

Opinion
by
Professor Robert Rennie
for
The Highland Council
relative to
Inverness West Link Road
The Town and Lands of Bught

1.0 Introduction

By disposition dated 15th and recorded in the Division of the General Register of Sasines applicable to the County of Inverness on 28th both days of May 1923 Alexander Redmond Bewley Warrant of Bught conveyed certain lands to the Provost, Magistrates and Councillors of the Royal Burgh of Inverness. The disposition is a straightforward disposition in consideration of a price of £11,250. There is nothing in the narrative of the disposition to indicate that the land was being acquired for a particular statutory or local authority purpose. The words of conveyance are in the following terms:-

“DO HEREBY SELL and DISPONE to the said Provost, Magistrates and Councillors and their successors in office and assignees whomsoever heritably and irredeemably.”

Six separate subjects are conveyed. The first of these is described in the following terms:-



“ALL and HAILL the Town and Lands of Bught lying near the Town of Inverness with the Mansion House and other houses, biggings, garden and bleachfield thereof and haill parts, pentacles and universal pertienents thereto belonging lying within the territory of the Burgh of Inverness, Parish and Sheriffdom thereof with the teinds both parsonage and vicarage of the same with the stock included and not separated therefrom and all other easements, privileges and pertinents belonging thereto, as the same are more particularly described, bounded and meithed and marched in the original and late rights and infestments thereof, with the seat, desk and room appertaining thereto within the Highland Church of Inverness as said lands and others are described in an Instrument of Sasine in favour of the now deceased Duncan Grant, Esquire of Bught near Inverness, recorded in the Particular Register of Sasines et cetera for the Shires of Inverness, et cetera, the Eighteenth of October Eighteen Hundred and Forty Seven.”

The other five subjects are variously described as being part of the Lands of Kinnylies, the Mill and Barony of Kinnylies called the Mill of Bught, part of the Lands of Wester Ballifeary, a portion of the Estate of Ballifeary on which a dwellinghouse has been bought and lastly (SIXTH) various salmon fishings. At the end of the description is a declaration ¹ that the whole lands described are in the future to be known by the name of the Lands and Estate of Bught in the County and Parish of Inverness. Existing feu rights and leases are excepted from the warrandice granted.

- 1.1 I have been advised that the granter of the disposition of 1923 had approached the then Town Council in 1921/2 with a view to a sale as he was intending to market the property. Apparently there were then protracted negotiations and the property

¹ Under Titles to Land Consolidation (Scotland) Act 1868 S13



was purchased as a straightforward purchase by the Town Council. The disposition does not contain any real burdens as to use nor does it contain any trust wording which would suggest that the Town Council were to hold the property in trust for a particular group of people or indeed for particular uses. The words of conveyance which I have quoted above do not state that the subjects are conveyed to the Town Council for behoof of, or for the benefit of, the inhabitants of the Burgh.

- 1.2 At the time of the negotiations for the acquisition of the ground the Town Council did have a Common Good Committee. However no issues relating to the possible acquisition came before that Committee. It would appear from the minutes of 1922/1923 that the Finance Committee then a special *ad hoc* Committee dealt with the matter. The Town Council originally suggested it would purchase at a price of £8,000 but this was branded a “ridiculous” offer by the solicitors acting for Mr Warrand, the seller. Eventually it was agreed by Mr Warrand that he would drop his asking price by £500 to £12,000. Following threats from the selling agents that the Estate might be broken up and sold in lots it was agreed to make a definite offer in terms of the *Public Parks (Scotland) Act 1878*². The price was to be £10,500 but this was then increased to £11,000. It has been suggested that the additional £250 to make up the price of £11,250 stated in the disposition was actually contributed by an individual.
- 1.3 The lands themselves lie generally to the north and west of the River Ness. The Caledonian Canal passes through the lands. An up to date Ordnance Plan shows that the current use of the lands is for a park, a sports ground, a caravan and camping site, a swimming pool, a sports centre, an ice rink, a rugby ground, an adventure playground, and a golf course which is currently leased by the current

² The reference to this Statute is minuted



Local Authority to a golf club. The one exception to this generally leisure use is certain housing at Torvean Avenue, Springfield Gardens and Warrand Road.

