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THE GREAT RABBIT MASSACRE – A "COMEDY OF THE COMMONS"? CUSTOM, COMMUNITY AND RIGHTS OF PUBLIC ACCESS TO THE LINKS OF ST ANDREWS

ABSTRACT. In the US courts and legal scholars have rediscovered the English doctrine of custom. In her essay "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property", Professor Carol Rose argues that customary uses of recreation lands should be upheld by courts because the highest value of such land is achieved by keeping them open to the public. Rose relies in her argument on the English doctrine of *custom*, but the doctrine of custom legitimates local not public use.

British legal history, however, provides an example of such a "public" common in the Links of St Andrews. In the case *Dempster* v. *Cleghorn*, the golfing public sought to vindicate their *customary right* to the maintenance of golfing ground as it had been "in all times past". This article examines the case of *Dempster*, and the consequent riot, and asks whether it was a "comedy of the commons". It concludes that despite ten years of litigation and the extirpation of the Dempsters' warrened rabbits, the case nevertheless is a "comedy of the commons" that provides a model of the meditation of public use by *local custom* and *community*.

KEY WORDS: common good, common land, custom

I. INTRODUCTION

Customary rights and common land remain a persistent source of litigation not only in the United Kingdom, but also in the United States, where the English doctrine of custom has been used to protect recreation and other use rights and hinder development. In England, the House of Lords recently overturned the Court of Appeal ruling in *R.* v. *Sudbury County*

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Council, ex parte Steed.[1] In *Steed* the Court of Appeal had held that customary use that results in the creation of a town green under the Commons Registration Act 1965 must be "as of right", which the court defined as "an honest belief in a legal right to use ... as an inhabitant ... and not merely a member of the public".[2] The Law Lords overruled *Steed* on the subjective belief requirement and held that, so long as the use made of a town green was predominantly by local inhabitants, twenty years' use could create a green capable of registration under the Act.[3]

Whilst still maintaining a link with the notion of "locality", as required by the words of the statute, the House of Lords freed custom from its (largely fictional) feudal past and court decisions that privileged private property rights over community use. The Law Lords updated custom doctrine to take account of the mobile urbanite who, in search of green spaces, travels to an established green, and rejected the contention that use by a non-inhabitant either goes beyond or invalidates a legal custom. They also rejected the argument that valid customary rights must have a "communal element" about them, and approved solitary uses such as fishing and dog walking.

In the United Kingdom, constraints of statute and doctrine preserve the local nature of customary use. In the United States, however, custom long ago was judicially extended beyond its local bounds. In the case *State ex rel. Thornton* v. *Hay*, the Supreme Court of Oregon used the doctrine of custom to guarantee rights of beach access in the most sweeping terms, holding that rights of public access stretched on the ocean-front land from "the northern to the southern border of the state".[4]

Environmentalists applaud, whilst developers, judicial conservatives and some academic lawyers despair of custom breaking free of its "Blackstonian origins".[5] Absent the constraints of legal and historical precedent, US state courts have transformed the ancient English doctrine of custom to do what judges in custom cases have always done – confirm those use rights the judges deem to be legitimate.[6]

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[1] *R.* v. *Suffolk County Council, ex p Steed* (1996) P. & C.R. 102 (C.A.).

[2] *Supra*, n. 1 at 111–112.

[3] *R.* v. *Oxfordshire County Council*, ex p. Sunningwell Parish Council [1999] 3 W.L.R. 160 at 173 (H.L.).

[4] 462 P.2d 671 (1969).

[5] D. J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings", *Columbia Law Review* 96 (1996), pp. 13475–1455 at 1446. See also, D. L. Callies, "Custom and Public Trust: Background Principles to State Property Law", *Environmental Law Reporter* 30 (2000) at 10003.

[6] See, e.g., *Hammerton* v. *Honey*, 24 W.R. 603 at 604 (Ch. 1876) (Jessel, MR): "[W]hatever definition you may give to custom and prescription, we all know that they

Whether state courts have the power to modernise the doctrine of custom to take account of the nature of community in the modern era remains to be decided by the US Supreme Court. The Fifth Amendment to the U.S. Constitution, which binds the states pursuant to the Fourteenth Amendment, states that private property shall not be taken for public use without just compensation. In *Lucas* v. *South Carolina Coastal Council*,[7] the Supreme Court held that any limitation so severe as to prohibit all economically beneficial use of land cannot be newly legislated or decreed without compensation unless it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership".[8] Whether recognition by a state court of custom constitutes a new "decree" or an explication of the "background principles of the state's law" awaits determination by the US Supreme Court.[9]

The doctrinal rights and wrongs of US custom decisions, however, are not the subject of this article. Instead, this article explores the theoretical response of the American "legal elite" to the dilemma of the preservation of public rights of access to traditionally open land.[10]

It begins with an overview of custom in American legal theory. Part II then examines the case of *Dempster* v. *Cleghorn*,[11] and the riot that resulted from the Court of Session's declaration of a custom to shoot rabbits on the Links of St Andrews in order to preserve them "as in all times past", as an example of Carol Rose's "comedy of the commons". Whilst highlighting the less harmonious aspects of community and commons management, the article concludes that the "great rabbit massacre" ultimately was a comedy of the commons. Moreover, the response of the Society of Golfers to the threat to the links of St Andrews provides a model for the effective management of what Rose has denominated "inherently public property".

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are legal fictions invented by judges for the purpose of giving legal foundation or origin to long usage . . . [W]hen [a judge] finds a long-continued usage which can have a legal origin, then, with the view of preserving to the people claiming them quiet possession of the rights of property or rights of easement which they have so long enjoyed, you shall attribute these rights, if possible, to a legal origin so as to support them."

7 505 U.S. 1003 (1992).

8 *Supra* n. 7 at 1029.

9 The Court denied certiorari to the post-Lucas case *Stevens* v. *City of Cannon Beach*, which held that custom constitutes a "background principle" of state law and therefore is not a "taking" of property requiring compensation. 854 P.2d 449 at p. 456 (1994). In an unusual written dissent to the denial of *certiorari* written by Justice Scalia and joined by Justice O'Connor, Scalia said, "To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of constitutionality; and it is serious in the sense that the land-grab (if there is one) may run the entire length of the Oregon coast". 510 US 1207 at p. 1335 (1994).

10 G.S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (Chicago: University of Chicago Press, 1997), p. 8.

11 [1813] 2 Dow 40 (HL).

A. Custom in American legal theory

The resurrection of "custom" in American law has transformed England's village greens into the playground of American Ivy League legal scholars. At issue is what Greg Alexander has identified as the dialectic between market and proprietarian conceptions of property in American law.[12] For the English lawyer, the idea of property as commodity in American jurisprudence is "familiar to the point of banality".[13] What is less well known is the persistence of "proprietarian" concepts of property in US jurisprudence. Whilst the property as commodity vision emphasises individual preferences and the unrestrained market, the proprietarian tradition views property as the foundation of a proper social order. In this half of the dialectic the role of property law is not to facilitate exchange and maximise wealth, but rather to foster the "public good".[14]

The "schools" of law and economics and communitarian theorists in the US legal academy make-up the two halves of the American property dialectic. Law and economics scholars adhere to the property as commodity view. Concerned solely with "wealth maximisation" and positing human beings as rational economic actors motivated by self-interest, law and economics scholars seek the most economically utile solutions to property dilemmas.[15]

Communitarians, on the other hand, espouse a proprietarian vision of property. Property, in this view, is at the foundation of a normative vision of good governance. The appropriate use of private property is not that which maximises wealth, but rather that which serves the public good. Communitarians emphasise the inherently social nature of human beings who are dependent on others for their very survival. Far from placing trust in an unregulated market, the proprietarian view positively encourages market intervention where individuals are using their property in ways that fail to meet their social obligation to serve the public good.[16]

The doctrine of custom bridges the chasm between these two strands of American legal thought.[17] Law and economics scholars dedicated to the "neutral" value of wealth maximisation argue that private ordering, and the recognition of private ordering as legal custom by common law courts,

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12 *Supra* n. 10 at 7.

13 *Supra* n. 10 at 4.

14 *Supra* n. 10 at 14.

15 *Supra* n. 10 at 382.

16 *Supra* n. 10 at 2.

17 R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991), p. 7.

settle on solutions to "legal"[18] predicaments that are economically utile. Scholars such as Robert Ellickson analyse custom as an aspect of property law with an eye for its substantive outcome. In order to analyse whether private ordering has been effective in achieving a wealth-maximising rule, however, the law and economics scholar must evaluate both community processes and the context in which those processes operate.[19] Not all private ordering achieves the predicted wealth-maximising behaviour. This may be due either to time "lags" in the creation of custom to accommodate circumstance or to the existence of outsiders who bear the burden of externalities. According to Ellickson:

> [A] utilitarian judge would be wise to apply customary rules in contexts where those rules are more likely than legal rules to be welfare maximising in content. According to the hypothesis, a close-knit group acting in contexts where it was unable to impose losses on outsiders would be a reliable source of utilitarian customs. If the hypothesis is sound, a utilitarian judge could confidently defer, for example, to the customs of merchants engaged in repeat dealings, but not necessarily to the customary treatment of pedestrians by motorists.[20]

Law and economics scholars are committed, therefore, to both examining, and fostering, the process of the creation of legal customs. Close attention to the processes and situation of the subject community, however, must be paid in order to identify when a judge or legislator has "a comparative advantage" to community of "identifying a wealth-maximising practice".[21]

Communitarians also study the processes of community. Unlike law and economics scholars, however, they do so not in order to discover legal rules that achieve the apparently neutral goal of wealth maximisation. The communitarian's vision of custom, like her vision of property itself, is normative. Communitarians value custom because the process of its creation and preservation builds solidarity, reciprocity, liberality and a notion of trusteeship in pursuit of the "public good".

