

THE HISTORY OF COMMON LAND IN SCOTLAND

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THE HISTORY OF COMMON LAND IN SCOTLAND

Introduction

This paper describes the nature and extent of the main types of common land that have existed in Scotland.

The paper is based on the history of common land in Scotland contained in “A Pattern of Land ownership in Scotland” (Callander 1987), which has been the only modern publication to deal with the subject in any detail. Additional information about the legal character of common land in Scotland has been drawn from “How Scotland is Owned” (Callander, 1998).

Common land in Scotland has always been part of the country’s system of land tenure or ownership and the paper starts by setting common land in that wider context. The second part of the paper describes the nature, extent and history of commonties, which were by far the most widespread form of common land in Scotland. The other types of common land that have existed in Scotland are then described in Part 3 of the paper.

PART 1 LAND OWNERSHIP

1.1 Feudal Tenure

Land tenure in Scotland is a property system that completely embraces the whole country:- the land and inland water, the surrounding coastal waters, all the airspace above these areas and also the ground below them down to the centre of the earth.

The laws of this system are therefore fundamental in determining the control and use of Scotland’s land and natural resources. These laws are different from those in the rest of the United Kingdom, as Scotland’s system of land ownership is defined by Scots law.

Scotland’s system is also the only one in the world where the method by which most land is owned is still legally classified as feudal. This position will end when legislation passed by the Scottish Parliament in 2000 to abolish feudal tenure comes into force. However, the survival of feudal land ownership until now reflects a wider continuity in the history of land ownership in Scotland since feudalism first became established in the country during the 11th century.

1.2 Ultimate Ownership

Scotland's system of land ownership is based on sovereignty over the territory of Scotland. This sovereign authority is vested in the Crown and confers on the Crown the 'ultimate ownership' of all the land encompassed within Scotland. This is the authority from which all other rights of ownership, occupancy and use of the land derive.

The total surface area of Scotland is 177,511 square kilometres, made up of 78,789 square kilometres of land and inland water and 98,722 square kilometres of seabed under Scotland's coastal waters and territorial seas. These surrounding seas have never been granted out from the Crown into some form of ownership and thus remain held by the Crown 'in trust for the people of Scotland' under the Crown's distinct constitutional identity in Scotland.

By contrast with the marine environment and excluding the foreshore, virtually all of Scotland's 7.88 million hectares of land (including 0.17 million hectares of inland water) has been granted out into ownership. The principal exceptions are the relatively small scale 'ancient possessions' still held by the Crown and which date from at least the early medieval period. They include, for example, Edinburgh Castle with part of Princes Street Gardens and Stirling Castle with other nearby land.

Historically, there were also Crown Commons in Scotland. While none of these survives, they were the main example in Scotland of genuine commons that were open to all. This was in contrast to the main form of common land in Scotland, commonties, which were the undivided common property of the neighbouring land owners.

1.3 Crown Commons

Crown Commons were land held directly by the Crown and are thought to have originated out of the once extensive Royal Hunting Forests. The lands that became Crown Commons were areas within those forests where traditional communal use, which had predated the establishment of the Forests, continued after the system of Forests broke down in the medieval period. While these Commons were most heavily used by people living nearby, anyone unconnected with the area could also use them.

The former extent of Crown Commons is not known. However, it appears that areas of communal use only survived as Crown Commons in a limited number of instances when the Crown's lands passed into private ownership during the early centuries of feudalism. More generally, these areas either fell within the ownership of one private land owner or else became treated later as commonties. In other instances, they appear to have been eroded away by encroachment by surrounding land owners. In any event, Crown Commons had certainly largely disappeared by the early 19th century, when the continuing problem of

encroachment on the remaining Crown Commons forced an Act in 1828 to allow for their division. The land was then normally shared out between the adjoining land owners.