- 1.4 After the acquisition the Lands and Estate of Bught were administered by the Public Parks Department.
- 1.5 By Feu Charter dated 7th February and recorded in the said Division of the General Register of Sasines on 12th March both in the year 1927 the Provost Magistrates and Councillors of the Royal Burgh of Inverness feued piece or strip of ground on the south side of Ballifeay Road extending to .232 acre to themselves for housing purposes. Oddly this feu followed the exposure of the piece or strip of ground at a public roup. No other party offered at the roup. The words of conveyance are in the following terms:-

“WE DO HEREBY ALIENATE and in feu farm DISPONE and CONVEY to and in favour of the Provost, Magistrates and Councillors of the Royal Burgh of Inverness and their successors and officers of the Local Authority foresaid for the purposes of a Scheme for the provision of houses for the working-classes under the Housing (Scotland) Act 1892 1924 and their disponees whomsoever.”

The feu charter purports to create real burdens. I suspect that the feu charter may well have been valid in as much as it created two separate estates in land both head by the Town Council, one the superiority and one the *dominium utile*. That however is an academic issue. There is nothing in the feu charter to indicate that the Provost Magistrates and Councillors as granters held title in anything other than an unrestricted way. The received title specifically as the housing authority.

- 1.6 The narrative of the 1927 feu is to the effect that the piece or strip of ground was exposed:-

“After the statutory advertisements and notices required by law.”

The statute under which the Town Council would have been operating then would have been the *Town Council (Scotland) Act 1900*. In terms of Section 8 of the 1900 Act all functions under the *Burgh Police (Scotland) Act 1892* and any bodies of police, gas or water commissioners were vest in the Town Council. Section 9 provided that the Town Council could sue and be sued in its corporate name and that title to lands was to be taken in that corporate name. In terms of Section 91 of that Act all accounts of property heritable and moveable vested in the Council are to be kept in books by the Treasurer and are to show the nature of such property. In terms of Section 92 the Council must complete just and accurate accounts of monies received and expended:-

“On account of the common good and revenue of the Burgh and on account of any rates or assessments levied or collected or money realised received or borrowed by them under the Burgh Police (Scotland) Act 1892 or any other Act.”

Section 98 of the 1900 Act is in the following terms:-

“The Town Council shall cause all feus, alienations, or tacks for more than five years, of any heritable property of the Burgh or vested in the Council, so far as forming part of the common good, to proceed by public roup, of which public notice shall be given by advertisement published one weekly for at least three weeks immediately preceding the day of the roup, in a newspaper or newspapers circulating in the Burgh.”

The 1900 Act does not contain any definition of “common good”.


- 1.7 The thrust of the 1900 Act was to give flexibility to Town Councils in relation to property and assets. As Ferguson points out ³ the Act did nothing to define common good and subsequent cases have proceeded on the basis that the common law definition still applied. In commenting on Section 98 Ferguson points out that

³ Ferguson, *Common Good Law* 17-19

at first glance it appears to give a general authority to a Town Council to sell common good land. However this was not the position adopted in the leading case of *Magistrates of Kirkcaldy v Marks & Spencer Limited*⁴ where it appears to have been accepted that Section 98 did not in any way supersede or modify the common law rule that some common good properties were alienable and some were inalienable.

- 1.8 The current local authority, the Highland Council still maintain a common good fund. The lands and estate of Bught have never been shown as being part of the common good in the accounts of the current local authority nor of any of its predecessors. In particular I am advised that the abstract of the accounts for the Town Council for the year to 15th May 1923 show that common good accounts were dealt with separately from general assessment accounts. Under the entry for public parks in these accounts the record of payments includes an item in respect of the price of the Lands and Estate of Bught. In other words from the point of acquisition onwards these lands were not held in the Common Good account.
- 1.9 In 1939 39.439 acres was conveyed in a disposition by the Provost, Magistrates and Councillors in favour of themselves this time as Trustees for the inhabitants of the Royal Burgh of Inverness and the public generally. This is a disposition dated 6th and recorded in the said Division of the General Register of Sasines on 23rd both days of March 1939. It runs on the narrative that the Provost, Magistrates and Councillors as granters are simply heritable proprietors and that they have laid out and equipped the subjects conveyed as a playing field and recreation ground for behoof of the inhabitants of the Burgh and the public generally. It also narrates that a grant is to be made by the National Playing Fields Association on completion of the playing field subject to the Town Council

⁴ 1937 SLT 574

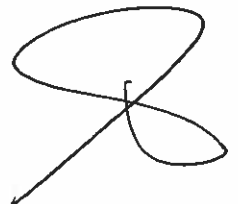


executing the conveyance and fulfilling certain other conditions. The words of conveyance are as follows:-

“DO HEREBY DISPONE and CONVEY to and in favour of ourselves and our successors as Provost, Magistrates and Councillors foresaid, as trustees for the inhabitants of the Royal Burgh of Inverness and the public generally for the purposes hereinafter specified, heritably and irredeemably, but always with and under the burdens, conditions and others after specified.”