Given the reliance of these two schools on the doctrine of custom to support their respective theses, it was perhaps inevitable that a scholar should seek to "reconcile communal ownership with the premises of the commodity conception".[22] In her essay "The Comedy of the Commons:

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[18] Ellickson, himself, argues that many such predictaments are resolved "beyond the reach of the law" and cogently criticises legal theorists for not sufficiently understanding "nonhierarchiacal systems of social control". *Supra* n. 17 at 4.

[19] *Supra* n. 17 at 8.

[20] *Supra* n. 17 at 255.

[21] *Supra* n. 17 at 255.

[22] *Supra* n. 10 at 275.

Custom, Commerce, and Inherently Public Property",[23] Rose draws upon both traditions to argue that the proprietarian vision evident in doctrines such as public trust and local custom have been preserved by judges because they are economically, as well as socially, efficient.

In her analysis of the beach access cases, Rose (albeit tentatively) extends the logic of English local custom to more general public access to the beachfront on the basis of the utility – in both economic and social terms – of inherently public property. Rose's theory relies in part on the English doctrine of custom, yet custom can be used solely to vindicate *community*, not public, rights of access to property. The users may be "indefinite", but they are inhabitants of a particular locale.[24]

Custom is *lex loci* or local common law that arises by praxis of a particular local jurisdiction that is recognised by the central courts by judicial notice. Custom, by definition, is always contrary to the common law. Thus, a custom cannot be claimed by the public at large because a rule that applies to all the Queen's subjects is not custom at all but the common law itself.[25] Indeed, even inhabitants of adjoining parishes cannot collectively claim a custom because a custom must have been capable of origin in a single feudal jurisdiction.[26]

The requirements of local origin and use survived the abolition of feudal tenure in England. In 1996, the Court of Appeal in *R.* v. *Sudbury County Council, ex parte Steed*, held that claims to a town green by custom pursuant to the Commons Registration Act 1965 must be made on behalf of a certain locality.[27] In *Sunningwell*, the House of Lords "assume[d] without deciding that the user should be similar to that which would have established a custom". The Law Lords did not apply a strict rule of local use, however, and held that so long as a green was used predominantly by inhabitants of a village, use by outsiders did not vitiate a claim to have a town green registered.[28]

Carol Rose's "fieldwork" in English legal history is extremely limited. Moreover, such fieldwork is nearly impossible due to the inherently local nature of customary use in English law. British legal history, however,

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[23] C. Rose, "The Comedy of the Commons: Custom, Commerce and Inherently Public Property", *University of Chicago Law Review* 53/37 (1986), pp. 711–781 at 711.

[24] A.C. Loux, "The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century", *Cornell Law Review* 79 (1993), pp. 183–218 at 213 and 215.

[25] Earl of *Coventry* v. *Willes* [1863] 12 W.R. 127, 1 at p. 28 (QB).

[26] *Edwards* v. *Jenkins* [1896] 1 Ch. 308 at pp. 312-13; *Sowerby* v. *Coleman* [1867] 2 LR-Ex 95 at 100.

[27] [1997] Est. Gazette 146.

[28] *Supra* n. 3 at 172.

does provide a case study of Rose's "inherently public property". On the links of St Andrews, the world's most famous town green, the customary right to play golf was reserved upon the sale of the links in the nineteenth century for members of the community and all golfers who wished "to resort thither for that amusement".[29]

Like English law, the Scots law of custom is essentially local and based in feudal jurisdiction, although customary rights are recognised as part of the common law rather than as a local exception to it.[30] Once title to claim a customary right is established, forty years' use can confirm a variety of public rights, but title to pursue is limited to an inhabitant of a burgh claiming rights in the land of the feudal superior.[31] In the case *Dyce* v. *Hay*,[32] the dual requirement of inhabitancy and a feudal superior was vigorously reasserted by the Lord Justice-Clerk, so as to cut off a movement in the Court's jurisprudence toward a recognition of an ever increasing variety of public rights of access to land.

Dempster v. *Cleghorn* is atypical of Scots custom cases because the right to recreation, reserved in the grant of land, existed not merely in the community but in golfers generally. Thus the saga of Dempster presents a unique case study of Rose's "comedy of the commons".

II. DEMPSTER V. CLEGHORN

One does not often think of commons and common riots in the context of Scottish history, at least in the modern period. This is because commons or commonties, other than those belonging to the King and Royal Burghs, were enclosed by an Act of Parliament in 1695.[33] Commonties in Royal Burghs were held by the incorporate body of the burgesses and inhabitants of the superior, the King, and could not be divided. Such property was part of the "common good" of the burgh.[34] At one time commonties in royal burghs could not be sold[35] or even set in tack for more that three

[29] D. Hay Fleming, *Historical Notes and Extracts Concerning The Links of St Andrews 1552–1893* (St Andrews: Citizen Office, 1893), p. 20.

[30] J.T. Cameron, "Custom as a Source of Law in Scotland", *Modern Law Review* 27/3 (1964), pp. 306–321 at 306.

[31] John Rankine, *A Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland* (Edinburgh: W Green, 1909), p. 352.

[32] *Dyce* v. *Hay* (1849) 11 D. 1266.

[33] *Acts of the Parliaments of Scotland*, ed. Thomas Thomson and Cosmo Innes (Edinburgh: Record Commission, 1814–1875; hereafter *APS*), vol. 9, p. 462 (c. 69) (1695).

[34] Thomas Craig, *The Jus Feudale with appendix containing the Books of the Feus* (J. A. Clyde trans., Edinburgh: W. Hodge, 1934) I. xv. 16.

[35] *Supra* n. 34.

years[36] and town Magistrates had to account yearly to the Exchequer for revenues and debt on the common good.[37] By the eighteenth century, tacks for longer than three years and sale (or feuing) of the common good was permitted, but only if it was for the benefit of the inhabitants.[38] Private burgesses who thought that the common good had been mismanaged in some way could sue the magistrates.[39] Such mismanagement might include infringement of a customary right of the inhabitants.

Custom defined which uses of the common good constituted a "benefit". As Lord Hailes said in 1776:

> Magistrates are administrators and guardians, not uncontrolled proprietors. They may feu waste ground, but not ground already occupied to its best advantage. *Here*, for the temptation of a ground rent of 15 shillings *per annum* from each house, they would deprive the whole inhabitants of a green which is at present useful. . . . The Magistrates of Glasgow might build the noblest street in Scotland by feuing out the green of Glasgow, and yet the Court would never authorise such a plan.[40]

Custom created public rights in land, which inured to the benefit of burgh inhabitants. Once such rights had been acquired by forty years' praxis, the proprietor's use of the land, whether magistrates or feudal superior, was limited by the quasi-real burden of the customary use.[41] Moreover, as part of the common good, magistrates had a duty as a matter of public law to protect the rights acquired by prescriptive use of burgh inhabitants.

In *Dempster* v. *Cleghorn*, the right of the inhabitants to golf on the links was expressly reserved in the feu by the magistrates to the Messrs. Dempster. The controversy arose because the inhabitants alleged that, by turning the links into a rabbit warren, the Dempsters were violating the rights of the inhabitants in the golfing ground, which had been expressly reserved. The *Dempster* case was the first case heard by the Court of Session where the inhabitants sued not the magistrates as managers of the common good, but rather the taker of the feu. The case presented novel questions both of standing or "title to pursue", as well as of inhabitant custom.

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36 *APS*, *supra* n. 33, vol. 2, p. 227 (c. 19) (1491); vol. 4, pp. 30–31 (c. 39) (1593).

37 *APS*, *supra* n. 33, vol. 9, p. 462 (c. 69) (1695). Craig, *supra* n. 34, I. xv. 16. *APS, supra* n. 33, vol. 2, p. 227 (c. 19) (1491); vol. 4, pp. 30–31 (c. 39) (1593). *Laing, and other Burgesses of Selkirk* v. *Magistrates*, M. 2515, 2520 (Nov. 28, 1748).

38 *Dean* v. *Magistrates of Irvine*, M. 2522, 2523 (July 4, 1752); *McDowal* v. *Magistrates of Glasgow*, M. 2525 (Nov. 8, 1768).

39 *Anderson* v. *Magistrates of Renfrew*, M 16122, 16123 (June 30, 1752).

40 *Magistrates of Kilmarnock* v. *Wilson*, Hailes 738 (Dec. 20, 1776).

