

The Hill of Alyth (the North Common of Alyth)

A legal history and commentary

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INTRODUCTION

This paper has been prepared to provide some detailed background to the story of the Hill of Alyth published in my book, *The Poor Had No Lawyers* on pages 205-211. In what follows, I argue that the Hill of Alyth remains a commonty, that property rights in the commonty are enjoyed by a large number of people, that the title currently held by Scottish Ministers is derived from defective deeds, that this title itself is defective and that the people of Alyth should have their ancient rights restored.

COMMONTIES (1)

Commonties are areas of common land that were once extensive across Scotland. Typically, each parish would have genuine common land that was owned by no-one yet used by all the inhabitants of the parish. As feudalism spread across Scotland, these commons began to be regarded in law as the undivided common property of the feudal landowners in the parish (the heritors). Parliamentary Acts of the 17th century allowed commonties to be divided. The 1695 Act was the most commonly used and most of Scotland's commonties were divided according to its terms (2). However, many were not and survive to this day. Importantly, the 1695 act is the 'only competent mode of division of a commonty. (3)

Who has rights to a commonty? In any division under the 1695 act, the right to a share in the property rights of the commonty was held by the heritors of the parish - that is to say, the landowners. Thus, when they came to be divided, each landowner who entered the process received a share proportionate to the size of their holding. Often, an owner's title would narrate property rights in a commonty but, whilst this provided evidence of their right, it did not exclude others who were heritors but whose title did not state such rights in the same terms.

It is important to understand that there are two kinds of rights in a commonty. Property rights held by heritors entitle them to a share upon division. Rights of use, on the other hand, are rights of servitude and carry no entitlement to a share of any division.

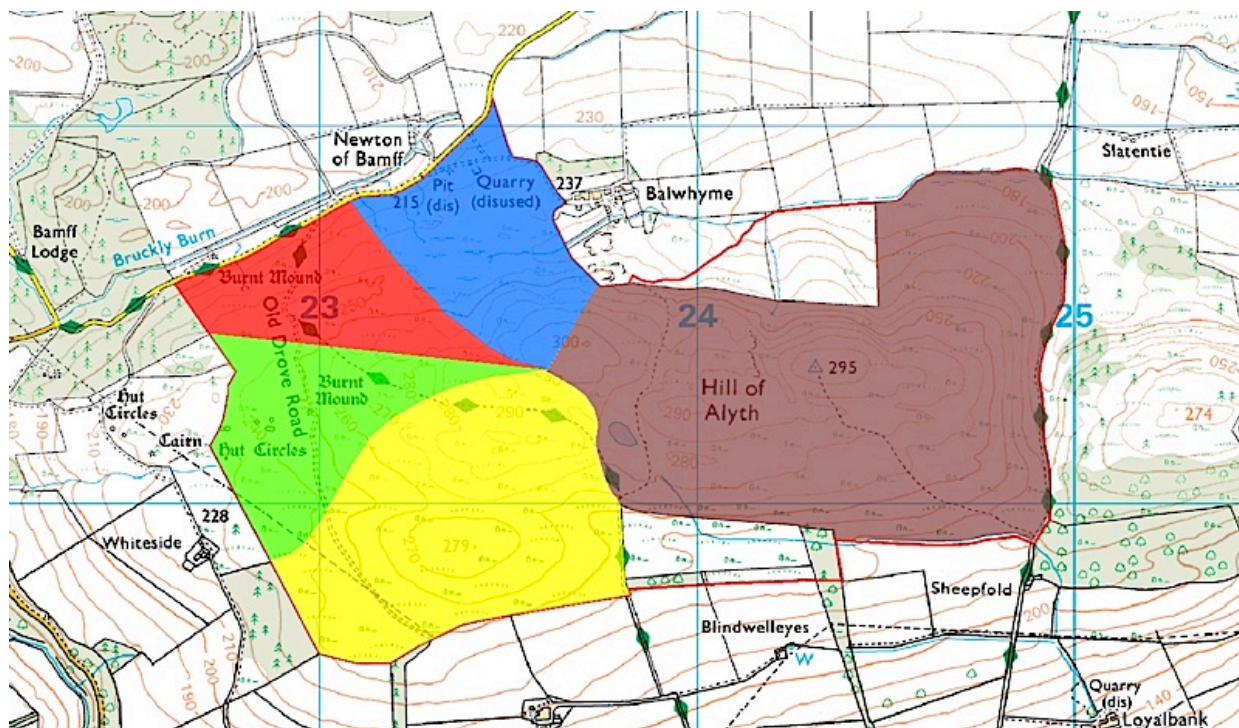
Finally, the status of commonties as the undivided common property of parish heritors is a feudal invention. Feudal tenure was abolished in November 2004 and thus, arguably, commonties have now reverted to their pre-feudal legal status of genuine commons.