The subjects were conveyed under certain burdens and conditions. The first is to the effect that the subjects are to be held by the grantees as trustees foresaid for the purpose of a playing field for public recreation for behoof of the inhabitants of the Royal Burgh of Inverness and the public generally. The second burden is a prohibition of buildings except residences for park keepers, gardeners, etc. or pavilions, dressing rooms, etc. The third burden is a prohibition of borrowing money on the security of the subjects. The fourth is a provision allowing lets for sporting purposes and for grazing. The fifth is an obligation to maintain the playing field. The sixth is a provision to the effect that the Scottish Committee of the National Playing Field Association can waive or discharge any of the burdens. The seventh is a provision that in the event of the subjects ceasing to be used as a playing field for public recreation etc. the Town Council “as trustees” must “report the position” to the Scottish Committee. The eighth burden provides that if the Scottish Committee had ceased to exist then its powers devolve from the National Playing Fields Association. These burdens are stated to be real and preferable burdens:-

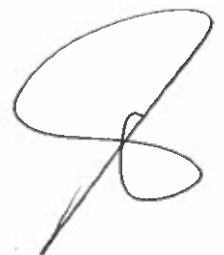
“In favour of the said Scottish Committee of the National Playing Fields Association in the event of its ceasing to exist as a separate body then in favour of the National Playing Fields Association.”

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So far as the burdens are concerned they are not real burdens in favour of anybody. A real burden is and always has been an encumbrance on land in favour of the owner of other land in that second party's capacity as owner of that other land⁵. There were no conservation burdens in 1939. I suspect however from other deeds relating to playing fields which I have seen that these conditions represented the conditions of the grant made by the National Playing Fields Association and it was a condition that somehow or other they would be incorporated in the title.

- 1.10 In 1968 the site of the former mansion house and outbuildings of Bught were feued to the extent of two fifths *pro indiviso* to Andrew Angus McLeod a company director residing in Inverness and to the extent of the remaining three fifths *pro indiviso* to trustees acting under a deed of trust granted by the said Andrew Angus McLeod. The Provost, Magistrates and Councillors are simply designed in the feu charter as heritable proprietors. The feu charter is dated 4th December 1967 and is recorded in the said Division of the General Register of Sasines on 9th February 1968. The subjects are feued under various burdens the first of which is that the land is only to be used for the purpose of erecting and maintaining an ice rink/dance hall, accommodation for an ice rink club, accommodation for supporting activities generally, a restaurant and public house and usual office and car park. There are other amenity burdens including a pre-emption. The subjects conveyed extend to 1.93 acres and are shown on a plan annexed.

⁵ *Title Conditions (Scotland) Act 2003 S1*

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- 1.11 Following the various local government reorganisations notices of title were recorded by Inverness District Council ⁶ and by the Highland Council ⁷. These notices are generally to the lands and estate of Bught as described in the 1923 disposition under the various exceptions. There is nothing to state that either Inverness District Council or the Highland Council hold title in any particular capacity or for behoof of the inhabitants of the former Burgh.
- 1.12 The current local authority have been conducting a public consultation exercise in relation to the route to be taken for a new Inverness West Link Road. The new road would require to cross the Caledonian Canal and the River Ness and then link up with the existing A.82 trunk road. During the course of the public consultation individuals and the Inverness Civic Trust have raised questions in relation to the basis on which the Local Authority actually owned the land. In particular it has been suggested that the land and estate of Bught is held by the local authority as part of the common good. In this connection I have seen a copy of a letter from the Chairman of Inverness Civic Trust to a Mr Hass at the Highland Council. I have been asked for my opinion on whether the land and estate of Bught is part of the common good.