41 K.G.C. Reid, "Defining Real Conditions", *Juridical Review* (1989), pp. 69–90 at 82.

A. The sale of the links of St Andrews

The part of the common good that is the subject of *Dempster* v. *Cleghorn* is recorded in the Directory of Former Scottish Commonties as the "Pilmour Links and Commonty" and consists of 280 acres of land.[42] The land was used by the Archbishops of St Andrews and when the prelacy was abolished was let in tack for use by various individuals.[43] In the eighteenth century, the City fell on hard times. Two merchants, Robert Gourlay and John Gunn, agreed to advance to the City the sums needed in return for the power to sell by public roup various lands held by the City, including the links.[44]

The first roup in June resulted in no offers, but in October the links were sold to Thomas Erskine, later Lord Kellie, former Captain of the Golfing Society and pursuer in *Dempster* v. *Cleghorn*. Erskine outbid Charles Dempster by £5.[45] Erskine let the links to George Forgan for use as a rabbit warren and offered to provide breeding rabbits from links he owned at Cambo. Before the warren could be created, Dempster bought the property and Forgan resigned his rights, receiving compensation for the peas he had sown there.[46]

In the Disposition granting the land to Erskine, and under which the Dempsters took the feu, certain rights were reserved to the inhabitants and the burgesses of the City. These included the liberty and privilege of use of the bleaching ground and the liberty to "cast and winn divots" (take turf) for the burgesses:

> [U]nder this reservation always, that no hurt or damage shall be done thereby to the Golf Links; nor shall it be in the power of any . . . proprietor of said Pilmor Links to plough up any part of the said golf links in all time coming, but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants and others who shall resort thither for that purpose.[47]

It is this reservation that is at the heart of the litigation between the Dempsters and the body public of St Andrews. The right to golf on burgh property may be claimed by custom,[48] but in St Andrews this right was

[42] I.A. Adams (ed.), *Directory of Former Scottish Commonties* (Edinburgh: Scottish Record Society, 1971), p. 15.

[43] Information for Charles and Cathcart Dempsters, NAS, CS 236/D/14/9 (May 28, 1807), p. 9; *supra* n. 29 at 7.

[44] *Supra* n. 29 at 15.

[45] *Supra* n. 29 at 15.

[46] State of Process, St Andrews University Muniments No. U4802 (Dec. 17, 1805) (Defenders' Proof), pp. 66–63.

[47] Information for Hugh Cleghorn, St Andrews University Muniments No. U4802 (Feb. 8, 1805), p. 3.

[48] *Supra* n. 31.

expressly reserved by the Town Council and was never contested by the Dempsters. What was contested was whether the links were being reserved as in times past, given the damage caused by the Dempsters' rabbits with their philoprogenitive propensities.

Charles Dempster and his son Cathcart entered into possession of the links on Whitsunday 1799 and let the links to James Begbie. He tried to raise sheep in the first season, but of "10 score only four score survived the first year".[49] After this failure the Dempsters and their tenant converted the land into a rabbit warren by importing 100 pairs of rabbits.[50]

In November, 1801, the first sign that trouble was on the horizon appears in the Town minutes in the form of a letter sent to the Town Council by the Captain of the Golfing Society, Mr. George Cheape. Cheape wrote to complain about the destruction of the links by the Dempsters' rabbits. The Golfing Society claimed "an absolute right acquired by prescription" to the links and noted that this right had been protected by the "Good City" by reservation in the sale.[51]

B. The action

In January, 1803, the Society of St Andrews Golfers authorised the raising of a subscription to institute a legal action against the Dempsters and their tenant. Dempster responded to this threat by writing to Hugh Cleghorn, then Captain of the Golfers, offering to hire someone to keep the links in good order and to pay the difference between that person's salary and the present cost of upkeep. The offer was not accepted.[52]

Instead, offers of money poured in from as far away as India and the West Indies to support the litigation.[53] By April they had the funds to proceed and on the 30th of that month a summons was executed in an action for declarator in the Court of Session.[54] The action was brought by prominent inhabitants and University personnel "for themselves and on the behalf of the other Inhabitants of the City of St Andrews, or others,

[49] *Supra* n. 47 at 23 (quoting a published announcement by the Dempsters).

[50] The golfers said they were the wrong kind of sheep: "Mr Dempster . . . being a good farmer, it is supposed he reaps a suitable return. But, unfortunately, in managing the pasture ground, instead of making use of the small sheep fitted for the grass, Mr. Dempster or his tenant put upon it sheep of a large size, who require a richer pasture, and who could not thrive or even live on the soil; and, besides, the sheep thus brought to the links by Mr. Dempster were at the time unhealthy." *Supra* n. 47.

[51] *Supra* n. 47 at 25; Tom Jarrett, *St Andrews Golf Links: The First 600 Years* (Edinburgh: Mainstream Publishing, 1995), p. 27.

[52] State of Process, St Andrews University Muniments No. U4802 (Dec. 17, 1805), p. 7.

[53] The list of subscribers is available at the University of St Andrews.

[54] *Supra* n. 29 at 29–30.

who may resort thither for playing Golf upon the Golfing Links of St Andrews". The pursuers sought a declarator that the inhabitants and others, "have good and undoubted right and title, at all times, and upon all occasions, to resort to the ... Golfing Links of St Andrews ... to exercise the privilege and enjoy the comfort and amusement of playing golf"; that the Dempsters should not "hinder or molest" them in their pursuits; and that the Dempsters should be "decerned and ordained to desist from putting or keeping rabbit on the links and remove or destroy the rabbits that were there."[55]

C. Title to pursue

The Lord Ordinary appointed the pursuers to give in a condescendence on the question of their title to pursue as well as the particular grounds of the action and on consideration of these materials ordered Informations to be prepared for the Inner House. Two issues arose regarding the title to pursue. The first was whether anyone other than the magistrates could sue the Dempsters. The defenders argued title to pursue was reserved by the Magistrates in the feu, who had not complained.[56] The second was whether the pursuers could include not only inhabitants of the burgh, but individuals from various towns surrounding St Andrews on behalf of themselves and all "others, who may resort" to the golfing links.[57]

The Court of Session looked to the reservation and "held it to be clear, that the reservation in the feu so qualified the right of the defender, that he was bound to suffer no damage to be done to the golf ground; and that, if it had been damaged, there was a right somewhere to prohibit the continuance of it."[58] The most controversial aspect of the pursuers' title to sue was the "others, who may resort" to the golfing links. The Dempsters argued that title to pursue could not exist in a group as amorphous as "the indefinite multitude who play golf."[59] The House of Lords, on appeal, would focus on this aspect of the action in remitting the cause to the Court of Session.[60] Although some Lords of Session found that solely the inhabitants had title to pursue, the Lord President and the other Lords of Session in the majority found that title to pursue could lie with all golfers

55 *Supra* n. 52 at 3–4.

56 The Town would not join the Golfer's action until February 17, 1806. *Supra* n. 52 at 13.

57 Information for Dempsters (Jan. 9, 1805), Faculty Collection of Session Papers March 1805–July 1805, p. 18.

58 M. 16141, 16143 (May 17, 1805).

59 *Supra* n. 58 at 16142.

60 *Supra* n. 11.

who played on the links of St Andrews. The majority based their decision on the case *Tod and Stodart* v. *Magistrates of Edinburgh*, where the title to sue was held by the public at large.[61]

Tod was a dispute over access to the foreshore after land adjacent to Leith Sands had been feued out by the Magistrates of Edinburgh. Although the real dispute appears to have been between two companies, it was brought in the name of the public in whom it was claimed there had been access to "the sands and race grounds and to the place for the execution of pirates within the sea-mark for *time immemorial*".[62] In *Tod* the title to pursue lay not only in inhabitants of Edinburgh, but in the public at large because the pursuers were claiming a public road.

The Inner House held that under the terms of the feu to the Dempsters the title to pursue could be found to be equally broad. The Court of Session sustained the pursuers' title on May 17, 1805.[63] The Golfers and Cheape gave in separate condescendences, which were answered by the Dempsters. On the 9 July 1805, Lord Polkamet granted commission for the taking of proof for both parties and set a date to report the cause to the whole Lords.[64]

D. The interlocutors

On 19 February 1806, the Court issued an Interlocutor.[65] The Lords of Session had much sympathy for the golfers, but stopped short of "removing the defenders from the links" or ordering the Dempsters to destroy the rabbits. Such an order, however, was hardly necessary because they found that "that the pursuers and the inhabitants of St Andrews and others have a right to take, kill, and destroy the rabbits upon the said links as they were formerly in use to do".[66]

A short interlocutor, but with two errors. As Lord Eldon would point out on appeal in 1813, the pursuers did not ask for the defenders to be removed from the links, merely their rabbits. The second error was successfully argued by the Dempsters in a reclaiming petition. The summons had not mentioned a customary right to kill rabbits on the golf course, and thus

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61 *Supra* n. 58 at 16143.

62 Bill of Advocation, *Tod and Stodart* v. *The Edinburgh Glass-House Co.* 45 Blair Collection 43, p. 5. On July 2, 1793 the court "Found that the whole grant in dispute must continue open" (Available at the Advocates' Library).