While there appear to be no Crown Commons left in Scotland now, a few did survive into the early 20th century. At that time, their administration was taken over by the Crown Commissioners. One of the last Crown Commons was “The Shooting Greens” which straddled the boundary between the parishes of Birse (Aberdeenshire) and Strachan (Kincardineshire) and was on a historically important north/south route.

The Shooting Greens was never formally divided. Various rights over it were granted by the Crown Commissioners to the Forestry Commission (FC), when the FC bought one of the neighbouring estates in the 1930s. However, the Shooting Greens still continued to be fairly extensively used as a common until the 1950s, when two neighbouring estates gave up their final rights over it and the FC were able to plant their first trees there.

1.4 Common Property

Crown Commons, including some small areas known as greens and loans, were the only form of genuine common land in Scotland. All the other types of common land have been forms of shared property, being the undivided common property of two or more owners, where those owners derive their interest in the common land from other property that they own.

The existence of such common property as part of the current pattern of land ownership in Scotland is usually due to the character of land or property making it unsuitable for division between the owners. A widespread example of such common property is that associated with tenement buildings. Owners who hold parts of the building exclusively (e.g., as flats) may, by virtue of that ownership, have a share in the undivided common property of other parts of the building (e.g., the stairs). The indispensable nature of the common property generally makes its division between the co-owners impractical.

In such instances, the co-owners have equal shares in the common property independent of the size of the exclusively owned property through which they derive their share. Another instance of common property where this principle applies is fresh water lochs that are not entirely enclosed within a single ownership. The status of these lochs as common property is due to the sheer impracticality of division in most instances. The owners, whatever the size of their frontage to the loch, own from their frontage to some theoretical mid-point, but in practice have rights all over the loch.

A third form of common property is commonties (and the closely related scattalds under udal tenure in the Shetland Isles). Historically, commonties were by far the most extensive type of common land in Scotland. However, commonties are not distinguished by the nature of the

land involved, and the rapid conversion of virtually all commonties into individually held private property during the 18th and 19th centuries reflects that there were not usually any practical physical difficulties in dividing them up between the different owners with a share in them.

The history of Scotland's commonties is the overwhelmingly dominant element in the history of common land in Scotland.

PART 2 COMMONTIES

2.1 Context

Millions of hectares survived the early centuries of feudalism as common land. It is estimated that half the land area of Scotland was still common land in 1500, nearly all of it commonties. By the mid 19th century, virtually all this common land had been divided into the private property of neighbouring land owners.

This loss of Scotland's common land to private property formed the third addition to the estates of private owners, following their acquisition of the Crown's and then the Church's extensive lands during earlier centuries.

The completeness of the loss can be compared with the position in England, which is also thought to have still had around half its land area as common land in 1500. By the 1870s, when common land had become virtually extinct in Scotland, there were still a million hectares of it in England and half a million hectares still survive there at the present time.

The reason for the difference is largely due to the fact that Scotland had no legislation equivalent to the Enclosure Acts in England, under which the division of each area of common land required parliamentary permission. The Scots Parliament passed a series of Acts in the 17th century to allow the division of commonties between neighbouring land owners. This legislation culminated in a 1695 Act for the Division of Commonties that was simple, quick and cheap compared with the procedure in England. This single Act in Scotland enabled all commonties to be divided through the courts.

The 1695 Act survived the Union of Parliaments with England in 1707 and became the chief agent of the loss of Scotland's common land. The Act still remains on the Statute Book today.

2.2 Origins

Commonties were uninhabited areas that ranged in size from less than a hectare to a thousand hectares. They originated as areas of land over which traditions of common use predated the

arrival of feudalism. The rights to these common areas became held to go with the neighbouring (though not necessarily adjacent) lands from which the users of the common areas came. This led to the rights over these areas being held to belong to the owners of the neighbouring lands.

This definition of commonities as undivided private property was an essential pre-requisite for the legislation in the 17th century to divide them between the local land owners. The validity of the definition dated from the arrival of feudalism in Scotland. The laws of feudalism started from the premise that all land had to have a land-lord and by presuming and promoting property over the whole countryside, the establishment of feudal ownership converted all common land in Scotland, apart from Crown Commons, into a form of private property.