2.0 Opinion

Common good as a concept is difficult to define and has now been subject to a textbook by Andrew Ferguson ⁸. Historically of course it meant the common property of Burghs particularly Royal Burghs as distinguished from the property of individual Burgesses. An Act of the Scottish Parliament ⁹ required common good property to be kept to the common good of the town and spent on necessary things for the Burgh. There were several Acts of the Scottish Parliament over the

⁶ On 14th July 1980

⁷ On 11th October 1996

⁸ Ferguson, *Common Good Law*

⁹ Act 1491 Cap 11227, C19



years to ensure that property of a Burgh was used for common purposes. Common good property included not just heritable property but other revenue sources such as Mills, houses and farms. So far as heritable property was concerned the Town Hall and the Town Jail would be held in the common good of the Burgh because these were buildings necessary for the Burgh to fulfil its functions in terms of the Royal Charter. These functions would be to “watch and ward”¹⁰. At one time certain property which formed part of the common good was said to be inalienable or *extra commercium*. These were such buildings as I have already mentioned necessary for the Burgh to exercise its functions as a Burgh. Other property held in the common good fund might however be alienable. Some court decisions¹¹ tend to suggest that even inalienable property can be alienated if it is no longer needed for the particular purpose. If an alternative property is used for that purpose then it of course may become inalienable in its turn.

- 2.2 In the normal case where subjects are conveyed to the common good words are used which indicate that the conveyances are for “behooof of the inhabitants of the said Burgh”. In other grants the words of grant can be in favour of the Burgh or other local authority “as representing the community of the said Burgh and their successors in office for behoof of the whole body and community of the said Burgh”. There are no such words in the Disposition of 1923. However there are cases where a specific dedication to a particular use which might be said in some way to be a public use has been held to imply a grant to the common good. Thus where the condition was that the property was:-

¹⁰ see for example *Dixon v Lawther* (1823) 2S 176

¹¹ *Magistrates of Kirkcaldy v Marks & Spencer Limited* 1937 SLT 574; *Cockenzie & Port Seton Community Council v East Lothian District Council* 1996 SCLR 219



“To be used as a public hall, council chambers, offices and public refreshment and recreation rooms and offices in connection therewith and in connection with the swimming pond provided always that the said buildings shall always be appropriated to and for uses and purposes for which the same shall originally be erected or for uses and purposes similar to and not inconsistent therewith.”

there was a conveyance to common good ¹². As Ferguson notes ¹³ each case and each title turns on the specific wording and the expressed intentions of the disponent if these can be shown either from within the bounds of the deed or outwith.

2.3 In the leading case of *Murray v Magistrates of Forfar* ¹⁴ Lord McLaren laid down the three ways in which Burgh property might become common good. These were:-

- (a) The land might be appropriated to public uses in the charter or original grant.
- (b) The land after it is vested in a public body “such as a Town Council” might be irrevocably appropriated to public uses by the act of the Town Council itself.
- (c) The land might be so appropriated or rather the inference might be drawn that it was originally appropriated to public uses from evidence that the land had been so used and enjoyed for time immemorial.

2.4 I understand that one of the arguments being put forward is that since the narrative clause in the 1923 disposition does not indicate that the Provost, Magistrates and Councillors acquired the land for a specific purpose it must therefore have been acquired for the general purposes of the Burgh and

¹² *Cockenzie and Port Seton Community Council v East Lothian District Council 1997 SLT 81*

¹³ *Ferguson, Common Good Law p66*

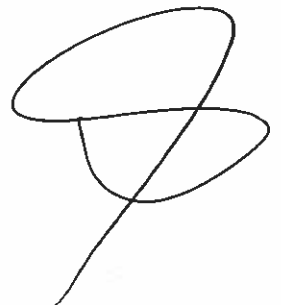
¹⁴ (1893) 20R 908

accordingly for the common good of the Burgh and all its inhabitants. I do not agree with that interpretation. The purpose of the 1900 Act was, as I have said, to allow Burghs to act in their own name as corporate entities not to suggest that any land acquired by a Local Authority would, in the absence of a designated purpose, be acquired as part of the common good. Moreover there is no suggestion that the granter of the 1923 disposition had any philanthropic intentions or a desire to benefit the inhabitants of the Royal Burgh of Inverness; quite the contrary the negotiation for the acquisition was clearly a commercial one very much at arms length.