63 Interlocutor signed February 19, 1806, *quoted* in The Case of Respondents in the Original, and Appellants in the Cross Appeal, 3 (Record Office House of Lords).

64 State of Process, St Andrews University Muniments No. U4802 (Dec. 17, 1805) 13.

65 *Supra* n. 63 at 3.

66 *Supra* n. 11 at 45.

the portion of the interlocutor that found such a right was *ultra petita*. The Lords of Session agreed and said in their interlocutor of May 13, 1806, that "the interlocutor reclaimed against, in so far as it does thereby find and declare that the pursuers, the inhabitants of St Andrews and others, have a right to take, kill, and destroy the rabbits upon the said links, as they were formerly in use to do, goes beyond the conclusions of the libel; they recall the said finding as incompetent without prejudice to the questions when tried in a proper shape."[67]

In May 1806, this was how the action stood. The Lords of Session clearly believed that the rabbits were doing harm to the golf course. Rather than order the Defenders to destroy their own rabbits, they found that the inhabitants had an immemorial right to do so. Upon the reclaiming petition they acknowledged the pleading irregularity and rescinded that part of the interlocutor finding a customary right of the inhabitants to kill the rabbits.

E. The commonty riot

This state of affairs raised a fundamental question about the nature of local custom as a source of law in Scotland. Does a customary use become a legal right by virtue of a court declaration in Scots law, or does the court merely "recognise" the existence of the right when it is faced with a dispute over its exercise? The pursuers sought an advocate's opinion on this point. In a letter written on May 31, a copy of which was sent to Magistrate Haigh, the writer said that "Mr. Bruce is to get an opinion of counsel . . . you are in safety to go in killing the Rabbits. I shall not interfere when counsel is to be consulted but I know *what I would have done* long ago."[68] On June 14, 1806, Mr. Bruce finally notified Mr. Grace, the golfers' solicitor and Town Clerk of St. Andrews, of counsel's conclusions. The advice was signed by the Solicitor General and counsel for the Magistrates, whose concurrence was sought as superiors of the links. Mr. Bruce wrote:

> As that opinion is clearly in favour of killing the rabbits I think you should immediately setting [sic] about doing what is to be done – I have suspicions that when you begin to destroy the Rabbits, Messrs. Dempster may apply for Suspension and Interdict which will be presented to the Lord Ordinary on the Bills for the time – Lord Justice Clerk is on the Bills for next week – His opinion was very favourable for the Golfers and I have no doubt that he will remember the circumstances so fully as to enable him to give a proper deliverance even without an Answer. The Judges, who succeed him on the Bills for the two succeeding weeks were against the Interlocutor and on that account I have some fear they may be inclined to grant a Sus[pension] which would be unlucky – If therefore you cannot

67 *Supra* n. 11 at 46.

68 Letter dated May 31, 1806, St Andrews University Muniments No. B 65/22/70.

proceed immediately, I would not reckon it prudent to begin between the 23rd June and 6 July.[69]

On the fourth of July the Society of Golfers read into the minutes the opinion of their lawyers and passed a resolution declaring that the inhabitants and the public in general "are Entitled [to] exercise ... the right which they have from time immemorial enjoyed to destroy the Rabbits on the links". They ordered that their opinion be published to the inhabitants, together with that of the Town Council that the Inhabitants "would be protected in this their undoubted legal right".[70] On 5 July the resolution was published by directions of the Magistrates by the town Sergeants and, according to the letter of suspension and interdict, "all and sundry were invited to enlist under the standard of their authority to shoot kill and destroy every thing they could find upon the links".[71]

The Dempsters published a counter-advertisement stating that such a right had not been found by the Lords of Session and threatening prosecution, "but the lower order of the people naturally fond of mischief were extremely glad of the countenance of the magistrates and in defiance of all the complainers could say ... went out on Saturday the Fifth"[72] armed with guns spades and dogs and did "incalculable damage to the surface of the ground".[73] This was nothing less than the Suspenders expected, for when the "Magistrates whose duty it is to preserve peace and good order in society become the Instigators of a Riot ... the inferior classes will follow their instructions".[74]

The Dempsters filed their Letter of Suspension and Interdict on Monday the 7th of July.[75] Lord Armadale refused to grant the interdict (as predicted by the Golfers' solicitor in his letter advising the Golfers to kill the rabbits) and appointed the petition to be answered. The Golfers failed to give answers and the interdict was granted by default on December 29, 1806. However, when the action came before Lord Armadale he ordered that informations be prepared so that he could report the cause to the full court.[76] The court ruled that "the chargers must confine themselves to what has been the immemorial Practice of killing Rabbits on what is

69 Letter dated June 14, 1806, St Andrews University Muniments No. B65/22/70.

70 Minutes of Society of St Andrews Society of Golfers, July 4, 1806 (available at British Golf Museum, St Andrews).

71 Letters of Suspension and Interdict, NAS, CS 236/D/14/9 (July 7, 1806) 12.

72 *Supra* n. 71 at 13.

73 Information, *supra* n. 43 at 7.

74 *Supra* n. 71 at 14.

75 *Supra* n. 71.

76 *Supra* n. 63 at 3.

denominated the Links or Common of St. Andrew's, exclusive of such parts thereon as shall happened to be under crops at the time and to this extent recall interdict".[77]

The Dempsters appealed to the House of Lords against the declarator of the Court of Session in the first action (that they could not keep the rabbits) as well as against the recall of the interdict, which had prevented the inhabitants from killing rabbits on the links. The Golfers, likewise, appealed the declarator in the first action because the Dempsters had not been ordered to kill the rabbits and cross-appealed against the imposition of the interdict on December 29, 1806.[78] In the meantime they obtained legal advice on how to "play havoc amongst the rabbits" pending appeal without being held in contempt of the House of Lords. Advocate John Clerk was of the view that the interlocutor finding the customary right of the inhabitants to shoot rabbits on the links, and that recalling the interdict which temporarily prevented them doing so, both remained in effect pending the appeal. Thus, he concluded the inhabitants could continue to extirpate the rabbits, whether with guns or by setting snares upon the links.[79]

F. The appeal to the House of Lords

There was a significant back-log of cases from Scotland in the House of Lords in the early nineteenth century, and the case was not heard by the Lords until December, 1813.[80] In the nineteenth century, Scottish judges would only rarely be summoned to the House. Often the only professional judge who would attend the House when hearing appeals would be the Lord Chancellor, sitting in his capacity as Speaker of the House of Lords.[81] In *Dempster*, it is the speech of Lord Chancellor Eldon that is reported, and as is often the case with Scots appeals of this period, his judgement reflects his knowledge of the English law of custom.

The case for the Dempsters was argued by Henry Brougham, Scots advocate and barrister, founding editor of *The Edinburgh Review* and future Lord Chancellor. The Court of Session's decisions finding a title to pursue, as well as the inhabitant custom of shooting rabbits on the links, were both argued before the Lords. On the question of the title to pursue, Lord Eldon maintained that the title had been argued on the basis of the

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77 *Ibid*.

78 *Supra* n. 66 at 4.

79 Opinion of Counsel, John Clerk, 3 August 1807. St Andrews University Muniments B65/22/70.

80 Lord Fraser of Tullybelton, "Constitutional Law", 5 *Stair Memorial Encyclopaedia* (Edinburgh: The Law Society of Scotland/Butterworths, 1987), p. 342.

81 Lord Keith of Kinkel, "Courts and Competency", *supra* n. 80, p. 344.

bargain made by the corporation in the original act of disposition, yet the title to pursue had been granted to the pursuers before the City had become a party to the action. "[C]ertainly it was a different question whether such a title could be set up by prescription and whether it might be reserved by bargain. But, on looking at the record, it appeared that the Court had given no judgement on the question of title, as founded on the acts of the corporation." The question of the title to pursue was remitted to the Court of Session to consider because the Lords could not decide a point on appeal that had not been considered by the court below. Lord Eldon was also concerned that the original summons in the declarator had claimed title not only in the inhabitants of the burgh, but also for "all others choosing to resort thither for this amusement of playing golf" who were not residents of St Andrews.

Lord Eldon was incorrect in his assertion that the issue of title to pursue had not been thoroughly argued and decided by the Inner House. The hand-written notes of the judges' opinions that survive in the Session Papers indicate that the Lords of Session considered the title of the inhabitants in light of the reservation in the feu. The Lord President found the title to be "in the Town of St. Andrews – the whole of it – reserved in the feu itself". Lord Armadale believed the question to be difficult on the decisions but "as the inhabitants all have the right, some are entitled to enforce". Even Lord Meadowbank, who disagreed with his fellow Lords of Session, did so on the basis of the reservation in the deed which "did not give any personal right to [the inhabitants] to insist" since "the inhabitants do not constitute a corporation".[82] The Lord Ordinary found that title was based "not only on Prescription but on a special Reservation of the Right for the use of the inhabitants in general". Indeed it was only this reservation in the Acts of Sale and Disposition that prevented the Magistrates being sued themselves by the townspeople. In his view the Magistrates had "acted very improperly in feuing out . . . [the] links, at least the golfing ground".[83]

As for the substance of the action for declarator, the Court was much confused:

> . . . the defenders had no right to keep the rabbits, but negatived the alleged obligation upon them to destroy their own rabbits; finding, however, that the pursuers, inhabitants and *Others* had a right to destroy the rabbits. . . . but on reviewing this interlocutor, the Court found they were wrong in declaring the right in the pursuers to kill and destroy the rabbits . . . That reduced the finding to this – that the defenders were not to keep rabbits, but they were not bound to destroy or to remove them. If, then, they were not bound to destroy or

[82] Hand-written Notes, Faculty Collection Session Papers Mar. 1805–July 1805, No. 209.