During the early centuries of the feudal period, the Crown's lands were very extensive. The Crown's grants of land often led to huge tracts of countryside passing into the ownership of the Church and other main land owners. The areas subsequently designated as commonities were within these massive territories. They were areas which had ancient and strong traditions of common use that were irrevocably built into the annual cycles and subsistence economy of the rural communities.

The existence of these areas was acknowledged by the convention which evolved of conveying, as a matter of course, wide and unspecified rights in the charters or title deeds for land. Prominent amongst these were phrases like "with all commons, commonities, common woods and common grazings". No areas might be named or identified in any way and none might exist near the lands conveyed.

This legal style developed as a matter of precaution and practice to ensure that a land owner's tenants continued to have access to the resources of any traditional area of common use outside the land owner's own estate. The fact that these general phrases later became interpreted as conveying definite rights to specific areas was one of the main reasons why the division of commonities during the 18th and 19th centuries gave rise to such a wealth of legal disputes.

2.3 Survival

Commonities were therefore not simply remote relics that had survived outside the earlier feudal grants. They were areas where firmly rooted communal use continued unimpeded within the initial wide grants of land. Then, as the number of land owners increased before the 17th century, these areas survived as areas of shared property.

It was the increase in the number of land owners that led to these areas becoming conspicuous as areas of common property, and not just of common use. They had been submerged into

feudalism as areas of shared use and emerged as areas of shared property. It was the traditional use by local populations that maintained these areas of common land and which became the basis of their landlord's right to claim a share in them as private property.

The distribution of commonities resulted from patterns of land ownership being superimposed on patterns of communal use. It was not possible for tenant populations to be cut off from these vital areas, so that areas which had been used by a single owner's tenants continued to be used by these tenants after they had become the tenants of several owners.

A crucial distinction could emerge when one owner possessed the superiority of any of the other owners' lands. In these cases, the vassals' rights in the commonity were just rights of servitude (use), not rights of property. If one of the owners possessed the superiority of all the areas of land which had rights in an area of common use, then the area was not a commonity.

Similarly, the dramatic reductions in the number of land owners in Scotland during the 17th, 18th and 19th centuries meant that many commonities disappeared without recourse to the process of division. This was because all the rights of property in each of these commonities had become held by a single proprietor. The commonity thus became individually held private land.

2.4 Parish Commonities

While some commonities were shared between only two land owners, some commonities, particularly the larger ones, became associated with whole parishes and were shared by all the land owners in these parishes.

The origins of parishes date from the same general period as the arrival of feudalism. The comprehensive coverage of the country by parishes absorbed all local communities and the common land used by local inhabitants often became associated with the parishes' organisation. Parishes were administered by the local land owners, or the heritors¹ of the parish. The people who used the uninhabited commonities were all tenants of these heritors or else of the heritors of any other parish that shared the commonity. The authority of the heritors over these people and the parish as a whole meant that the heritors administered the commonities.

These commonities were originally seen as parish land, but with the consolidation of feudalism and the institution of private property the commonities became described as the heritors' land. The ambiguity of this transfer was still reflected in many comments in the Statistical Accounts of Scotland in the 1790s and 1840s. As late as this, many reporters still

¹ A heritor is an owner of heritable property, i.e. land.

described surviving commonities as “belonging to the parish”, while the law had long since conveyed these lands to the land owners in the parish.

2.5 Process of Division

The process established by the 1695 Act for the Division of Commonities was straightforward. It allowed a commonity to be divided at the instigation of a single pursuer or ‘any having an interest’, whether the other parties agreed or not. The pursuer submitted their claim to a share in a commonity at the Court of Session, producing title deeds to substantiate this. All other parties were then called upon to defend their rights with all necessary proof. The various claims were assessed by a judge, who then appointed a local commissioner to arrange the division if all the legal aspects were in order.