THE HILL OF ALYTH

The history of the Hill of Alyth is part of the history of three commonties. The Forest of Alyth commonty lay to the north of Alyth, was 7946 acres in extent and was divided in 1796. The South Common of Alyth lay to the south of Alyth and was 364 acres in extent. The process of division of the South Common was initiated in 1780 and the North

Common (Hill of Alyth) was added to this process in 1805 but dropped from the process in 1806. Eventually, the South Common was divided in 1858. Importantly, a number of properties within the town of Alyth received shares of the South Common since, as heritors (albeit modest ones), they were entitled to a share.

The Hill of Alyth was never divided and has never been divided. It thus remains a commonty. So what has happened to cause all the fuss?



Map 1 showing Hill of Alyth commonty outlined in red and various apportionments shaded.

Blue = 50 acres with Balwhyme, 1922

Brown = 216 acres with Loyalbank Farm, 1923

Yellow = 106 acres with Kirklandbank and Blindwelleyes, 1926

Green = southern 52 acre part of 1977 sale by Earl of Airlie

Red = northern 54 acre part of 1977 sale by Earl of Airlie

The trouble started in the 1920s when the Earl of Airlie sold a number of tenanted farms adjoining the commonty. The sale of these farms included the blue, brown and yellow apportionments of the commonty as delineated in Map 1.

Balwhyme

In a disposition recorded on 14 December 1922, the Earl of Airlie sold the farm and lands of Balwhyme extending to 362 acres together with a *“portion, extending to 50 acres, of the Hill of Alyth”*. This is shown in blue on Map 1.

Loyalbank Farm

Loyalbank Farm was sold by the Earl of Airlie in a disposition in favour of George C Whamond and recorded in the Books of Council and Session on 1 February 1923. The farm extended to 350 acres and the portion of the hill (brown on Map 1) extended to 218 acres. The sale of the commonty was *“not warranted”*.

Kirklandbank and Blindwelleyes

The disposition from Airlie Estates Company to Clare BL Shand recorded in the Register of Sasines on 17 November 1926 transfers title of 184.819 acres of the farm together with 106.556 acres of the commonty (shaded yellow in Map 1). No evidence is produced as to Airlie's ownership of the commonty. As late as 1980, when the farm was again sold (disp. Christie to Haddow recorded 19 March 1980), the land on the Hill of Alyth was excluded from warrandice viz. *"and declaring that this Disposition is granted by me without any warrandice express or implied in regard to the subjects and others (Secundo) hereinbefore disposed."* - the secundo subjects being the yellow area of the Hill of Alyth.

The 1977 sale (red and green)

This is perhaps the most controversial of all the alleged sales of the commonty. In a deed recorded on 15 September 1977, the Trustees of the Earl of Airlie purported to sell 54 acres of the commonty to Sir Neis Ramsay of Bamff Estate (red) and 52 acres to Richmond Haddow (green). The deed is interesting in that it effectively admits that Airlie does not in fact own the commonty. The relevant passages are worth quoting.