[83] Hand-written Notes Campbell's Collection Session Papers 1806, No. 50.

remove them (nobody else having a right to do so), and yet were bound not to keep them, what was to be done.[84]

When the pursuers took to the golfing green to exercise their customary right to destroy the rabbits, the Dempsters had instigated a second action seeking a suspension and interdict. On the results of this action, Lord Eldon was equally puzzled. The Court of Session concluded that the pursuers could kill the rabbits on the links exclusive of those parts under crops. But no proof was taken in the second action regarding this alleged right and upon the first cause the Court had said that they could not decide the question of the right of the pursuers to kill the rabbits. How could the Court of Session have predicated a right in the second action upon a custom that had not been found in the first? On this point, too, a decision in the court of first instance must be taken before the House of Lords could consider it on appeal.[85]

Lord Eldon clearly doubted that any such custom existed or perhaps that any such custom could exist. In English law, commoners could abate the common of any obstruction save that of rabbits.[86] The formal ground upon which he remitted the case to the Court of Session was that the custom had never been pled or proved, but this assumes that custom does not create rights without the prior imprimatur of a court. In the Action for Declarator the Court of Session was satisfied that such a custom existed but was incompetent to so rule because the custom had not been pled in the original summons. In the second action, the inhabitants sought to use custom not as a sword (or spade) but as a shield. The custom made the actions lawful and required the court to deny the Dempsters an interdict. The Golfers included the witness statements gathered in the Action for Declarator in their Information filed in the Action for Interdict as evidence of the custom pled. Eldon was incorrect in saying that no proof had been put before the court in the second action.

Even if the custom could have been proved, Lord Eldon, for one, doubted its reasonableness, for "it [is] a strong thing to say that all who choose to do so might play at golf on a man's ground, and, for that purpose, destroy all the produce which it was best calculated to yield, and prevent its being used for those ends to which it alone could be applied beneficially

84 *Supra* n. 11 at 63.

85 *Supra* n. 11 at 64.

86 *Cooper* v. *Marshall* 1 Burrow 259–268. For a fascinating study of the background to the commons riot, *see* D. Hay, "Poaching and Game Laws on Cannock Chase", in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. D. Hay, P. Linebaugh, J. Rule, E.P. Thompson, and C. Winslow (New York: Pantheon Books, 1975) at 225.

for the owner."[87] The Golfers had suggested that the Dempsters' tenant switch to raising black cattle, but as Eldon observed "if it were possible to feed black cattle there, if these balls got into what they occasionally left behind them, they would be in a worse scrape than if they got into a rabbit scrape".[88] In English law, reasonableness was a question of law for the courts to determine before taking judicial notice of a local custom. In Scots law, the law of inhabitant custom was far less developed, and no such test existed. Yet aside from its reasonableness, was Lord Eldon correct to doubt this custom?

The evidence of a genuine legal custom is ambiguous at best. In the various tacks submitted to the court we find that in 1732 the links were let for 19 years "with power to the tacksmen to catch and take all the rabbits in the said links".[89] In the tack of 1751 the inhabitants may shoot, take and destroy rabbits, in any place on the links without harm to the golf links.[90] In 1786, the tack specifically states that the links shall not be used as a warren, but no such language appeared in the feu to the Dempsters' predecessor, the Earl of Kellie.[91] The Scottish courts required proof of forty years' use to recognise a true custom, which was the prescriptive period for the creation of a positive servitude. The depositions show that as recently as twenty three years before the proof in the Dempster action was taken, the exclusive right to shoot was let by the then current holder of the feu to various inhabitants.[92]

Even aside from the question of a sufficient period of use, in order for custom to arise by prescription, there must be an element of openness and certainty about it.[93] This requirement ensures that proprietors of land, and

87 *Supra* n. 11 at 64.

88 The golfers had complained that the Rabbits interfered with their game "not merely by their Holes and Burrows, but by the Paths they make, and what are called Scrapes, destructive of the Turf, which stop the Balls of Golf-players". [1813-14] Appeal Cases, No. 51, p. 5.

89 State of Process, St Andrews University Muniments No. U4802 (Dec. 17, 1805) (Inventory and Excerpts of Productions made on the part of the Pursuers), p. 67.

90 *Supra* n. 47.

91 *Supra* n. 47 at 68.

92 In his deposition, Alexander Fernie said that he "took a lease of the rabbits in the links from Robert Nicol, for one killing season 23 years ago: That at this time, the deponent had power from Robert Nicol to keep people from killing the rabbits, otherwise he would have had nothing to do with the lease; and he did keep off every person he saw attempting to kill them". *Supra*, n. 47 at 59. David Edie, weaver, said that "during Robert Nicol's lease; David Goodfellow was tacksman for the rabbits for one year when the deponent acted under him ... and Goodfellow challenged any person observed hunting rabbits". *Supra* n. 48 at 64. Edie, too, took the rabbits for a year. *Ibid*.

93 *Supra* n. 30 at 306.

potential feuars, are aware when a burden is being, or has been, created upon the land by prescription.[94] This is why only positive servitudes can arise by prescription. A negative servitude, such as an obligation to refrain from keeping a rabbit warren, could never arise by prescription because only positive acts alert proprietors and potential feuars that the prescriptive clock is ticking. Thus the Court of Session found that the inhabitants had a right to shoot the rabbits, rather than finding a negative servitude preventing the Dempsters from keeping of rabbits on the links. Yet no evidence of such a certain custom of shooting rabbits can be found in the record.

This is particularly so given that the Dempsters when they took the feu could not have known that they, or their tenant, could not create a rabbit warren. The Earl of Kellie believed that he could let the land for a warren, and his tenant said in his deposition that he could not have paid the rent demanded if he could not keep rabbits.[95] Lord Kellie's agent, Stuart Grace, would have known about any limitations regarding a warren on the land because as Town Clerk he, or his deputy, had drafted the articles of roup. Grace stressed in his deposition that it was as a "private man of business of the Earl of Kellie" that he knew that the links had been let as a rabbit warren and "that so far as he recollect[ed] the Town Council knew nothing of this".[96] If this claim were not difficult enough to believe on its face, it is contradicted by the evidence of Alexander Kirk, Innkeeper and member of the Town Council who "remembers it was a topic of conversation in the Town-Council at the time, that the links would make a good rabbit-warren: That he heard both Bailie Richard and Mr. Grace, the town-clerk, say so."[97] Another member of the Council, "Mr. Andrew Walker, remembers the same suggestion being made by way of a joke."[98] Lord Kellie was likely to have been very well informed as to the intent of the Magistrates in inserting the reservation in the form it appeared, and yet he believed that he could let the land as a rabbit warren. To prevent Dempster from doing so, given the admitted fate of the sheep, was in fact a very great burden, particularly given the weak evidence of any genuine practice of shooting rabbits on the links.

94 *Supra* n. 31 at 419.
95 *Supra* n. 46 at 63.
96 *Supra* n. 46 at 66.
97 *Supra* n. 46 at 67.
98 *Supra* n. 46 at 67.

G. Epilogue

Dempster v. *Cleghorn* never did again come before the Court of Session. Perhaps this was because the rabbits had been done away with by the shooting and snaring by the inhabitants that carried on unabated between 1806 and 1813, when the case was finally heard by the House of Lords. In 1821, one of the pursuers, James Cheape of Strathtyrum, bought the feu from the Dempsters, and declared at the Society's annual dinner that "in doing this, [he was] confident that in putting an end to all future litigation, I am rendering a service to my successors as well as to the Society".[99] Ironically, one year after James Cheape took possession he prosecuted a townsperson for shooting rabbits on the links, to which charge the defendant claimed custom. He was convicted by the magistrates with one dissenter, Magistrate Haigh.[100] A custom so quickly created could, it appears, as easily be extinguished, even without a formal decree of the Court of Session.

III. A COMEDY OF THE COMMONS?

In *Dempster* v. *Cleghorn*, the Court of Session did not "recognise" the custom on the links of St Andrews; they created it. The great rabbit massacre was no ordinary commons riot. Whilst the rioters were members of the "inferior classes"[101] who were protected by "two of the most desperate Ruffians which the County of Fife could furnish",[102] the organisers of the riot were the Society of Golfers and the Town Council, acting on the instructions of their Edinburgh lawyers. Is *Dempster* v. *Cleghorn*, therefore, an appropriate case study of Rose's legal theory, if the common right was a legal fiction and the instigators of the riot not so "common" after all?