The commissioner hired surveyors to measure and map the commonity and then the commissioner divided the commonity between the local land owners with regard to both the quality and quantity of land. The shares were calculated in proportion to the valued rent of the properties through which the land owners derived their rights and were allocated on the basis of proximity to these other holdings. If parts of a commonity proved indivisible, separate agreements had to be reached over their fate. While a moss might continue to be shared in common, a valuable stone quarry might be leased to an external party and the income then divided between the land owners.

Finally, the division was recorded and registered in the Court of Session, the costs of the operation being shared in proportion to the lands received. The whole process, from the raising of the action to the final settlement, might only take a couple of months when no legal disputes needed to be contested.

2.6 Legal Disputes

Disputes could arise out of the allocation of the shares from the division. For example, the traditional shared use of the commonity was typically organised on the basis of an equal share for all, yet the division was calculated on the basis of the extent of land owned outside the commonity. This frequently resulted in gross inequalities, with the smaller land owners always being the victims.

The great majority of disputes arose, however, from the initial issue of who had rights to a share in the commonity. Many commonities produced long and expensive legal cases, which required all the parties involved to dig down to the bottom of the family deed chest for ancient land grants. The precise terms of these titles and what rights they conveyed needed detailed legal decisions, which were frequently contested. Some commonities were in and out of the

courts for a century or more. The simple procedures of the 1695 Act were in marked contrast to the maze of legal complexities and ambiguities that emerged through its application.

Most legal disputes stemmed from the fact that even the legal authorities had to conclude: “It is not at all times easy to ascertain whether the right be a right of common property, or merely a right of servitude”. A servitude provided a right of use, but neither a right to a share in the division nor the right to sue for a division. The distinction between rights of property and servitude was frequently not apparent in the history of a commonty, as the possessors of the different rights would still have shared the area equally. The distinction only became relevant at the time of division and derived from the wording of the title deeds of each claimant.

The wording and terms of a title deed, even with the most genuine claim to a right of property, were often very ambiguous. This reflected the limited nature and origins of the claim of any proprietor to a share in the commonty. The old deeds seldom named the commonty in question and the whole issue depended on subtle interpretations of the stylistic conventions used in the land owners’ titles to their own privately held lands. The distinction could hinge on, for example, whether their title said “with parts, pendicles and pertinences” or “with parts, pertinences and privileges”. The former was considered to convey a right of property in a neighbouring commonty, while the latter would be interpreted as only a right of servitude.

The fact that estates might have changed hands several times led to complications in titles and the need to scour earlier titles for some phrase that might establish a claim as a right of property. An additional complication was that superiors, who might have long ago feud out all their lands relating to a particular commonty, could still claim through their superiorities a right to a share in any division. Thus, those who had been making no use of the commonty could receive a share, while other traditional users might receive nothing from a division if their title was deemed merely one of servitude.

Servitude rights did, however, continue to exist over the divided-out shares of a former commonty. There was no legal process for removing these and no legal mechanism by which the holders could be compelled to dispose of them. However, it was usual practice for these rights to be exchanged outside the courts for an area of land in outright ownership. The normal formula for this arrangement was the number of stock previously grazed, irrelevant of the extent of the area used, and this was a strong incentive to put as many stock as possible on the commonty. The exchange of servitudes for an agreed amount of land could result in new divisions over each of the divided portions of a former commonty, so that it became fragmented beyond recognition.

2.7 Local Users

The one group of people with an interest in a common who were not required to be called or cited by law were the actual users of the common, be they tenants, sub-tenants or other local inhabitants. Sometimes they were taken along as witnesses to give evidence on the past uses of a common. However, more usually, the only indication local users had of an impending division was a pre-ambulation or walking of the boundaries by the land owners or their agents, followed by the arrival of the surveyors. Surveyors soon became recognised as agents of misfortune and records survive of them being driven off by local mobs with sticks and stones.