"We [the trustees] considering that the subjects known as The Hill of Alyth form part of the Lands and Baronies of Lintrathen ... but that the said subjects known as The Hill of Alyth are not referred to by name in the particular description of the said Lands and Baronies , further considering that we or our predecessors in title have at various times disposed parts of the subjects known as The Hill of Alyth to which we or they may have had a right but granted no warrandice and that Sir Neis Ramsay and Richmond Haddow ... have a right to those parts of the said Hill of Alyth hereinafter disposed and that we as Trustees foresaid and our predecessors as proprietors of the aforesaid Lands and Barony have never claimed the said subjects as part of our or their property but that nevertheless it can be construed from the titles of the said Lands and Barony that the said subjects may be included therein. Further considering that the said Sir Neis Ramsay and Richmond Haddow for the avoidance of doubt and in order to obtain an irredeemable title to the said subjects hereinafter disposed have requested us as Trustees foresaid to grant these presents."

The admission that the Earl of Airlie had, in times past, disposed parts of the commonty to which he *"may have had a right"* and that his predecessors *"have never claimed the said subjects as part of our or their property"* is noteworthy since it begs the question as to what authority Airlie had to dispose the two areas.

Moreover, in 1956, Sir Neis Ramsay had sold the farms of Wester Whiteside & Wellton of Creuchies to the west of the Hill of Alyth. On the boundary running A - B shown on the right, the plan was annotated with the words "COMMON LAND". So, in 1956, Sir Neis Ramsay knew it was common but by 1977 had decided was requesting a grant of the land from the Earl of Airlie.



THE SITUATION TODAY

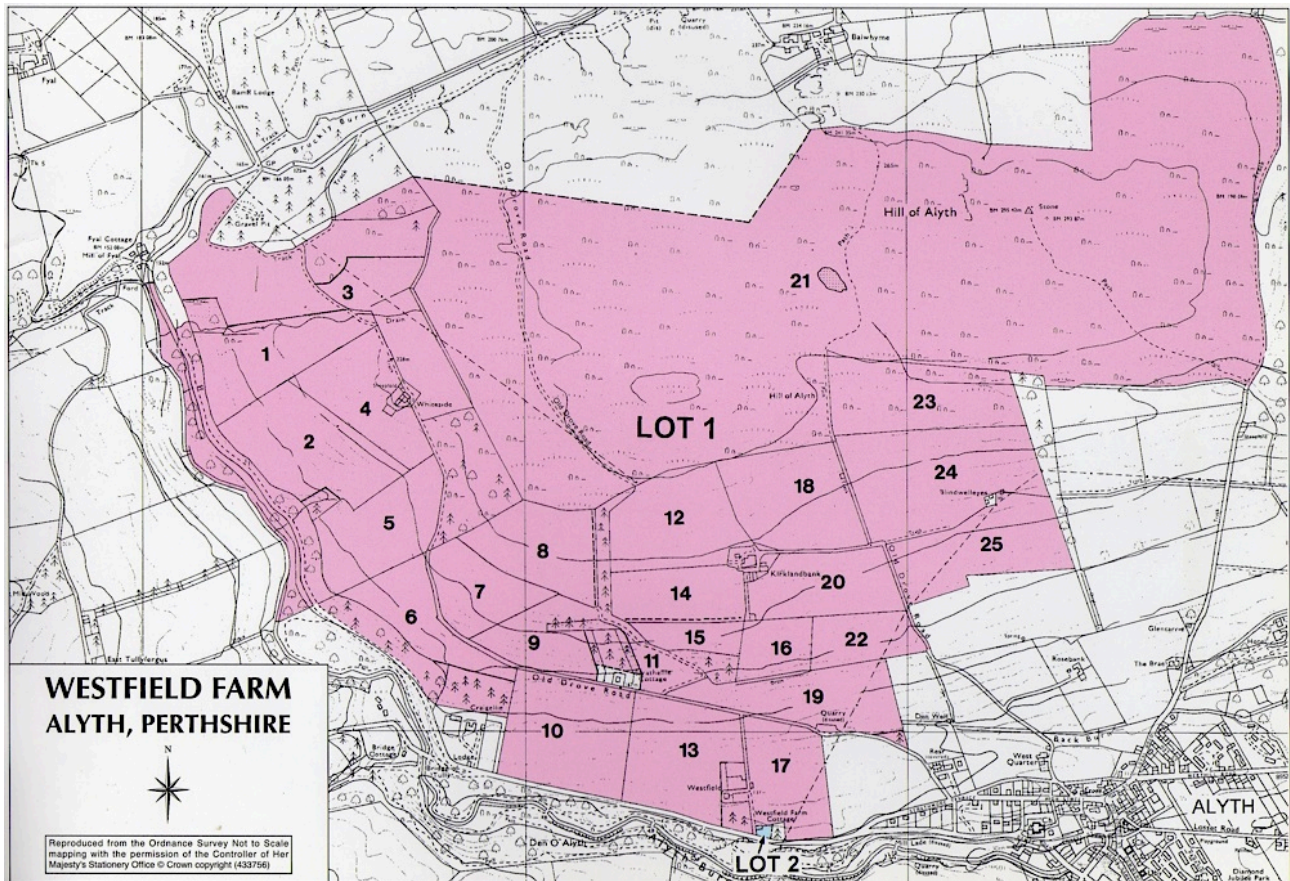
Westfield Farm, acquired by Scottish Ministers in 2007, is an amalgamation of Westfield, Whiteside, Kirklandbank, Blindwelleyes and Loyal Farms together with 3 disputed parts of the commonty, namely the green, the yellow and the brown. The farm was put up for sale in 1998 (see Map 2) and again in 2001. In the 1998 sales particulars, the selling agents, FPD Savills, noted that: -