It is unclear whether the Court of Session was conscious of the slender evidence upon which they found the custom that saved the links of St Andrews. In England, where custom doctrine was more highly developed, the foundations of legal custom lay in legal fictions of immemorial use and legal presumptions of antiquity. Custom's origins must be found in the past, thus custom cases are filled with judicially imagined "histories".[103]

99 Jarrett, *supra* n. 51 at 27.

100 *Supra* n. 68; *Cheape* v. *Carmichael* (JP Court 1822) (available at University of St Andrews).

101 *Supra* n. 71.

102 Memorial for Charles and Cathcart Dempster, NAS, CS 236/D/14/9 (May 28, 1807).

103 *Supra* n. 24 at 189, 209.

In nineteenth-century England, customs are based upon the rules of the "democratic" feudal manor, where a lord and his tenants agreed to customs that benefited the community as a whole.[104] In twentieth-century Oregon, the custom of access to the dry-sand beach was based on the observations and practices of the first European settlers who found the "aboriginal inhabitants using the foreshore for clam digging and the dry-sand area for their cooking fires . . . and continued these customs after statehood".[105] The usefulness of these histories to the legal historian is not what they purport to tell us about the past, but what they reveal about the judges that created them to protect what they deemed to be legitimate uses of property.

Although custom as a source of law is as old as the common law itself, custom doctrine has undergone significant changes throughout history that reflect changes in social and legal attitudes about property and its use.[106] Indeed, custom is one of legal history's best barometers of social and economic change. That this would be true is self-evident as custom-law arises out of the praxis of the community and its courts. Yet the changing nature of custom is often hidden because its legitimacy is seen to derive from its antiquity.

Legal custom, then, is the result of "practice in search of a doctrine".[107] In England, judges openly declare customs a fiction and imagine the historical origins of praxis, whilst announcing the "reasonableness" or utility of the uses they are protecting. Moreover, these "fictions" change over time as society develops new understandings of what is reasonable or utile. The only stable element of custom is its policy: to recognise judicially that praxis can create law.

As for the social rank of the instigators of the riot, it is not atypical that the leaders of those riots that come to the attention of legal historians via common law cases were men of position. Another famous rabbit massacre – the riot on Cannock Chase – was led by wealthy villagers who sought legal advice prior to taking matters into their own hands.[108] Despite their

104 *Supra* n. 24 at 189, 209.

105 *Supra* n. 4 at 673.

106 For works charting changes in custom doctrine, see C. Hill, "Customary Liberties and Legal Rights", *Liberty Against the Law: Some Seventeenth Century Controversies* (London: Penguin Books, 1997), J.M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge: Cambridge University Press, 1993), E.P. Thompson, *Customs in Common* (London: Merlin Press, 1991), Loux, *supra* n. 24, and Peter King, "Gleaners, Farmers and the Failure of Legal Sanction in England 1750-1850", 125 *Past and Present* 116 (1989).

107 M.A. Clawson, "Prescription Adrift in a Sea of Servitudes: Postmodernism and the Lost Grant", *Duke Law Journal* 43/4 (1994), pp. 845–878 at 864.

108 Hay, *supra* n. 86 at 225.

lawyers' advice not to remove the rabbits by force,[109] the wealthy villagers "paid the village crier ... to announce that any man who joined 'the Free Company on Cannock Wood' would have meat and drink and 1s. 6d. a day, or all the rabbits he could kill".[110] The leaders then "prudently stayed away from the battle itself".

Legal historians and theorists rely on legal texts as their sources. Litigation costs money and commons cases, like all litigation, generally involve persons of wealth. Legal disputes that reached the courts were rarely "typical" commons disputes. As E.P. Thompson, the leading historian of custom and common right has said, "The English Reports are not packed with cases in which poor commoners challenged their lords or great landowners in the highest courts of the land. ... Unless some party with a substantial interest was involved on their side, their rights were liable to be lost silently and without context".[111]

Dempster may not have involved the "genuine" local custom of poor and landless cottagers, but then custom cases rarely do. Moreover, once custom is tested at law, what emerges is a legal not an historical truth. The fact that Rose founds her theory on legal cases makes the riot and litigation of *Dempster* typical enough for a case-study of Rose's theory.

A. Inherently public property

In her essay "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property",[112] Rose examines the development of U.S. case law in the nineteenth century regarding what she calls "inherently public property". Rose seeks to solve a riddle of law and economic theory: why at a time when classical economic theory prevailed did courts develop doctrines of public use for some types of property?

Classical economic theory holds that giving landowners the right to exclude maximises the value of the property, both for the individual owner and the public at large. Private property regimes encourage owners to develop and care for landed resources because they can "capture" the value of their efforts upon sale. Exclusive control of land fosters this value by allowing the identification of owners by buyers who value the property most highly. Thus private property encourages the "best" or "highest" use of land. Common property, on the other hand, results in the "tragedy of the commons". No one wants to invest in a resource the value of which can be "captured" by another common holder, and an incentive exists for the

[109] Hay, *supra* n. 86 at 225.
[110] Hay, *supra* n. 86 at 228.
[111] Thompson, *supra* n. 106 at 141.
[112] *Supra* n. 23.

individual commoner to grab as much of the common resource as possible before her fellow commoners do.[113]

Despite the overwhelming dominance of this ideology of the efficiency of private property, U.S. courts throughout the nineteenth and twentieth centuries have developed various doctrines that justify public use, access and management of "inherently public property". Such property has two characteristics: it is property that is "physically capable of monopolisation by private persons – or would . . . [be] without doctrines securing public access against such threats. Second, the public's claim . . . [is] superior to that of the private owner, because the properties themselves . . . [are] most valuable when used by indefinite and unlimited numbers of persons – by the public at large".[114] Inherently public property is not wholly controlled either by government or by private persons, but rather "provides[s] each member of some 'public' with a bundle of rights, neither entirely alienable by state or other collective action, nor necessarily 'managed' in any explicitly organised manner".[115]

Rose argues that the legal doctrines governing such resources can be justified in classical economic terms. Doctrines of public use applied to land and resources where there are indefinite users, the danger of hold outs and scale returns. Property with indefinite users has to be dedicated to the public because the existence of an indefinite class induces market failure. Those "indefinite persons" who would put the property to its highest use by definition cannot be identified and thus cannot negotiate to acquire the property. Moreover, although the class of users could not be identified, it is the users themselves, according to Rose, who create value in the property. Public use doctrines apply where the value of the resource is created by its use by an expandable and indefinite number of persons. Rose's primary example of public use creating value is customary rights of recreation, such as sport and dancing, upheld by English courts:

> At least within the community, the more persons who participate in a dance, the higher its value to each participant. Each added dancer brings new opportunities to vary partners and share the excitement . . . Activities of this sort may have value precisely because they reinforce the solidarity and fellow-feeling of the whole community; thus the more members of the community who participate, even if only as observers, the better for all . . . In a sense, this is the reverse of the "tragedy of the commons": it is a "comedy of the commons," as is so felicitously expressed in the phrase "the more the merrier" . . . Here indefinite numbers and expandability take on a special flavour, relating not to negotiation cost, but what I call "interactive" activities, where increasing participation *enhances* the value of the activity

113 G. Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968).
114 *Supra* n. 23 at 774.
115 *Supra* n. 23 at 720.

rather than diminishing it. This quality is closely related to scale economies in industrial production: the larger the investment, the higher the rate of return per unit of investment.[116]

Where such property exists indefinite users will make the highest use of the property, but this cannot be established by negotiation. Such property is also liable to be held for ransom, the so-called hold out problem. Although the public could put the land to its highest use, an owner can attempt to "capture" the value or "rent" of the property by preventing public use unless the property is somehow acquired for and dedicated to the indefinite multitude. "But what created the 'rent' ", according to Rose, was "[t]he very 'publicness' of the ... use; its non-exclusivity makes it valuable, because [the] activity is exponentially enhance by greater participation".[117] Doctrines that uphold public use rights ensure that property is put to its highest use where there is a danger of hold out and market failure and where the value of the property is not created by the owner, but by the public who seek legal authority for their use.

American commerce, and property that facilitates such commerce, is according to Rose a classic case of an activity that is enhanced by the participation of indefinite users. Thus avenues of commerce, such as navigable rivers and public highways, were protected by nineteenth-century American courts. The benefits of wide participation in the market, however, were not merely economic. Like the village green and the sporting ground, commerce was also valuable as a force of socialisation and community building, and it is this latter use that Rose argues should be recognised by modern courts to expand public use doctrines to "other socialising activities ... insofar as those activities require specific locations",[118] such as beaches and other recreation grounds.

B. Custom and community

Communities, both local and geographically disparate, create and regulate inherently public property through custom. According to Rose, "a group capable of generating its own customs ought to be if anything a less objectionable holder of 'public property' than is the unorganised public at large, because a customary public comes closer to the management capacities of a government".[119] Where inherently public property exists, custom operates either in place of, or in the interstices created by, government regulation to protect common resources.

116 *Supra* n. 23 at 767–768.
117 *Supra* n. 23 at 769.
118 *Supra* n. 23 at 777.
119 *Supra* n. 23 at 743.