The local users had little or no prospect of any benefit from a division and they stood to lose their means of survival when the division was carried through and the land put beyond their reach. The users who were called as witnesses were usually the oldest local inhabitants. In their recorded statements they have left some of the richest accounts of the central role commons had in the rural economy.

A landowner's rights in a common allowed all possible resources to be exploited, unless forbidden by law or reserved to the Crown, and the tenants had the privilege of using any of these resources through their landlord, excepting any reserved by the land owner for personal use. The scope of these all-embracing rights means that it is not possible to make an exhaustive list of all that a common could provide or of all the uses that commons have been put to in the past. However, the list of assets that local communities obtained from commons is in marked contrast to the impression given by land owners when commons were being divided. Then, commons were described as just barren wastes peripheral to the needs of agriculture. Yet the collective farm towns, or collective farm settlements, of Scotland's subsistence agriculture, which survived in northern areas into the 19th century, were a traditional arrangement that typically could not have survived without the resources provided by a common.

A common could provide many of the resources needed by a community at no cost apart from the inhabitants' own labour. The common also offered a degree of flexibility to meet fluctuations in population or food supply, that was not possible within the formal restrictions of privately held land. The image of commons as barren wastes was the perspective of the land-owning class, who were seeking to do away with commons and the farm town structure they served.

2.8 Local Uses

A common usually offered the complete set of building materials: stone, clay for mortar, timber for roofing and fixtures, flint and divot for walls and roofs, and a range of thatching

materials, whether heather, broom, rushes or bracken, or in some areas, slate. The commonty also typically met all fuel needs: usually peat and turf, with gorse and broom. Sometimes there was wood and in central Scotland occasionally coal.

The commonty was fully incorporated into the agricultural cycle: for nearly half the year, between May and October, it was the site of the sheilings and vital summer grazings; it offered a reserve of arable land where an extra crop could be taken and it supplied a range of fertilisers, of which turf was the most typical but which might include limestone, marl or kelp. Commonties also offered a range of blossoms, berries and sap crops from the native vegetation. These had many traditional uses as foods, drinks and medications. The fishing and hunting on a commonty might be reserved by the land owners, but these areas traditionally offered opportunities in those lines for the local population, even when forbidden by their landlord.

Commonties provided areas of free access, whether for comings and goings, markets and fairs or other events, particularly those needing to be out of sight of the authorities, such as sectarian preaching. Commonties could be used for bleachfields or offer scope for mill dams to supplement summer water supplies downstream.

The list of resources could be extended, as could the uses for the types of resources already mentioned. A huge range of uses was made of natural resources, that are of little direct material value today (e.g. heather, bracken), by communities which were then living off very limited resources.

2.9 Rules of Operation

The extensive use of commonties contradicted the land owners' assertion that these areas were barren wastes. At the same time, the land owners also claimed that these commons suffered from over-exploitation and cited Aristotle's ancient dictum that "that which is common to the greatest number has the least care bestowed upon it". However, commonties were not a 'free for all', like genuine commons. Their use was covered by sets of rules that were, unlike the legal subtleties of servitudes and property, well established and understood locally. Aspects of these regulations may have grown out of traditions as old as the commonties themselves and some are still suggested by modern practices over the common grazings of crofting townships.

The system of rules for commonties included a conventional souming or sharing of the principal resource uses between the land owners and this was repeated amongst the tenants on each estate. With grazing, for example, the land owner's extent might be shared between the tenants in proportion to the valued rent of their holdings and a specific livestock total decided

for each, with recognised equivalents for different species (such as five sheep equalling one horse or cow).

Other rules were even more clear-cut. No-one, whether land owner or tenant, could make financial profit out of the common. The resources of the common were solely for personal uses, and individuals could not, for instance, cut timber for sale or rent grazing to someone else. Such rules were also backed up by the accepted procedure by which any land owner, seeing another infringing the common, had the right and responsibility to sue them at law.

