# Land Reform and Land Restitution in Post-Feudal Scotland

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Andy Wightman
Edinburgh, Scotland
andywightman@caledonia.org.uk

*This paper explores the historical context within which land reforms are currently underway in Scotland and provides a critique and analysis of their relevance and justification. It argues that, whilst new laws are welcome, they do little to counter centuries of landed hegemony. Historical assumptions, conventions and statutes relating to land ownership continue to be deployed in defence of a system of land law and a pattern of private landownership that is unjust and iniquitous.*

## INTRODUCTION

**Cover**

Like many others I am sure the title of this workshop, Squatters and Settlers prompted me to think on matters of land tenure and landownership in a particular way. Interestingly, it is just this perspective that I have been increasingly been contemplating more often in the past few years.

I should say at the outset that I am not an academic. I am a self-employed writer and researcher whose specialist topic is land tenure, land ownership and land reform in Scotland.

**Ghillie**

The essential argument I want to develop in this paper is, that existing title holders were squatters at one time, that the particular case of Scotland demonstrates eloquently how such squatting has taken place and been legitimised over the centuries, and that this history reinforces my view that tenure systems are social constructs which reflect the political, economic and cultural norms of the time. Importantly, they form part of a legal code which in properly democratic frameworks governed by the rule of law, legislatures can amend and change to reflect new and emerging realities. Rights in land have no absolute sanctity and are entirely

dependent for their legitimacy on the wider agreement of the society upon whose legal system such rights rest. In short, (and from a land reform perspective) “It may be your land but it’s our land law”

The theme too reminds me of an apocryphal tale which has probably been told too often back home but no doubt may be new to some of you of a Scottish miner walking home one evening with a brace of pheasants in his pockets. He meets the landowner unexpectedly who informs him that this is his land and he had better hand over the pheasants.

“Your land eh”, asks the miner.
“Yes”, replies the laird, “and my pheasants.”
“And who did you get this land from?”
“Well, I inherited it from my father.”
“And who did he get it from?” the miner insists.
“His father of course. The land has been in my family for over 400 years,” the laird spluttered.
“OK, so how did your family come to own this land 400 years ago?” the miner asks.
“Well....well.... they fought for it!”
“Fine,” replies the miner. “Take your jacket off and I’ll fight you for it now.”

Such a perspective, prevalent among radicals, may easily be dismissed as little more than agitprop since the course of legal history has long served to entrench in law what might once have been settled by a straightforward physical clash. Despite this harsh reality, however, the idea that we the people have been dispossessed and that much of what passes for legal title to land today is little more that legitimised theft, not only continues to serve as a useful rallying cry for reformers but is also in fact an accurate reflection of that history. In this paper I aim to show how this is the case in Scotland and how current debates about land reform have yet to exploit fully the reality of our land history in the cause of real and lasting reform.

I also want to show how the doctrine of possessory title or adverse possession has been invoked by private interests to deny legitimate interests historic rights through the Scots law doctrine of positive prescription.

## Where is Scotland

I should perhaps declare an interest at this point. Although I do not own any land or property on Planet Earth (the housing market in Edinburgh where I live is the subject of such obscene inflationary pressures that even owning my own house is not a realistic proposition), I am in fact myself a squatter - I own a small parcel of real estate on the moon.

**Moon Map**

It consists of Lot Number 032/0827in Area F-4 of Quadrant Charlie otherwise known as the Oceanus Procellarium. And I have a Deed to prove it.

**Lunar Deed**

And what's interesting about this is that of course the title to much of my own country derives from bits of paper that are every bit as fanciful as this.

## HISTORICAL BACKGROUND

But first, a bit of history.

Scotland was, until 28 November 2004, a feudal country (yes - it took us until last November to finally abolish feudalism!) with over 95% of land held under feudal tenure. It is also a country with an extraordinarily concentrated pattern of private landownership.

**Concentration of Ownership**

The statistics speak for themselves. In a country of 19 million acres and 5 million people, a mere 1252 landowners (0.025 per cent of the population) own two-thirds of the privately-owned rural land. And it is this manifest inequity in how land has been divided, how its value pocketed, its use ill-judged, its ownership carefully protected and defended, and its inhabitants harshly treated over the centuries that lies at the heart of the land question and its potency as a political issue.