When trouble arose over the condition of the golfing ground of St Andrews it was not the Town, but a local interest group, the Society of Golfers, that solicited donations and raised the summons. The Court then found a custom on the part of the inhabitants to shoot the offending rabbits and protect the golfing ground. The inhabitants had a right to vindicate their common right to golf, created by custom and confirmed by grant, by means of the gun, the spade and the trap. The use arose by community praxis and community praxis protected the use.

Through Rose's tinted glasses we saw villagers dancing round a maypole, not rabbits being slaughtered in their hundreds, nor lawyers slaving away in libraries and courtrooms for over a decade to vindicate the right to a round of golf. Yet ultimately, there is a comedic aspect to *Dempster* v. *Cleghorn* (for the golfers if not the rabbits). The pressure of litigation resulted in the creation of an organisation that would manage the community resource of the golfing green. From the Minutes of the Society of Golfers it is obvious that there was very little activity until the Society was spurred into action by the destruction of the course by the Dempsters' rabbits. St Andrews would become the world's most famous town green and the Royal and Ancient an internationally renowned organisation that would spread its customary game to the far reaches of the globe.

As for the transaction costs, litigation, like commerce, is often viewed as "an activity that tend[s] to avarice and meanspiritedness".[120] Yet as any civil rights lawyer can attest, it can serve as a galvanising force that binds a community together. It also has an educative function, revealing the face of injustice and the need for law reform, or in the case of a commons dispute, a need for better management of community resources. The comedy of the commons is in the transaction costs. The paradox of custom litigation is that when the community comes together to manage and protect their common property, what results is socialisation and integration through litigation.

Was early nineteenth-century St Andrews truly such a communitarian idyll? The world of the "great and good" in eighteenth-century St Andrews was very small indeed, and most were involved in both the sale of the links and the subsequent litigation. Thomas, Earl of Kellie, the original proprietor of links, had been Captain of the Golfing Society the year prior to the sale. His agent, Stuart Grace, was Town Clerk of St Andrews and secretary to the Golfing Society. The Earl of Kellie was a pursuer in *Dempster*, and Grace acted as agent for the Society in the litigation.

Moreover, the Town Council and the courtroom was not the only battlefield where the prominent of St Andrews would meet. In 1803 the Royal

[120] *Supra* n. 23 at 743.

St Andrews Volunteers were formed to respond to the threat posed by the war with France. The officers roll could just as well have served the Court of Session as a list of litigants. The Volunteers were under the command of the Earl of Kellie, with James Cheape of Strathyrum as Colonel, Hugh Cleghorn as Lieutenant Colonel and Cathcart Dempster as Major.[121] Erskine, Cheape and Cleghorn were all pursuers against Cathcart Dempster, who defended the action along with his father Charles. James Cheape was brother of George, Captain of the Golfing Society, who had fired the first shot in the *Dempster* v. *Cleghorn* with his letter of complaint to the Town Council.

In early nineteenth-century St Andrews the prominent would take up "their" position in society, be it on the golfing links or on the drill field. The fact that the Golfers had collected a fighting fund and sued Dempster in the Court of Session did not initially prevent the pursuers and Dempster from serving together.[122] In 1804, however, Dempster and Cleghorn were involved in a dispute of such seriousness that the letters exchanged during the affair were forwarded to the Secretary of State who set up a military court of enquiry.[123] Interestingly it was not Dempster, the sole defender of the legal action amongst the volunteers, who was put on leave of absence by the Earl of Kellie pending the outcome of the court of enquiry, but Cleghorn, his fellow pursuer, who from the letters does appear the more intransigent in refusing to accept an apology from Dempster.[124]

The letters exchanged during the "military imbroglio" evidence a society that turns to law to solve its disputes. Letters appear to have been written, exchanged and returned in anticipation of litigation. Early nineteenth-century St Andrews was not a placid place, but its elite were sophisticated merchants and landowners who favoured the writ over the sword. Even the commons riot, which was so violent as to result in "one of the bullies being brought before the sheriff . . . for having wantonly and severely wounded Charles Dempster",[125] was organised by the Golfers' Edinburgh lawyers. Yet despite all this legal activity, the officer corps of the Volunteers indicates that social relations in the town did not break down with every writ filed. Litigation could bring elements of the community together without, it appears, creating a permanent "outsider" amongst its ranks.

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121 Aylwin Clark, *An Enlightened Scot: Hugh Cleghorn, 1752–1837* (Duns: Black Ace Books, 1992), p. 233.

122 The resolution to take up a subscription was taken on January 15, 1803. *Supra* n. 52.

123 *Supra* n. 121 at 238.

124 The letters are available at the University of St Andrews.

125 *Supra* n. 102 at 8.

C. Capture and hold out

Communities by their nature, however, tend to exclude. Although the Golfing Society had united to protect the public's right to golf at the outset of the nineteenth century, by the century's end the club was united in the goal to exclude the public from the links. The plans of the club to privatise the links came to light in discussions with the Town to create a second golf course. Both the town and the club agreed that expanding the golfing facilities on the links was desirable. The club agreed that they would continue to maintain both the course, and the public's privilege to walk on the links, but refused to accept that they had any obligation to do so. Moreover, the Town was becoming convinced that "what the club really wanted was a course from which they could exclude others".[126]

The links themselves were still owned by the Cheape family, who had "saved" them from the proprietorship of the Dempsters. The Town asked Cheape (the heir to the Cheape who had acquired the Links) not to sell the links to the club until they could make an offer, but he refused and sold the links to the club for £5,000 (the Town having offered £4,500).

The Town Council, with the support of the inhabitants, decided that they should buy the links from the club and promoted a Bill in Parliament in 1894 to acquire the links, by compulsory purchase if necessary. They did so because they were "trustees for the public, and seeing there has been talk about private links from which the public are to be excluded we must have the controlling voice, and the power of approving and seeing that the regulations are not of an exclusive nature or prejudicial to the existing rights of the public".[127] The bill was duly passed and the Town Council was empowered to acquire the links for £5,000.

The Town would not have clear title, however, until they could resolve the hold out problem that arose from a pre-emption clause that Cheape had inserted into the feu of the links to the club. The clause stated that should the links ever be sold, Cheape had a right of first refusal to buy the links for the amount originally paid by the club.[128] Cheape demanded £11,500 to relinquish his right of pre-emption, "more than twice the amount he had already received for the sale of the land".[129] Eventually, over one year after the New Course had been built, Cheape finally agreed to accept £1,500 to relinquish his rights.

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126 Jarret, *supra* n. 51 at 30.

127 Jarret, *supra* n. 51 at 34 (quoting evidence of senior counsel for the Town Council before the Scottish Select Committee).

128 Jarret, *supra* n. 51 at 31.

129 Jarret, *supra* n. 51 at 36.

Cheape's anticipation of the Town's manoeuvres to acquire the links garnered him a tidy profit. It is just this sort of profit – from speculation on, and abuse of, public use rights that court recognition of "inherently public property" is meant to foreclose. It was not only Cheape, however, who tried to "capture" the value of the links. The golf club became such a powerful clique that it, too, began to act like a private owner by threatening to create a private course and exclude the public from the links.

The "saving" of the links by the Golfing Society and a private owner created the problems of hold out predicted by Rose's model. In order to resolve this hold out dilemma, the links had to be acquired, at great expense to the ratepayers of St Andrews, for the "indefinite multitude". Threatened with "capture" by the very individuals and institutions that had once protected the links from the ravages of a private landowner, the Town and Parliament acquired the links in order to dedicate them to the public at large.

Golfing grounds, of all public property, are relatively easy to acquire because of the large, but certain and limited parcels of land on which they operate.[130] This is not, of course, the case with most inherently public property. Even if all land subject to public use could be identified, governments could never afford to acquire it. This is why US state courts recognise that custom creates use rights on behalf of the public that the court will protect from abuse by private owners.

IV. Custom on Distant Shores

A. Custom made law

Dempster v. *Cleghorn* was a genuine comedy of commons, but what can a Scots commons riot tell us about public access to land for recreation in twenty-first century America? Rose argues that "an entire populace may have customs ... as Blackstone and others recognised when they called the common law the 'custom of the country' ".[131] Whilst Rose acknowledges in the most recent edition of her essay that "the old cases accorded customary rights ... to residents of a community and not to outsiders who chanced to be there", she nevertheless continues to argue that English custom doctrine can be used to justify public use rights.[132] Despite the recognition that the limitation of custom to uses created

[130] *Supra* n. 32 at 1277.

[131] Rose, *supra* n. 23 at 746.

[132] C. M. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Press, 1994).

by a local community "undoubtedly help[s] to preserve the underlying resource",[133] her theory extends the logic of a doctrine founded upon one type of use – that of town greens by local inhabitants – to general public access to the beachfront.

Neither Blackstone, nor the doctrine of the English law of custom can be relied upon as the basis for such an extension. Blackstone distinguished the "custom of the country" from those particular customs that gave rise to local common law. The former was the common law itself, whilst the latter was a local exception to it created by community use.[134] Moreover, the notion that good custom must arise from a community capable of creating local common law has persisted.[135] On a strict reading, therefore, the theory and doctrine of English doctrine is of little use as legal precedent for the extension of access rights to the public.