2.10 Reasons for Division

The 1695 Act for the Division of Commonlands, and the series of related common acts before it, were part of a wider body of 17th century legislation aimed at rationalising and strengthening the hold of land owners on their land. The momentum that existed for this is reflected in the re-concentration of the pattern of land ownership into fewer and fewer hands that started in Scotland during that century.

This reason for the common legislation is sometimes disguised by later events. The origins of the Acts were very different from the causes behind the rapid increase in the division of commonlands from the mid 18th century onwards. By then the motivation was no longer an interest in removing the sometimes legally ambiguous commons as part of consolidating an estate. The motivation had become economic and as a result, by the mid 18th century, the opinion of the land-owning class was unanimous in condemning commonlands as wasteful relics of the past that impeded modern progress.

The profitable development of commonlands was not possible unless they were divided. The rules governing their use expressly forbade earning personal profit from their resources and there were also other strong disincentives against improving any part of a common for one's own use. Any improvements could be exploited by other users and, if a division subsequently occurred, no compensation was allowed for improvements in the calculation of the shares to be allocated. It was only after a share had been secured as individually-held private property that agricultural, forestry and sporting use of these areas could be profitably developed. In the second half of the 18th century, all these land uses were offering increasingly strong financial returns.

These economic incentives in the 'Era of Improvement' led to a sharp increase in the number of common divisions from the 1760s. For the next 100 years, the prospect of profits provided the momentum for common divisions. Less and less favourable common lands were drawn into the process, and by the 1870s the huge bulk of Scotland's commonlands had been divided. There was a general south to north spread of these divisions, similar to the

pattern recorded for the spread of Improvement generally. However, as with the spread of agricultural changes, the progress of divisions was not a simple result of diffusion. At the local level, a complex range of factors could be involved.

Two important factors stand out from the individual records of common divisions. Firstly, the most frequent cause for a common to be brought to division was encroachment. Secondly, the instigators of the divisions were normally the smaller land owners and those that had made the least progress with improvements on their own lands.

These conclusions do not point to the smaller land owners as those responsible for the encroachment. As Sir James Rankine pointed out in his authoritative 19th century '*Laws of Land Ownership in Scotland*' (1879): "All history shows that the tendency has been the very opposite – for the powerful to encroach on the ancient rights of the weak". The records support this, as the pursuers were invariably the injured parties and recourse to the law was the only effective defence to rescue their rightful share of a common before it was illegally enclosed by more powerful neighbours. The legal records also show that encroachment had often already substantially reduced the acreage that came up for division.

2.11 Distribution of Divisions

The existing records of common divisions suggest that commonities were most common in the lowlands and around the fringes of the eastern and central Highlands. There is a conspicuous lack of records for the Highlands, particularly the north and west Highlands. This appears as something of a paradox, as it is in that region that traditions of shared land use have lasted longest.

A part of the explanation might be the more concentrated pattern of land ownership in the Highlands, including the very extensive superiorities held by a small number of land owners. These factors, combined with the typically more distinct physical separation of communities by Highland topography, mean that areas of communal use will have long been areas of shared use rather than shared ownership.

However, the question needs further research as the history of feudal land ownership in the Highlands has many differences from that in the rest of Scotland. The Highlands missed out on many of the early phases of feudalism and feudal titles to land only became widespread in the Highlands at a later date. It is likely that the late penetration of feudalism into the Highlands, combined with the strength of the Gaelic culture it encountered, resulted in many distinctive aspects of the history of common lands there.

2.12 Local Impact of Divisions

Another poorly-researched aspect of the history of commonties is the impact of their division on the local populations that made use of them. A problem in considering this is that these divisions were only one element in the major changes affecting Scotland's rural communities at the same time. The seriousness of the impact was also affected by the timing of the division relative to these other changes. The later divisions tended to have a less severe impact, as the local population was likely to have already been depleted by changes in farm structure, land use practices and settlement patterns. In each locality, the impact also depended on the extent and character of the commonty involved.