**Glencoe**

Scotland's history is, to a large degree, a history of landed power. Until the 19th century landed power was synonymous with political power. Not surprisingly therefore Scotland's system of land tenure has protected and supported the political, commercial and social ambitions of the ruling classes. In 1814 Sir John Sinclair, the Caithness improver and author of the first Statistical Account of Scotland was moved to observe that 'In no country in Europe are the rights of proprietors so well defined and so carefully protected' (Sinclair, 1814). And it has been this careful definition and assiduous protection which has denied Scotland

the kinds of reforms enjoyed by our West European neighbours. It all began in the 11th century with feudalism, a system of land tenure that survived as I said a moment earlier until a month before last Christmas - an indication if ever it was needed of the resilience of Scotland's land laws and our historic failure to do anything fundamental about reforming them.

The origins of the current system and pattern of landownership lie deep in Scotland's history. Feudalism was a system of governance initiated by David I based on the contractual relationship between the Crown and the nobility whereby powerful loyal nobles were granted feudal charters over extensive estates in return for political, military and financial support.

At this early stage feudal charters did not confer ownership of land in the sense of that term today. What was being offered to the favoured few was the job of governing Scotland. It was a system of patronage. As time passed however the system gave vassals of the crown more and more security. What started as a system of political power evolved steadily into a system of landed power within which the aristocracy distanced themselves from financial and military obligations to the Crown and became full-blown landowners.

From these early Charters flowed rights and privileges that continue to this day to inform debate about landownership as I will highlight in a moment in respect of the MacLeod case.

Under this tenurial system and the powers conferred by it, landowners have, over the past 1000 years, built a formidable power base. However feudalism alone was merely the start of a long process of squatting - a process that involved four great land grabs - episodes during which political and legal power was used to wrest control of the vast majority of the country from others.

Feudalism itself was the **first great squat**. Indigenous forms of land tenure were eliminated by the unilateral actions of the Crown in declaring that all land belonged to it.  This was of course the same doctrine by which Britain was later to colonise the globe

**Pink Bits**

- those parts of the world often to referred to as the pink bits (on account of how they were represented in school atlases. The fallout from those adventures with their claims of terra nullis etc. resound to this day in countries such as Australia, Canada, and Zimbabwe.

The **second** great land squat was more overt and preceded the rash of legal reforms in the 17th century. it involved the expropriation of the lands of the Church in the years immediately before and in the aftermath of the Reformation.

The Reformation in Scotland is popularly regarded as a great victory of Mr John Knox and the common people over a corrupt and overbearing Church. However, the Reformation would have got nowhere without the support of the nobility who were motivated not by a sense of theological renewal but by naked greed. As Mackintosh makes clear,

“Many of the nobles, from motives of self interest, professed a willingness to embrace the reformed opinions, and gradually ranked themselves on the side of the Reformers; as time passed and the prospects of the division of the Church lands approached, they became more and more ardent in their adherence to the principles of the Reformation”

In one particularly grizzly episode, the Earl of Cassilis sought to persuade the Abbot of Crossraguel Abbey to sign over the 8 parishes and 27 manors to him. The Abbot refused but Cassilis was not dissuaded and kidnapped the Abbot. For a long time the Abbot, one Alan Steuart, refused to sign away the abbey property but Cassilis proceeded to roast the Abbot over a slow fire. This went on for a week before the Abbot finally agreed to sign the necessary documents.

The Church, which, it was estimated represented half of the total wealth of the country, stared the 16th century as the wealthiest and largest landowner in the country and ended the century with virtually nothing left.

It is worth noting at this stage of course that the landowning elite until the late 19th century had virtually complete control of both the Scots (and later UK) Parliament and the legal profession. Lawyers, Judges, Landowners and Legislators were essentially one and the same class. This was of particular importance in the 17th

century - in the 100 years or so after the Reformation and the second great squat. This had 3 implications.

First, through judicial decisions, what had been the de facto position regarding land rights in many cases became, through action in the courts, the de jure position.

