Ruthin Castle Ltd 1944 SC 36).

1. Was the property owned by a royal burgh or a burgh of barony (for practical purposes a former town council on 15 May 1975)?
If it was, and if it then remained the property of the relevant district council until transferring to the unitary authority on reorganisation of local government in 1996, the property will be common good if (a) neither of the other two grounds of exclusion applies, and (b) the property has not been formally appropriated for a council function after due process. If it was not owned by the town council on 15 May 1975, the property will not be common good unless it had later been conveyed to either a district council or a unitary authority under the express direction that it should be held for the common good of (or, more typically "for the use and behoof of the community of") a particular former burgh.

2. Is it held under a "special trust" (or subject to special conditions)?
In general terms this ground of exclusion might be expected to apply only to a full blown express trust which meets all of the criteria for the Trusts (Scotland) Acts to apply. Such properties clearly were not intended to form part of the common good.

However, it appears that by application of largely the same principle, a property acquired under a disposition or feu disposition containing restrictive provisions in a form insufficient to create a trust proper, but which are still clearly inconsistent with the notion that a conveyance to the common good had been intended, may also be excluded. For example, a condition restricting the use of the property, or the revenues accrued from it, to purposes other than the general benefit of the townspeople or generally accepted "common good" purposes like parks or recreation grounds, may suffice to take a property out of the common good (see Lord Justice Clerk Cooper, also in Magistrates of Banff v Ruthin Castle Ltd, and Lord Drummond Young in Wilson v Inverclyde Council).

If the property falls into either of these categories of special arrangement then it will not form part of the common good. However, care still needs to be taken in assessing the position. Mere reference to the word "trust", particularly if it appears only in the narrative or burdens clause of a disposition (the primary purpose of which is simply to effect a conveyance of heritable property rather than to create a distinct form of tenure), may not have the effect that the wording might suggest. In fact, in many cases, it may actually have the effect of reinforcing the view that property was intended to form part of the common good. As a general rule, it is considered unlikely that a trust will be deemed to exist in the absence of a separate trust deed. It should be borne in mind too that, as mere representatives of the community they served, the town councillors could not be the sole trustees where the people of the burgh were the sole beneficiaries – as the two groupings are regarded as essentially one and the same.

3. Was it acquired under statutory powers?

If so, then again the property would not be common good.

While there has not yet been any judicial exploration of the full meaning of this test, it seems to the writer that it is intended to cover acquisition for any specific purpose for which the acquiring authority had power to levy rates. As such, it is suggested that the "statutory powers" test should not be regarded as meaning, for example, that only properties bought by (or under threat of) compulsory purchase would be excluded from the common good. It would seem illogical if land or buildings to be applied to a purpose for which a council enjoyed compulsory purchase powers, would be excluded from the common good if these powers were exercised but would not be excluded if the property was acquired by voluntary agreement – or even by way of gift – where rates monies, as opposed to common good funds, would still have been expected to be used in the development or reconfiguration of the property for use for provision of the service concerned, and in its subsequent maintenance, etc.

In considering whether a property might have been acquired under statutory powers, it should be borne in mind that it cannot be assumed that, if it was, there would be some reference to that fact in the title deeds. While in many instances the title might well give an indication of the position, it has never been the case – save, perhaps, in the case of a conveyance in the form of Schedule A to the Lands Clauses Consolidation (Scotland) Act 1845 – that an enabling statute must be referred to in the deed by which a property is acquired. Unhelpfully, the use of statutory conveyances seems, in the case of many town councils, to have been the exception rather than the rule!

Often, therefore, it is necessary to investigate the background to the transaction and examine the minutes and financial records of the authority in question in order to establish the parties' intentions. Even then, however, it would take a particularly clear set of records to displace any express suggestion in the deed that a conveyance to the common good had in fact been intended (as in Cockenzie and Port Seton Community Council v East Lothian District Council, 1997 SLT 81, where the quality of external evidence to support the contention that the Pond Hall in Port Seton had been held on the rates account – in the form of entries in the former town council's accounts – was deemed insufficient to overcome title provisions which indicated strongly that the intention had been that the property was to be used for general common good purposes).