Hill of Alyth

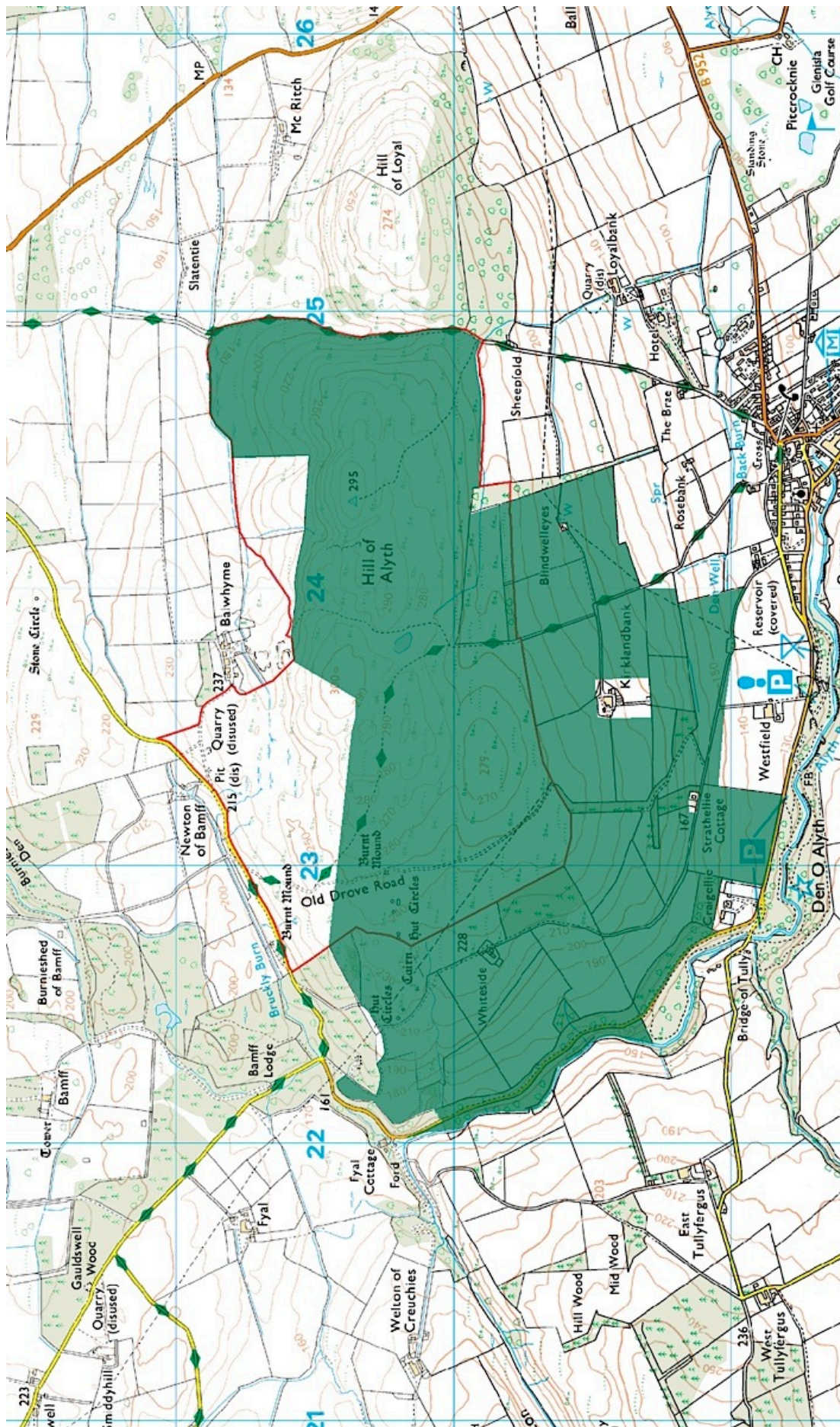
The sellers acquired title from previous heritable proprietors to Hill of Alyth without warrandice. The purchaser will be given title to the hill on the same terms.