- 2.5 One of the leading cases in relation to common good law is *Magistrates of Banff v Ruthin Castle Limited*¹⁵. In the case the Duke of Fife offered to gift the mansion of Duff House and some ground to the Burghs of Banff and Macduff. A disposition was granted to the Provost, Magistrates and Councillors of both Burghs and to their joint assignees heritably and irredeemably. It was never clear what this joint destination actually meant. The two Burghs came to a private agreement in 1909 with Duff House Limited to grant a lease to that company for 99 years. It would, I think, have been accepted that the terms of the lease were hardly beneficial to the two Local Authorities. The lease was assigned and then there was a sub-lease granted. In October 1939 the property was requisitioned by the War Office. In 1940 the tenants argued that the lease was void because the property fell into the common good and as such ought to have been advertised by public roup¹⁶. The lease was for the period of 99 years and so would only have expired in 2008. In the Outer House Lord Stevenson held that the property did not form part of the common good; he did not even require proof. The tenants

¹⁵ 1944 SLT 373; the case is discussed in detail in Ferguson, *Common Good Law* 5.2

¹⁶ In terms of *Town Councils (Scotland) Act 1900 S98*



reclaimed to the Inner House who ordered a proof before answer. In the first place their Lordships rejected the idea that the property was held in a trust. However their Lordships appeared to come to the view that the property could only be part of the common good. Lord Mackay, in particular, indicated that there were only two types of Burgh property namely common good property and other properties with powers to "stent". He held there was no third indeterminate kind of right. He went on to point out that property acquired for specific statutory duties relating to say water, streets or light carried with them the power to raise rates and revenues of this type were not common good. Lord Wark ¹⁷ took a similar view holding that there was no dispute between the parties that all property of a Royal Burgh not acquired under statutory powers or held under special trust formed part of the common good.

- 2.6 The clearest evidence that property acquired by a Burgh was not acquired as part of the common good will be where the conveyance itself states that the property was acquired for a specific statutory purposes. Of course property can be acquired by a local authority for a particular purpose where that purpose is not be expressed in the conveyance. As Ferguson points out there have always been a number of statutory purposes ¹⁸. For example in terms of the *Burgh Police (Scotland) Act 1892* a Burgh as Local Authority had responsibility for pleasure grounds or places of public resort or recreation ¹⁹. Similarly it had responsibility for public baths and washhouses ²⁰. As I have indicated in the introduction to this Opinion ²¹ a Council meeting took place on 31st March 1923 and it was agreed to make an offer for the purchase of the estate in terms of the *Public Parks*

¹⁷ At 384

¹⁸ Ferguson, 81-83

¹⁹ *Burgh Police (Scotland) 1892 S307*

²⁰ *1892 Act S309*

²¹ Para 1.2



(Scotland) Act 1878. The minute specifically refers to the acquisition as being under that Act. One of the difficulties with public parks or indeed other areas used for public recreation are that the land could be said to be acquired either in the furtherance of statutory purpose or for the common good of the inhabitants of a Burgh²².

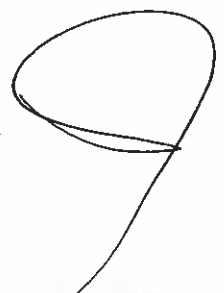
- 2.7 Certain factors plainly influenced the judges in the *Ruthin Castle* case. In the first place the land had been gifted to the two Burghs and in the second place the commercial reality was that the lease which had been granted was on very poor commercial terms so far as the landlords and therefore the inhabitants of both Burghs were concerned.
- 2.8 Three other factors have to be considered here. In the first place there is the fact that in 1927 the then Town Council thought it necessary to expose the piece or strip of ground by public roup. One might argue that they did so with a view to complying with the provisions of Section 98 of the 1900 Act. If that was the case then in 1927 the Council must have had the view that the land in question was indeed part of the common good. The second point relates to the fact that in the disposition of 1939 there appears to be a clear “dedication” of the land conveyed for leisure purposes as a park. I have come across the wording used in the disposition before and it is a set form of words used when a grant is to be made. A third issue worthy of consideration is the fact that in the 1968 feu it is stipulated that the feuduty is to be paid to the superiors and their successors for the use and behoof of the said Burgh per the Town Chamberlain. As I have indicated in the introduction to this Opinion it is possible for land acquired by a Burgh not as part of the common good to be dedicated or appropriated to the common good.