Neither can it be assumed that lands or buildings gifted to a local authority cannot be regarded as having been "acquired under statutory powers", particularly where it is clear that the gift was accepted so that the property could be used for statutory purposes and that any upgrading and/or future maintenance works would therefore be funded from the rates account.

While some of the earlier legislation incorporated specific powers in relation to acceptance of gifts – for example, s 13 of the Public Libraries (Consolidation) (Scotland) Act 1887 provided that all property gifted or purchased for the purposes of a library under that legislation within a burgh would be held in the name of the town council, rather than the statutory committee responsible for the administration of the library service, half of which committee were not council members – not all of it did. There is an element of conjecture about this, but it is perhaps no coincidence that, very shortly after the tests we still apply today were laid down in the Court of Session, Parliament was taking the opportunity to legislate in specific terms which gave local authorities express wide-ranging statutory powers to acquire heritable properties for the purposes of any of their statutory functions, either by purchasing them on agreed terms or by accepting them as gifts. See the Local Government (Scotland) Act 1947, ss 156 and 340.

This would seem to suggest very strongly that nothing which came into a town council's ownership after the 1947 Act came into force would have become common good property without an express statement to that effect having appeared in the deed by which title was transferred – or at least in the supporting records – unless it was clear that, at the time of the acquisition, the council had had no specific statutory use in mind for the property in question (which, while it might not have been a common occurrence, would still occasionally have happened).

As alluded to above ("Appreciating the history"), there is one set of circumstances in which the applicability of the foregoing rules might be thrown into question. The purpose of s 180 of the 1947 Act was to establish a new "burgh fund", through which all of the business of a town council was to be transacted. Only receipts and sums receivable or payable by the common good fund or trust funds were excluded from its ambit. However, the opportunity was given for the council, by special resolution, to include these items in the general burgh fund.

The precise effect of such a resolution relating to the common good is, unfortunately, rather unclear. The wording of the section is quite precise and it does not, for example, appear to permit of the transfer of heritable assets – or perhaps, arguably, even monies already held – although if all receipts and expenditure relating to the same were to be channelled through the burgh fund, that would seem to be the general practical effect, at least as far as the alienable common good assets were concerned. Perhaps the only clear conclusion which can be drawn is that, if a town council had made such a resolution, then no property which it subsequently purchased would form part of the common good – whether acquired for a defined statutory purpose or not. This, however, is not a matter which appears to have come before the courts thus far.

Inhabitants' right to use

Secondly – when might the inhabitants of the former burgh not have a right to the use of the property? Perhaps the most obvious instances of properties which are not inalienable are those such as shops, farms and grazing lands, which have traditionally been utilised only to generate income for the common good fund. These obviously would not have been available for use by the burgh residents as a whole, and so must clearly be regarded as capable of being sold – as must remnants of common good ground which are not and have rarely, if ever, been put to any obvious community use. The receipts from such sales would, of course, be added to the common good funds in the same way as the rentals which might have preceded them.

In addition, as indicated above, the characteristic of inalienability will cease to apply in cases where the necessity for a particular property being used either for a specific community use or for general purposes has been superseded by the acquisition or provision of another property which has been brought into use for that same purpose (see para 6 of Lord Drummond Young's judgment in Wilson v Inverclyde Council, 2003 SC 36; 2004 SLT 265 for a concise exposition of the law in this area). Again, the instances in which such circumstances will have arisen should generally be obvious.

The situation becomes rather less clear, however, when properties forming part of a burgh's common good holdings have been put to a particular public use only through the exercise of the town council's will (and not as a consequence of an irrevocable dedication to use for such purposes, or through public use, as of right, from time immemorial). It has recently been held that, where that is the case, no right of use enforceable by the community is created (Capacity Building Project v City of Edinburgh Council [2011] CSOH 58 – see, in particular, Lord Malcolm's comments at paras 38-43), and the writer would contend that, if that is so, then the property concerned cannot in those circumstances have acquired inalienable status either.