In 2007, Scottish Ministers acquired title to most of the land from Ian and Sandra Gauld for the sum of £2,295,000 (see Map 3 on next page).

The Forestry Commission (who manage the land on behalf of Scottish Ministers) apparently bought the land as part of the Woodlands in and around Towns initiative.



Map 2 Sales brochure map from 1998



Map 3 Land “acquired” by Scottish Ministers in 2007 showing commonty in red.

FACTS

The following are established facts.

- The Hill of Alyth is an extant commony for the simple reason that it has never been divided by proper judicial process.
- The Earl of Airlie has purported to dispoone all of the commony to third parties despite full knowledge that they he and his Trustees had no title to it
- Those in possession of the commony (for the most part now Scottish Ministers) have to rely on the legal doctrine of prescriptive possession to legitimise their title.
- Prescriptive possession is not available as a means of securing title to land founded on an ex facie invalid deed.
- At least one of the deeds purporting to alienate the commony (the 1977 deed) is ex facie invalid because "*a disposition 'a non domino' must not reveal that the disponer is not the owner, or it will lose its potential status as a foundation writ*" (4)

SOLUTION

The simplest solution is made possible by the fact that most of the commony is now claimed to be owned by Scottish Ministers rather than by any private interest. Three things should now happen: -

- Scottish Ministers should publicly accept that their title is invalid.
- Scottish Ministers should seek compensation for their defective title from the Keeper of the registers of Scotland under the terms of the Land Registration (Scotland) Act 1979.
- Scottish Ministers should transfer that part of the commony that appears on their title to an appropriately constituted body representing the people of Alyth.

NOTES

(1) See chapter 7 of *The Poor had no Lawyers* for full discussion of commonities.

(2) The 1695 Act remains in force.

(3) Gordon, W. M., *Scottish Land Law*, 1999, paras 15–55, p. 439. He cites in support of this view *Macandrew v Crerar*, 1929, SC 699. This was a case in Perth Sheriff Court involving the division of a 99-acre commony known as Cow Park.

(4) Reid, K., and Gretton, G. L., *Conveyancing*, 3rd edition, pp. 7–25 as quoted in *Opinion of Lord Menzies in Board of Management of Aberdeen College v Youngson*, 2005, CSOH 31.