Second, in the absence of specific statutes, the so-called institutional writers (such as Stair in 1681 and later Rankine in 1890) wrote down what they regarded as the state of the law with regard to property. Such institutional writings came to enjoy the status of citable law and continue to this day to be drawn upon as evidence in legal cases.

Third, statutes were enacted that entrenched specific rights in law. Many of these were introduced in the 17th century. And it was no coincidence that from this time on the increase in number of landowners that had characterised previous centuries ceased and the trend became reversed, a trend that was to continue throughout the 18th and 19th centuries (Callander 1986). Among the statutes enacted were.

*1617 The Register of Sasines*
A legal register of deeds - 300 years ahead of England and a register that was necessary to provide some legitimacy to earlier land seizures, security to titles, and a permanent record that could be used to validate titles and resolve disputes

*1685 The Law of Entail*
This law protected the estates of landowners who suffered bankruptcy, madness or imprisonment by securing a line of succession that could not be challenged by creditors who might otherwise forces a sale to recover debts.

*1695 Division of Commonties*
This act provided for a quick and easy method of dividing commonties - areas of land held in an undivided state over which local landowners shared rights and over which peasants enjoyed certain rights of pasture, fuel and other usefruct rights

During this period the law of succession was also refined so as to ensure the

survival of primogeniture. Until 1868, land passed automatically to the eldest son under this system. From 1868, bequests were permissible but these continued to favour the eldest son until the Succession Act of 1964. Even today, despite all the other equality and human rights law that has been enacted, landowners in Scotland remain free to bequeath land to whomsoever they wish (still normally the eldest son) and neither spouses nor children have any legal rights to any share other than the family home.

Right across Europe, the abolition of feudalism and the rights granted to family members to inherit land have been responsible for a pluralistic, small scale pattern of landownership and the elimination of the larger landed estates. In Scotland, by contrast, the preservation of our vast feudal estates has been made possible almost exclusively by the arrangements surrounding the inheritance of landed property which have disenfranchised women in particular.

## Commonty Map

The **Third Great land squat** occurred in the late 17th and early 19th century and involved the judicial division of the **commonties**. These areas of land, amounting to some 25% of the land area of the country were not genuine commons but rather the undivided common property of the heritors of the parish over which there were common rights of use usufruct. Over the course of the 17th century a series of laws were passed, which steadily increased the ease and speed with which the commonties could be divided. Callander (1986) notes two interesting aspects of these divisions. The first is that the most frequent cause of an action for division was encroachment. The second is that the instigators of such divisions were normally the smaller landowners.

Since history suggests that it is not the weak who have encroached upon the rights of the powerful, these observations support the view that the pursuers of such divisions (the small landowners) were invariably the injured party and that recourse to the law was the only effective defence to secure their rightful share of the commonty before it was illegally enclosed by more powerful neighbours”(Callander,1986).

The final Act for the Division of the Commonties , passed on 4 July 1695, provided that “all the commonties or common muirs within the Kingdom shall be divided”.

And so it was.

Finally, the **Fourth great land squat** was the extensive plundering of the common land of the burghs of Scotland. This was land granted by Royal Charter in most instances to medieval burghs to afford them the independence to prosper as trading environments, free from interference from neighbouring landowners. Such land grants afforded a rental income for the burgh to support the burghal administration and provided a degree of food security.

The vast territories granted to Scotland's Royal Burghs were designed to act as a bulwark against noble power. According to Johnston (1920), such acreages, together with other common lands, extended in the latter part of the sixteenth century to fully one half of the entire area of Scotland. But this valuable patrimony was not to last long.

As Johnston argued, "Until the Burgh Reform Act of 1833 the landowners and the commercial bourgeois class controlled all burghal administration of the common lands, and controlled it in such a way that vast areas of common lands were quietly appropriated, trust funds wholly disappeared, and to such a length did the plunder and the corruption develop, that some ancient burghs with valuable patrimonies went bankrupt, some disappeared altogether from the map of Scotland, some had their charters confiscated, and those which survived to the middle of the nineteenth century were left mere miserable starved caricatures of their former greatness, their Common Good funds gone, their lands fenced in private ownership, and their treasurers faced often with crushing debts.