Courts that have approved custom in the US have done so more by analogy with the English doctrine than by a direct use of English precedent, although this is not always openly stated. Given the origins of custom in feudal jurisdiction, this was inevitable. If courts wish to protect inherently public property using the doctrinal vehicle of custom, the doctrine has to be adapted to the needs of the modern American polity. That US state courts have done so does not break with the history of custom at common law, but rather accords with it. Custom, like the uses it approves, is dynamic. Its judicial test has always permitted the "changing of law to reflect common social beliefs and attitudes".[136]

The more significant question for America's courts is whether Rose is correct that judicially recognised custom as a form of social organisation can be relied upon both to create and to preserve the value of inherently public property. *Dempster* v. *Cleghorn* demonstrates that communities bound by custom need not be inhabitants of a single geographical locale. Moreover, the saga of the links demonstrates that such property is best preserved not merely by and for a locality, but on behalf of and in partnership with a larger public. Vesting rights in the public at large shores up the guardianship role of the local community and makes it less likely that a community will, like a private owner, attempt to capture its value.

The significance of local management, however, should not be underestimated, which arguably has happened in those states where customs have been declared, absent proof of use. In the Oregon, the Supreme Court declared a custom of access to the dry-sand beach along the entire

133 *Supra* n. 132.
134 Callies, *supra* n. 5 at 10006.
135 *Supra* n. 3 at 172.
136 Callies, *supra* n. 5 at 10006.

shoreline. They did so without such proof because although "strictly construed prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly".[137] As the above discussion makes clear, custom in English law is always pled and proved as actual use of a tract of land by local users. Not to require proof of use stretches to the breaking point not only the English doctrine of custom, but the theory of custom as a source of law. Moreover, if the court is correct about the custom of the people of Oregon, this distortion the doctrine of custom is unnecessary.

The court in *Thornton* found that "until recently, no question concerning the right of the public to enjoy the dry-sand area appears to have been brought before the [Oregon] courts".[138] It can be presumed that on those beaches where private owners had previously not complained of use, no litigation will result. The Oregon court was worried, however, about developers of hotels and resorts that were attempting to privatise the previously open Oregon beaches. Yet in those cases if there had been community use surely the beach users would be willing to turn up to court and say so. Of course developers' resources far outstrip those of the local inhabitants, but if local custom genuinely exists praxis should not be so difficult, or expensive to prove. In the US, litigants bear the burden of their own costs whatever the outcome of the litigation, and community litigants are likely to receive *pro bono* legal representation.

Whatever the savings in court time achieved by the court in *Thornton*, in efficiency terms, it is best that communities are forced to prove their "customary" use. Proof of use establishes that the property at issue is inherently public property. Absent such proof, the court cannot establish whether the "highest", "best" or for that matter any use of the beach in question is that made of it by either local inhabitants or the public at large.

Such litigation would also ensure that local communities take an interest in their shared resource. In Oregon public access rights by acquired custom are vested in the State of Oregon, but as every inhabitant of a beach community knows, the protection of recreational resources is best achieved by a combination of state and local authority.[139] Litigation and the forma-

[137] *Supra* n. 4 at 676.

[138] *Supra* n. 4 at 674.

[139] For example, in my home town of Lewes, Delaware, a local (town) ordinance controlling the use of jet-skis on the otherwise state-maintained beach was passed after community complaints. For the significance of local governance in American life, see

tion of local interest groups can only serve to strengthen the protection of access to, and enjoyment of, recreational beach property.

In the United Kingdom interest groups on the local and national level both create and protect customary rights. Not only do these groups ensure that public rights of access to property for recreation are never far from governmental and judicial consciousness, on the local level they aid in managing public access rights. They achieve this in part by integrating outsiders into the customs of the community. Local associations of the Ramblers, for example, keep footpaths open by organising groups to walk them.[140] They also provide inexpensive guides to local walks to encourage public use of footpaths, as well as helping to ease congestion on better known routes. The Ramblers organise the "unorganised public". A quick stop at a local book-shop can integrate the most casual of visitors into the community of walkers, not merely in a spirit of management but in a spirit of play.

Like the Golfing Society of nineteenth-century St Andrews, these local groups mediate the public's use of local recreation land. Until recently English law restricted customary uses to local communities that could organise their use by custom.[141] The membership of such communities was uncertain and fluctuating, but it was not infinite. More might be the merrier, but no one wants to dance on a too crowded green. The management of the links of St Andrews by the Golfing Society provides a model of how community rights of access can be shared by the public at large without turning the resource into a wasteland.

Of course commons litigation is not always comedic. Like the commons riots of old, disputes over public property can reflect the deeper tensions in a community. In recent Scottish litigation over sale of a portion of the common good to build a Catholic primary school, the judge ignored the representations made by the local inhabitants because their views simply reflected their religious affiliation. This was so despite the fact that the overall plan would result in significant investment in a derelict park, including landscaping and the building of indoor and outdoor recreation

J. Freedland, *Bringing Home the Revolution: The Case for a British Republic* (London: Fourth Estate Limited, 1998).

[140] Such activity need not be by an organised group, on a research trip to Sudbury to interview the complainers in *Steed* v. *Sudbury County Council*, I listened in to a casual conversation by local women about where to walk their dogs to ensure that a footpath on land that was recently sold remained open to public use. They disagreed about its exact location, so they decided to walk up one purported path and back the other just to make sure the true path, wherever it lay, would remain open.

[141] Neeson, *supra* n. 106 at 110.

facilities.[142] In such communities litigation over public use rights may, for a time, exacerbate division.

A communitarian would argue that if such divisions are ever to be healed it will be on common recreation land, where communities play together. The history of sport in Scotland would belie this assumption. The rivalry between Protestant and Catholic teams can lead to violence. On the local level the sport of bowls is reputed to be an exclusively Protestant activity. Yet when compared to the violent nature of the religious divide elsewhere in the United Kingdom, perhaps channelling religious divisions into refereed (or policeable) activities such as sport and litigation does help foster peace within divided communities.

Litigation can also be costly. In *R.* v. *Sudbury County Council, ex parte Steed*, the Steed brothers were charged with the litigation costs of the Health Trust that acquired the property to build a hospital, though they were helped financially by the Countryside Commission and by a private donor arranged by the Commission. Moreover, had the Steeds been successful in registering Sudbury's People's Park as a town green, they would have been able to sell their land to the Trust as a site for the hospital for a significant amount of money. This last point demonstrates an important aspect of commons litigation. A declaration of public use rights does not mean no development, just alternative development. In the most recent common good case in Scotland, *In re West Dumbartonshire Council*[143] the respondents, an accountant, midwife and school teacher argued the case themselves, but were helped out by an anonymous QC.

These cases show that communities are generally capable of demonstrating the value of their common property to the courts when their use rights are threatened. These instances of modern commons litigation may seem a far cry from Rose's commoners dancing on the green, but as historian E.P. Thompson has pointed out the support of local inhabitants' customary rights by interest groups is as much a part of the history of common land as the customary rights themselves. "London and its environs would have no parks today if commoners had not asserted their rights, and as the nineteenth century drew on rights of recreation became more important than rights of pasture, and were defended vigilantly by the Commons Preservation Society."[144]

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[142] *Re Motherwell District Council* (Outer House Cases 25 March 1998) (available on LEXIS).

[143] *West Dunbartonshire Council* v. *Harvey*, 1997 SLT 979 (Outer House), *aff'd* 1998 S.C.L.R. 69.

[144] Thompson, *supra* n. 106.

At the beginning of the twenty-first century we are experiencing a similar crisis over access to land for recreation. In England, *Sunningwell* is a triumph for those communities and pressure groups whose litigation activity had been stymied by the legal test of customary use created by the Court of Appeal in *Ex parte Steed*. In the US, the ultimate constitutionality of the "new" judicial doctrine of custom remains to be tested. Not only the results but the process of organising to litigate custom cases in Britain – old and new – demonstrates that even if the US Supreme Court should disallow single declarations of custom across swathes of the American coastline, public access to inherently public property could nevertheless be preserved.

In the meantime, American scholars continue to traipse through the English countryside in attempt to establish the "true" nature of English legal custom. Like the custom cases themselves, however, such articles rarely expose historical or doctrinal truth. Rather, they resemble the custumals used to prove manorial customs, which were nothing more than "partisan briefs drawn up by the lord's steward ... or by substantial landholders ... or the result of compromise ... in which the cottager or landless had no voice".[145] Proof of custom, as the English courts have long recognised, is difficult to come by absent the recognition of legal fictions. For the historian, custom doctrine is impossible to understand absent a recognition of the centrality of judicial ideology to its development. The on-going debate over custom in American law serves only to prove a thesis quite different from that which the authors intend – that no matter how dominant a particular conception of property appears to be at any point in time, the "dialectic between civic and commodified understandings of property will reach no end point".[146]

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[145] Thompson, *supra* n. 106 at 101; Callies, *supra* n. 5.
[146] Alexander, *supra* n. 10 at 384.