These factors, however, affected only the degree of the impact. The evidence shows that the divisions of commonties had a profound affect on rural communities in the 18th and 19th centuries. Subsistence agriculture could not survive without access to the resources commonties traditionally supplied. After divisions, some local populations continued to have the common use of adequate resources on their landlord's individually held lands. However, in other areas, the records suggest that the loss of commonties was a major factor in forcing local inhabitants to abandon the way of life that had sustained generations before them and join the mass of people leaving the Scottish countryside.

PART 3 OTHER TYPES OF COMMON LAND

3.1 Main Types

Crown Commons and commonties are two of the eight main types of common land recognised in Scotland. All the other types are of similar form and also owed their origins to pre-feudal traditions of communal use.

Two of the other types, greens and loans, appear to have been genuine commons akin to Crown Commons. Three of the other types, scattalds, common mosses and runrig lands, were very similar to commonties in being the undivided common property of the neighbouring land owners. The final type, burgh commons, was a collective designation for common lands that could incorporate several of the other types.

3.2 Greens

A green is a small area of common land usually closely associated with a settlement, whether a town, village or single clachan. These greens provided an area where cows could be milked, markets and other events held, garments bleached and a host of other common and communal activities carried out. The greens associated with some fishing communities were used for drying and repairing nets and related activities. One specific type of green were the overnight and river crossing stances associated with traditional routes and drove roads.

The extent of shared ownership in greens is not known and no records exist of any divisions. However, most appear to have been genuine commons to the extent that only the Crown had any title to them. A few greens still survive, but the fate of most is unknown. Many appear to have simply been absorbed into an adjoining estate when their common use declined.

3.3 Loans

A loan was a common route through private property to and from an area of common land or some other 'public' place. The distinction between this and a right of way was that the loan was itself common land and not just a right of use.

The fate of most loans is unknown. Many fell into disuse with the disappearance of commonties and the end of the other traditional activities like the drove trade², and appear to have been absorbed into adjoining private estates. Some have survived as rights of way, while the former existence of others is indicated by the place names, like Loanend and Loanhead, that occur fairly frequently in the Scottish countryside.

3.4 Scattalds

Scattalds are a type of common land found in the Shetland Isles and associated with udal, as opposed to feudal, land ownership. Under udal tenure, land can be held by possession without any written title deed and is free from all the burdens and conditions associated with feudalism.

Scattalds are areas of common land shared between different owners and, because of their similarity in that respect to commonties, they could be divided under the 1695 Act for the Division of Commonties despite their udal origins.

It appears that historically there were at least 127 scattalds in the Shetland Isles. Fifteen or so of these still survive, making them one of the most conspicuous examples of traditional common land in Scotland today.

3.5 Common Mosses

A moss is a wet area where peats can be dug and historically many were used in common by local inhabitants. Common mosses were the same form of shared property as commonties and could be divided under the same legislation. Most commonties included a moss and the 1695 Act, recognising the difficulty of dividing a moss equitably, allowed for mosses to be

² The practice of moving cattle along traditional routes (drove roads) to distant markets.

left out of common divisions. This meant that many common mosses only became independent commons as the result of a division.

The concentration of land ownership in Scotland into fewer larger estates during the 17th to 19th centuries meant that many common mosses ceased to be commons when they fell within the property of a single landowner. However, the exclusion of common mosses from so many of the recorded common divisions suggests that a significant number may still survive at the present time.

The common status of surviving common mosses has often gone unnoticed because they have been of relatively little use since the decline of peat cutting in the eastern and central Highlands. However, during recent decades, the afforestation potential and botanical interest of some mosses focused new attention on such areas and led to the identification of several surviving common mosses.

3.6 Runrig Lands

Rigs were narrow strips of cultivated land, sometimes up to around 15 metres wide. Traditionally, adjacent rigs were used by different cultivators and the rigs periodically re-allocated between them. This system was known as runrig. Lands lying runrig were invariably associated with an area of rough ground or hill land that was also shared in common. These two types of land were the longstanding basis of farming in Scotland before the Improvements of the 18th and 19th centuries.