As late as 1800 there were great common properties extant; many burghs, towns and villages owned lands and mosses; Forres engaged in municipal timber-growing; Fortrose owned claypits; Glasgow owned quarries and coalfields; Hamilton owned a coal pit; Irvine had mills, farms and a loom shop ....."

By the time the Royal Commission on Municipal Corporations in Scotland reported in 1835,

"Wick had lost in the law courts its limited right of commonty over the hill of Wick, and owned no property; Abernethy owned nothing, nor did Alloa. Bathgate was the

proud possessor of the site of a fountain and a right of servitude over four and a half acres of moorland. Beith had no local government of any kind; Bo'ness owned nothing; Castle-Douglas owned only a shop; Coldstream was stripped bare, not even possessing "rights in its street dung"; Crieff had two fields; Dalkeith nothing; Dunkeld nothing; and Dunoon, nothing.

The commons associated with Scotland's 300 or more burghs have all virtually disappeared but in recent years there has been a growing concern at local level about modern encroachment and alienation of what little remains. This has been exacerbated by the abolition of any role for Burghs in local administration in 1975 and their subsequent absorption into much larger units of local government

Under the new Freedom of Information law passed by the Scottish Parliament in 2002 and which cam into force in January of 2005, I have been making enquiries of Scottish local government of the extent of burgh commons remaining. I have yet to collate and analyse the responses but preliminary observations are that

- there is no consistent approach to what constitutes burgh commons
- records of what land may or may not be burgh commons exists but are incomplete in some instances
- The historic accounting convention continues to be deployed in the majority of cases leading to a dramatic undervaluing of the asset value of commons
- burgh commons continue to the the subject of alienation as part of processes that are high variable in their transparency, legitimacy and (possible) legality.

**CONSEQUENCES OF SQUATTING**

The consequence of all these processes of squatting was to concentrate the ownership of land into a very small number of hands, to extinguish the municipal independence and freedoms of burghs, to deny historic usufruct rights and to establish in Scots Law a code of rules and assumptions that left future generations impoverished

Thus I concluded in 1999, that

*The history of landed power in Scotland is a history of a class whose authority and hegemony have never been challenged effectively, whose possession of disproportionate property holdings has never been broken, and whose influence on debates on landownership and use has been conspicuous by its formidable extent and discrete application.* (Wightman, 1999)

But not all legal authorities have conspired to sanction the ease with which lawyers were able to annex land in the course of conveyances - annexations which by subsequent occupation and further clever drafting became part of their estates by stealth. Professor Cosmo Innes (1798-1874), the famous advocate and Professor of Constitutional Law and History in this Department wrote in his Scotch Legal Antiquities,

**Bidean nam Bian**

“Looking over our country, the land held in common was of vast extent. In truth, the arable - the cultivated land of Scotland, the land early appropriated and held by charter - is a narrow strip on the river bank or beside the sea. The inland, the upland, the moor, the mountain were really not occupied at all for agricultural purposes, or served only to keep the poor and their cattle from starving. hey were not thought of when charters were made and lands feudalised. Now as cultivation increased, the tendency in the agricultural mind was to occupy these wide commons, and our lawyers lent themselves to appropriate the poor man’s grazing to the neighbouring baron. They pointed to his charter with its clause of parts and pertinents, with its general clause of mosses and moors - clauses taken from the style book, not with any reference to the territory conveyed in that charter; and although the charter was hundreds of years old, and the lord had never possessed any of the common, when it cam to be divided, the lord got the whole that was allocated to the estate, and the poor cottar none. The poor had no lawyers.”

Not only did the poor have no lawyers. They spoke no Latin either and were not in the habit of travelling to Edinburgh on a regular basis to examine the title deeds of the Nobility.

**CASE STUDIES**

I want now to illustrate the arguments I’ve presented by three case studies. The first concerns a mountain range on the Isle of Skye which was put up for sale in

2000 and which relates very closely to the points just made by Professor Cosmo Innes. The second concerns a surviving commonty in Perthshire and the third concerns the ownership of a lump of rock 300 miles west of Scotland in the Atlantic Ocean.