²² See the discussion in *Ferguson* 83



- 2.9 There is nothing in the 1900 Act which actually lays down any procedure for the disposal of land which is not part of the common good. One would, I think, therefore have to assume that there were no such restrictions. This then begs the question of why the Town Council in 1927 took the view that the sale had to be by public roup and after notices and advertisements. It is difficult to escape the conclusion frankly that the Council had a view that the land which was being conveyed might at least be part of the common good. I do not regard the dedication in the 1939 disposition as creating common good land because the land was already used as a park and in any event the words used in that deed are standard words used where a grant is to be imposed. So far as the feu of 1968 is concerned the statement that the feuduty is to be for the use and behoof of the Burgh would be equally applicable to common good land as to ordinary land and I do not think these words have any great significance.
- 2.10 There is one other legal point which would not, I think, have arisen in 1927 or in 1939 and that relates to the actual legal status of a conveyance by the Town Council to themselves. The purpose of the 1927 deed was, I think, to make it clear that the land was to be held for the future on the housing account. The purpose of the 1939 disposition was simply to attempt to create burdens for the purposes of obtaining a grant; there was no change from one local authority function to another. It has now been held in the context of positive prescription that a conveyance by A in favour of A is a legal nullity²³. It might, I suppose, be argued that a feu by A in favour of A would have created two separate estates of ownership and that A would hold both in different capacities. It is clear that if A was superior and also acquired title to the *dominium utile* consolidation did not

²³ *Board of Management for Aberdeen College v Youngson* 2005 SC 33; *Prescription and Limitation (Scotland) Act 1973 S1*



automatically result ²⁴. However if A then possessed the land for the prescriptive period of ten years consolidation applied and the vassal's title was lost ²⁵.

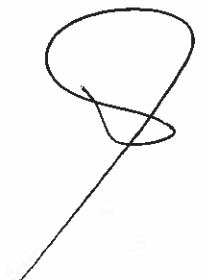
2.11 In light of what I have said above I answer the questions as follows:-

1. Are the Memorialists correct in their view that no part of the Bught Estate, as now vested in The Highland Council, forms part of the assets of the Common Good Fund of the Royal Burgh of Inverness?

In my opinion no part of Bught Estate as now vested in the Highland Council forms part of the assets of the common good fund of the Royal Burgh of Inverness. I say this for the following reasons:-

- (a) In the first place there are no words in the 1923 disposition which indicate expressly that the subjects are being conveyed to the Provost Magistrates and Councillors for behoof of the inhabitants of the Burgh as would have been the norm where land was being acquired as part of the common good.
- (b) The land in question was not gifted in 1923 but was bought for valuable consideration after negotiation at arms length.
- (c) There is nothing in the 1923 disposition to suggest that either the granter of that disposition or the Town Council thought that the land was being acquired for any particular public purpose.
- (d) There are no burdens in the disposition restricting use of the land to any particular public purpose such as a public park.
- (e) While land acquired by a Burgh can subsequently be appropriated to the common good I do not consider that that has happened here. While the uses to which the land has been put do benefit the public in general terms in as much as they are for the most part comprised with leisure and recreation facilities that is not in my

²⁴ *Bald v Cannon (1787) 2.RLC 210*



view enough given the fact that at 1923 the then Burgh had statutory functions in relation to public parks etc.

- (f) While the exposure of the piece or strip of ground prior to the grant of the 1927 deed suggests that the ground was exposed for sale in terms of Section 98 of the 1900 Act I do not think that that is in itself conclusive of anything other than the possibility in the minds of the then Councillors or Officials that the possibility existed of a challenge. In 1923 there was no statutory right to apply to the court for consent to alienate as there is now in terms of S75 of the *Local Government (Scotland) Act 1973*.

2. **If the answer to question (1) is in the affirmative, Professor Rennie is respectfully requested to provide a note of his reasoning to support that conclusion.**

I have endeavoured to set out my reasoning in the body of this Opinion.

3. **If the answer to question (1) is in the negative, either as to the whole or any part of the Bught Estate, Professor Rennie is respectfully requested to provide a note of his reasoning to support that conclusion.**

Superseded.

4. **If the answer to question (1) is in the negative, and Professor Rennie is of the opinion that the Bught Estate comprises part of the common good of the Royal Burgh of Inverness, does Professor Rennie regard this asset as alienable or inalienable in terms of applicable law?**

Superseded.

5. **If the answer to question (1) is in the negative, are the Memorialists entitled to appropriate any parts of the Bught Estate affected by the Inverness West Link Road Scheme to secure the delivery of a new public road in terms of the powers arising under Section 75 (1) of the Local Government (Scotland) Act 1973 on payment of proper compensation?**

Section 75(1) of the 1973 Act only applies where the land forms part of the common good and is alienable. If it is inalienable common good or at

²⁵ *Wilson v Pollock (1839) 2D 159*

least a question arises as to whether it is inalienable then the Local Authority can apply to the court for consent. It seems however to be clear that Section 75 only applies to an actual disposal; it does not apply to a reallocation of common good land from one local authority function to another²⁶.