Originally, many areas of runrig, together with their shared hill ground, were held by two or more proprietors. Each owned a number of rigs which were interspersed with the rigs of the other owners and each owner had an undivided share of the ownership of the common hill. The common hill was thus a common division and the runrig lands equivalent to a common division on arable land.

The Scots Parliament passed an Act for the division of runrig lands in 1695, the same year as the Act for the Division of Common Divisions. The Act enabled land owners to apportion the rigs between themselves into consolidated holdings. The rigs were allocated in proportion to the value of the land owners' other lands and divided so that the share for each was closest to their other lands.

These principles were the same as those for the division of common divisions, but the process was easier as the division could be heard in local courts. This reflected the fact that runrig land, as arable land, was more valuable than hill ground and the division of runrig lands always tended to precede that of common divisions. It was not until the late 19th century that the division of common divisions was transferred to the local courts.

3.7 Burgh Commons

Burghs were established in Scotland from the 12th century onwards by both the Crown and local barons. Most burghs, and particularly those established by Crown charters, received extensive territories and wide privileges for the use and support of their inhabitants.

The lands over which property rights and privileges of use were held by the burgh or its feuars (those who feued or owned land in the burgh) were the burgh commons. They did not represent a single type of common land, but might encompass the full range of Scottish commons: commonties, common mosses, runrig lands, greens and loans. These areas and other rights, like fishing privileges, were not always held exclusively by the burgh, but might also be shared in common with the owners of land outside the burgh's boundaries.

Few burgh commons survive in Scotland today. However, a clear indication of their former great extent is given by the reports of the House of Commons Select Committee on the Royal Burghs of Scotland for 1793, 1819, 1820 and 1821 and also in the 1832 report of the Commission into the State of Municipal Corporations in Scotland. These investigations were all prompted by the growing concern and scandal at the disappearance of burgh commons and resulted in the Burgh Reform Act 1833.

The reports showed how the loss of the burgh commons stemmed in large part from an Act of the Scots Parliament in 1469. This Act had suppressed the popular election of Councils and led to the dominance of burghs by local land owners and wealthy merchants. The evidence in the reports shows how these land owners and merchants, with their relations and allies, had appropriated the burgh commons to themselves through generous land grants and cheap feus. By the early nineteenth century, when the new legislation was brought in, they had already stripped the Scottish burghs of nearly all their common land and other associated rights.

PART 4 CLOSING COMMENTS

The history of common land in Scotland has always been more about common property than genuine commons. In both cases, however, the history has been one of common land being converted into individually-held private property.

Crown Commons have been essentially the only example of genuine 'pro indiviso' commons and they are thought to be extinct in Scotland.

The other main traditional forms of common land, which all involved the undivided common property of neighbouring land owners, have also nearly all gone. Some scattalds still survive

in the Shetland Isles, and there are thought to be a few surviving examples of commonties and common mosses.

There is plenty of scope for more research to improve current knowledge of the history of common land in Scotland, while factors such as the progress of land registration may also lead to the identification of a few more relic commons.

An additional perspective is to see the traditional forms of common land that were the undivided common property of neighbouring land owners, within a wider common property context. Similar legal arrangements are not unusual in other situations, for example, freshwater lochs where the shore is held by more than one owner (see 1.4 above). They are essentially a form of commonty for which no method of dividing them into separate shares has ever been found.

In addition to such common property situations, there are also a range of other areas where there is still common use, albeit on the lands of one owner rather than an area of shared ownership. This use can be based on either shared rights of servitude or shared tenants' rights.

Other examples of shared rights over land also exist in Scotland and form part of the complex permutations of rights and interests in land that can exist under Scotland's system of land ownership.

Thus, while the history of 'common land' in Scotland may be more or less over, common property resource management is a subject that still has a future.

References

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