**1. Cuillin**

The extent to which the Scots Law of land was designed to legitimise the doubtful acquisition of land rights and provide a legally watertight guarantee of title is evident to any scholar who cares to investigate the title deeds, legal history and social policy of any one of Scotland's landed estates. But seldom do such issues come to the attention of anyone other than legal of historical scholars. However, one recent case which exposed these issues for the first time to extensive public scrutiny was the case of John MacLeod of MacLeod, Chief of the Clan MacLeod who put up for sale a mountain range on the Isle of Skye.

**Chief John**

Chief MacLeod owns a castle whose roof leaks badly. He decided that, in order to pay for the roof repairs, and to invest in the commercial future of his estate, he needed to sell the Cuillin, a rugged and dramatic mountain range in the south of the Isle of Skye, off the west coast of Scotland.

**Cuillin Sales Advert**

The sale prompted a furious row as locals, mountaineers and land reformers expressed shock and outrage at the idea of selling an iconic mountain range. Much of this was little more than hot air prompted by an underlying antipathy towards Scotland's lairds.

**West Highland Free Press**

But dimly visible beyond the rhetoric there appeared a question. Did Mr Macleod actually own the Cuillin? Again this question was, in part, a variation on the old call of land agitators for landowners to produce their title deeds in the belief that they would show no claim to the land they held (such calls inevitably ended in disappointment). But the question this time from a small number of informed quarters appeared to be genuinely motivated.

One investigator in particular, Alan Blackshaw, conducted a long series of in depth enquiries. These concluded that MacLeod's title was founded on a Royal Charter of 14 April 1611 This deed, written in Latin, contained no bounding descriptions

and only vague locational detail.

**1611 Title Deed x2**

In particular, the extent of the feudal grant was given as 4 unciates of land in Minginish - the part of Skye in which the Cuillin are situated. An unciate is a medieval unit of land assessment equivalent to an ounceland or, in the Highlands of Scotland a davoch which is an extent of land capable of yielding an ounce of silver in annual rent. this would be the equivalent of around 80ha of grazing or 20ha of arable land.

The vast bulk of the Cuillin is bare rocky precipitous mountain waste. As we have seen from our friend Cosmo Innes, this kind of feudal grant was typical of the time - waste ground and mountains were of no value and were not included in feudal grants of the period. Thus in 1611, MacLeod was not granted the Cuillin. The Cuillin remained in the possession of the Crown as the Paramount Superior and was probably properly regarded as a  Crown Common.

As the controversy grew, the Crown Estate were eventually persuaded to investigate. They commissioned a legal opinion which dismissed any prospect of a Crown challenge to MacLeod's title and concluded that he did in deed have good title. What was revealing, however, was that in this conclusion they never sought to claim that MacLeod had actually been granted the Cuillin (indeed that was not the question the QC was asked to provide an opinion on). What they concluded was that MacLeod had a good title based upon

1. the fact that his 1611 Charter and subsequent legal titles were habile (capable of including the Cuillin) and,

2. that MacLeod had enjoyed "possession" for the prescriptive period (20 years), openly, peaceably and without judicial interruption

Now there is case law to suggest that encroachments onto crown land cannot be based on habile titles - one judgement in 1846 stating that "no alienation shall be presumed except that which is clearly and indisputably expressed" and that the law of prescription does not apply over Crown land. Furthermore there is case law to suggest that the law of prescriptive possession cannot be applied to alloidal or Crown land. In fact, neither of these considerations were brought into play.

The legal opinion sought by the Crown Estate Commissioners told them (as so many legal opinions appear to) what they wanted to hear.

MacLeod owned the Cuillin because the deeds in question were worded in such a way as to be *capable* of including the land in question and because MacLeod had handed out a few fishing permits, thus upholding the law of legitimised theft which is the positive prescription.

What all this means of course is that an important and iconic mountain range came to be owned by the MacLeod family because the Crown had failed in its obligations as a gatekeeper. Indeed the whole basis of registration of deeds, open and peaceable possession etc. is founded on the notion that if no-one else comes forward to challenge a title it falls to he who claims it. But this fails to take account of the fact that everyone who might conceivably have an interest does not spend every day standing at the gates of the Registers of Scotland inspecting the deeds that flow though. They don't today and certainly the poor peasants of the 17th century who spoke no Latin and never left the Isle of Skye in their lifetime did not either.