6. **If the answer to question (5) is in the negative, are the Memorialists entitled to apply to the Court under Section 75 (2) of the Local Government (Scotland) Act 1973 and, if so, what practical proposals would the Memorialists require to place before the Court to support an Application in such an instance?**

Superseded. In my opinion there is no need to apply to the court under Section 75(2) of the *Local Government (Scotland) Act 1973*.

7. **As at the date of grant of the 1927 deed specified in section 6.0 of the foregoing Memorial, what statutory requirements applied to such a disposal, in particular specifying steps to be taken prior to the actual transfer effected by the 1927 deed?**

There have always been statutory provisions relating to the management of assets and accounts where local authorities are concerned. The most recent is to be found in the *Local Government (Scotland) Act 2003*²⁷. In 1927 I do not consider there were any specific requirements in relation to land which was not common good land. Section 98 of the 1900 Act applied to common good land.

8. **As at the date of grant of the 1939 deed specified in section 6.0 of the foregoing Memorial, what statutory requirements applied to such a disposal, in particular specifying steps to be taken prior to the actual transfer effected by the 1939 deed?**

I do not regard the 1939 deed as actually being any grant of land or any conveyance for the reasons I have already stated. The only purpose in granting the deed was to attempt to record conditions of a grant.

²⁶ *Ferguson, 88-89*

²⁷ *Part I, Best Value and Accountability*

9. **As at the date of grant of the 1968 deed specified in section 6.0 of the foregoing Memorial, what statutory requirements applied to such a disposal, in particular specifying steps to be taken prior to the actual transfer effected by the 1968 deed?**

In the past there were certain controls on both acquisitions and disposals by local authorities some requiring a ministerial consent. These appear to have been swept away by the *Town & Country Planning (Scotland) Act 1959*. Now a local authority can dispose of property as it sees fit subject to the best of value requirement ²⁸. On the basis that the land feued in 1968 was not part of the common good then there would have been no particular steps to be taken.

10. **Does Professor Rennie consider that any additional relevant issues fall to be considered?**

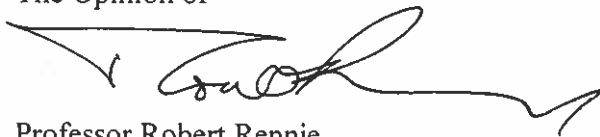
It did occur to me that the circumstances here are quite like the circumstances which arose in *Paterson v Magistrates of St Andrews* ²⁹. In that case ground was held by the Provost, Magistrates and Town Council of St Andrews for behoof of the inhabitants of the Burgh. It was used as golf links subject to an obligation of preserving the same for the purposes of the game of golf. In 1820 the Magistrates feued off a strip off the southern boundary of this piece of ground where it abutted on the high road. On this strip of ground houses were built facing the high road, and the actings of the Magistrates not being timeously objected to, these feus came in course of time to be no longer in point of law part of the Links. Houses were afterwards built at the north end of these feus facing the part of the Links reserved by the Magistrates and access was obtained to them along the margin of Links. This becoming cut up by traffic, the Magistrates resolved to form a regular metalled road twenty one feet wide

²⁸ *Local Government (Scotland) Act 2003 S1*

²⁹ (1880) 7R 712; (1881) 8R (HL) 117

on that part of the Links which adjoined these feus for the general use of the public as well as of the feuars. This was objected to as an encroachment on the rights of the inhabitants of the Burgh. Both the Inner House and the House of Lords held that on the evidence adduced the formation of the proposal would not in the meantime interfere with the use of the Links by the inhabitants as heretofore for the game of golf, and that therefore the Magistrates were entitled in their administration of the Burgh property to make the said road, but that they were bound to retain the road and the ground on which it was constructed subject to the same uses as any other portion of the Links and to take such steps as might be necessary to prevent the acquisition by any person or persons of any rights over the same which might conflict with the right of the Magistrates to take away or alter said road, or to restrict and regulate the traffic thereon should emerging circumstances render that necessary for the protection of the rights of the inhabitants. I think the point made in the case was that the construction of a road *per se* might still be for the common good of the inhabitants of the Burgh.

The Opinion of



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