How we distinguish an irrevocable dedication from a revocable one is somewhat less certain – but on the general premise that a council cannot bind future administrations in policy matters, it would seem that the requirements for the creation of an irrevocable dedication at the hands of a local authority must be rather exacting! In most cases, then, it is suggested that the presumption must be that an irrevocable dedication cannot have occurred purely as a consequence of a decision taken by a town council upon which public use has followed.

Public use of properties acquired under statutory powers

This brings us to an area which seems to be a frequent source of confusion – the case of property acquired ostensibly under statutory powers or for a statutory function, funded from the rates account, and thus not forming part of the common good from the date of its coming into the town council's hands. While some commentators appear to suggest that it is sufficient to give rise to inalienability that public use of any such property has occurred "from time immemorial", the writer is unaware of any authority for the proposition that a property which was not part of the common good in the first place can become part of the inalienable common good simply by that process.

It appears that a quite inappropriate expectation can arise if (as appears to be the case in a number of instances currently under consideration across Scotland) the emphasis is placed only on the usage which has occurred, without proper account also being taken of the common good status of the property at the time of its acquisition. It is suggested that, in fact, where a property has been acquired under statutory powers or for a statutory purpose – particularly where a price has been paid and the acquisition/redevelopment/maintenance costs etc have been funded from the rates account – then no amount of use for community purposes, general or specific, since then will, of itself, cause the property to become part of the inalienable common good. That would plainly be the case with properties held under properly constituted trusts and being utilised in furtherance of the trust purposes. It therefore appears to the writer that the position should be no different in the case of

properties acquired under a statutory power, and thus excluded from the common good at the point of purchase for that reason.

If that view is correct, then it may be, for example, that rather fewer of our public parks and open spaces than might otherwise be supposed will actually enjoy the quality of inalienability. While, obviously, much will depend on the facts of any individual case, it seems to the writer that this may be an area which would merit close investigation prior to the commencement of any s 75 court process.

Appropriating the inalienable – a loophole for local authorities?

The primary focus of this article has been on the considerations to be taken into account when a common good property is to be let or sold to a third party. There is, however, another scenario worthy of mention – the situation where the local authority itself wishes to redevelop a common good property for another purpose.

Sections 73 and 75(1) of the 1973 Act, when read together, empower councils to appropriate common good properties for any of their other functions where the property in question is freely alienable. There is no direct provision, either in that Act or any which have followed it, for a corresponding power in relation to inalienable common good properties. However, in the absence of any statutory provision to the contrary, it would seem that it is now open to local authorities to appropriate for other purposes any inalienable common good land or building under their control using the "advancement of wellbeing" powers conferred by s 20 of the Local Government in Scotland Act 2003 – provided that the statutory criteria for public wellbeing are met – and that without the need for any external approval whatsoever.

The writer is not aware of any instances in which this route has been followed, as yet. Indeed, there may not be much political appetite for taking such a potentially controversial step – and perhaps this is why a different course was followed in the Lanarkshire cases (South Lanarkshire Council, Petitioners, Inner House, 11 August 2004, unreported, and North Lanarkshire Council, Petitioners, 2006 SLT 398). However, it seems not beyond the bounds of possibility that we might yet see practices develop which will ultimately enable our local authorities, in certain instances (for example in collaboration with other public bodies), to use their powers under the 2003 Act to circumvent the s 75(2) consent process altogether.

While, ultimately, none of the foregoing might quite amount to dragon-slaying, it is to be hoped that it might nevertheless assist in plotting a way through (or around) a difficult area of unknown ground – ground in which, as matters currently stand, the risk of a rather painful (and public) scorching remains ever-present.

For the past year, Roddy McGeoch has been working as a solicitor with Scottish Borders Council, dealing exclusively with common good matters. He is about to return to private practice, where he has over 20 years' experience in commercial property work.

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NB: since the publication of this article there has been a landmark legal case (http://www.scotland-judiciary.org.uk/9/935/PORTOBELLO-ACTION-GROUP-ASSOCIATION-v-THE-CITY-OF-EDINBURGH-COUNCIL), which can be interpreted as closing the potential loophole described in the final section above, as far as inalienable common good property is concerned.