What is important to observe in this tale is that the Crown never examined the question of whether MacLeod's ancestors had actually been *granted* the Cuillin in 1611. It is clear that the land put up for sale had never been granted to MacLeod and to this day remains a Crown Common. But the laws of landownership in Scotland are constructed in such a way that render such questions irrelevant. Land which was never granted to MacLeod has become, by default and by neglect by the guardians of the public realm, part of the private possession of one man. It is hardly surprising that the Crown Estate never sought to dig deeper.

Mr MacLeod I should add failed to sell the mountain range, possibly due to the extent of the fuss he had precipitated.

**2. Alyth Hill**

My second case study focusses on a commonty in Perthshire. Few commonties now exist in Scotland. Most were absorbed into the estates of large landowners as

ac consequence of the 1695 Act but some do survive, how many we do not yet know. But what is worrying is that they are still disappearing mainly through ignorance of their significance and through the continuing legal trickery that is the deed tom found prescription or the a non domino deed.

The Hill of Alyth is an area of pasture that has been used over centuries by the people of Alyth. It is a recognised commonty which, unlike other commonties in the area, [note areas involved] escaped judicial division. Since the last division, generations of folk in Alyth have wondered what ever happened but only recently have they begun to seriously consider the legal status of the land in question. To their surprise they discovered that it in fact had been sold. I won't go into the legal details. Suffice to say that efforts are underway to restore the commonty but the salient issue for the purposes of this paper is this so-called sale - again theft would be more a apposite description.

The deed, created in 1977, conveys 20ha of this commonty to two neighbouring landowners. The granters are the Trustees of the Earl of Airlie, who was, until recently was Lord Chamberlain to the Queen. This deed is indeed a tribute to the lawyer's craft.

**Airlie Deed x2**

The Hill of Alyth is 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.....

....and that we as Trustees foresaid and our predecessors.....have never claimed the said subjects as part of our or their property but that it can be construed from the titles of the said Lands and Barony that the said subjects may be included therein. FURTHER CONSIDERING....Ramsay and Haddow have requested us etc.

This is in effect a non judicial division of a commonty being achieved through the legal trickery of the a non domino or habile title to found prescription to be secured through possession. It is a measure of the disempowerment of communities that the good folk of Alyth have yet to mount a challenge to this bare faced land grabbing.

### 3. Rockall

**Rockall Map**

Rockall is an isolated, uninhabited, rock situated in the North Atlantic Ocean. It is only 19m high, 25m across and 30m wide. It is is located 57° N, 13° W. The sea area around it, also known as Rockall and is well known to listeners of the BBC North Atlantic Shipping Forecasts.

**Rockall Picture**

The United Kingdom, Ireland, Iceland, Denmark all claim the rock. It is strategically significant as it sits on the Rockall Bank which is believed to contain significant deposits of oil and natural gas

The British originally claimed ownership on Rockall in 1955. On 18 September of that year Captain Connell of HMS Vidal, acting in pursuance of a Royal Warrant, led a naval expedition which landed on the rock, planted a Union flag, affixed a bronze plaque and formally annexed Rockall to the British Crown. Lieutenant-Commander Scott announced to his two companions on the rock and to the bemused puffins, guilliemots and other seabirds in the area

*"In the name of Her Majesty Queen Elizabeth II, I hereby take possession of this island of Rockall."*

The three men stood to attention as the flag was raised,and HMS Vidal sailed past and unleashed a 21-gun salute.

**Rockall Guards**

The plaque, which together with the flag have long been washed away read

*"By authority of Her Majesty Queen Elizabeth II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of her other realms and territories Queen, Head of the Commonwealth, Defender of the Faith etc., etc., etc., and in accordance with Her Majesty's instructions dated the 14th day of September, 1955, a landing was effected this day upon this island of Rockall from HMS Vidal. The Union flag was hoisted and possession of the island was taken in the name of Her Majesty. [Signed] R H Connell, Captain, HMS Vidal, 18th September, 1955."*

(This photo actually depicts a landing some years later during one of a regular

series of visits to assert British sovereignty.)

The reasons for this dramatic action was fear that the rock might be used by a foreign power to track missiles which were shortly to be tested from the rocket range on the Island of South Uist

it has been some time since the UK has conducted such imperial adventures and no doubt Captain Connell relished his duties that day.

But stranger things were yet to happen. In 1972, the Rockall Act was passed by Parliament. Section I provides that “from the date of the passing of this Act (10 February 1972), the Island of Rockall....shall be incorporated into that part of the United Kingdom known as Scotland and shall form part of the district of Harris in the County of Inverness, and the law of Scotland shall apply accordingly.”

In 1975 two Glasgow solicitors noted that there was, whilst the UK had annexed Rockall in 1955 and confirmed its claim in the 1972 Act, no title had been recorded. They thus submitted an a non domino disposition in their favour and submitted it for recording in the Register of Sasines (this Register’s name I should mention is derived from the French verb saisir meaning ‘to seize’ which is quite fitting really!

What followed was something of a farce as the Keeper of the Registers realised the potential significance of the deed. He returned it to them on the spurious grounds that they did not appear to have paid stamp duty - tax paid on property transactions. As a transaction of no value, however, stamp duty was not liable. However, this delay allowed the Crown Office to be alerted and for them to prepare a deed in the name of Her majesty which was promptly recorded (with no stamp duty payable) on  By the time the Glasgow pair had verified the non liability to stamp duty and resubmitted the deed, the Queen had got there before them.

**Rockall Search Sheet**

Thus the record of Rockall’s title appears in the Registers thus.

These three case studies demonstrate the trickery that is the legal system - a system that has been devised and adapted by centuries of  landowners and lawyers to do one very simple thing - enrich themselves at the expense of others.

Legal acquaintances of mine of course do not see things this way but, and this is what's interesting. Increasing numbers of ordinary folk see things this way and are demanding explanations. What was once a source of academic curiosity among historians, outrage by early 20th century radicals, and the norms of life by landowners and lawyers, has the potential to begin to undermine some of the articles of faith that underpin the Scots law of property.

**THE REFORM AGENDA**

I want to move on now to describe how land reform has come to prominence in contemporary Scotland and to conclude by arguing the case for what now needs to happen.

Towards the end of the 19th century, land reform became a hot political topic. In part this was a consequence of unrest in Ireland and in part because the establishment in London were being treated to daily accounts of the evictions and tensions taking place in the Highlands of Scotland as peasants demanded security of tenure and repossession of ancestral land. The most significant measure to arise out of this was undoubtedly the Crofters Holdings (Scotland) Act which stopped evictions and provided heritable secure tenure to this class of peasant occupier.

Further attempts at reform came with Prime Minister David Lloyd George's so-called 'People's Budget of 1909 which contained measures to tax land values The measure was eventually repealed, however, after the World War I when the Liberals were voted out of Government.

Since then the cause of land reform has been a cause picked up with varying degrees of enthusiasm by many generations fo reforming politician

Tom Johnston, wartime Secretary of State for Scotland, and author of that splendid philippic, *Our Scots Noble Families*, concluded the introduction to that work (which he titled *A General Indictment)* with a powerful invitation to social reformers to rally to the cause of land reform.

*“Show the people that our Old Nobility is not noble, that its lands are stolen lands - stolen either by force or fraud; show people that the title-deeds are rapine, murder, massacre, cheating, or court harlotry; dissolve the halo of divinity that surrounds the hereditary title; let the people clearly understand that our present House of Lords is composed largely of descendants of successful pirates and rogues; do these things and you shatter the Romance that keeps the nation numb and spellbound while privilege picks its pockets.”*

Johnston was the most perceptive, educated and committed of the small handful of early 20th century reformers but failed to achieve anything beyond his valuable historical research which today remains among the only work on the history of Scotland’s landed elites that seeks to tell something of the real truth about Scotland’s ignoble land history.

Land reform became unfashionable for the rest of the 20th century though the power of the landed aristocracy continued to wane. Planning powers over the built environment were nationalised after the war as were coal deposits. The State forestry department was set up leading to a massive increase in state owned land. But it was not until the 1990s that momentum began to gather on the topic of land reform. This came about as a consequence of greater self-confidence in Scottish politics - initially inspired by the growing opposition of the scottish public to the government s of Margaret Thatcher, then by a growing support and active engagement with the movement for self-government, and finally with the election of Tony Blair’s New Labour government in 1997 which led directly to the establishment of Scotland's first parliament since the Union of 1707 and the first truly democratic parliament ever.

This was the critical breakthrough. Whatever arguments might have been deployed in the promotion of land reform as a cause in the 1970s and 1980s, it could and would not lead to any change as a consequence of three factors.

1. the limited time on the parliamentary timetable for legislating on Scottish matters.

2. the hostility to land reform from the Second Chamber of the Westminster parliament - the House of Lords, whose members consisted of very large

numbers of landowning aristocrats - the hereditary peers, there purely by accident of their birth and the fact that no government had the political will to reform (until Tony Blair came along).

3. the weakness of Labour governments in the 1970s who otherwise might have been prepared to act together with 18 years of Conservative government ideologically opposed to any interference in the private property market.

The establishment of the Scottish Parliament ended all of that. it is a Parliament elected by and for the people of Scotland, with no revising chamber of ageing aristocrats, and with full legislative competence over all matters of Scots law. Scotland is now in a position to do something about land matters. So has it?

Well it's made a start. A bundle of statutes have been enacted including

- Abolition of Feudal Tenure Act
- Leasehold Casualties Act
- Land Reform (Scotland) Act
- Agricultural Holdings (Scotland) Act
- Title Conditions Act

Foremost among these and in many ways the flagship of the current land reform programme, is the Land Reform (Scotland) Act 2003 and in particular Part 2 of that Act, the Community Right to Buy. This provides communities with a right to register an interest in any land outside of Scotland's largest towns and cities (those with a population of over 10,000) and to have the opportunity to buy that land if and when it comes up for sale.

But most land in scotland has not been exposed to the market for over 100 years. Market assisted land reform of this sort can thus only go so far in ameliorating the highly concentrated pattern of private landownership that underlies many contemporary problems.

Moreover, Government claims that a community right to buy would 'greatly empower communities' and 'effect rapid change in the pattern of landownership' are plain nonsense. No community is going to be empowered through speculation

that at some point in the future, they might be able to take over control of the land.

Nevertheless, an important chapter has been opened. Life will not be the same again and the circumstances are now far more favourable than they have been for many centuries.

**CONCLUSIONS**

So to conclude, what should we do in an old country where the squatters moved in long ago? Well that is a matter of contemporary ongoing debate. Certainly there remains much to do. Some key observations are as follows.

- It is too easy for politicians to avoid getting involved in disputes about land and to claim that such matters are for the court to determine. Certainly this is the appropriate response in specific local cases but by the time such local cases become generic in their significance, the legislators need to act. The challenge today is how to redress the manifest wrongs of the past in a way that is flexible, just and lasting.

- this is not an argument simply about righting historical wrongs (though that is ample justification for land reform) it is about providing more equitable economic opportunities to communities today . For example, in the parish of Carluke near Glasgow, I have discovered what is perhaps the first commonty to be registered in the new Land Register

**Carluke Parish Account 1845**

Upon contacting the local authorities in Carluke and the Carluke Parish Historical Society, I was informed that no-one knew anything about the land. Indeed the Chair of the Parish historical Society confessed that she did not in fact know what a commonty was.

**Carluke Commonty 1**

This is the commonty - in yellow.

But maybe she should because the commonty is situated on the edge of the site of the largest wind farm in the UK.

**Carluke Commonty 2**

The annual rental for one turbine is i in excess of £100,000.

- politicians need to act. One prominent historian was moved to observe recently that

*We have long been in the habit in Scotland of bemoaning the more obvious excesses of our current landownership system. Newspaper libraries bulge with condemnatory articles about the way in which this or that community has had its prospects blighted as a result of finding its entire future dependent on the whims of the crook, the charlatan or the speculator who has become its laird. And as each new scandal comes along, there is never any lack of politicians, local or national, to denounce its perpetrators and to declare that such a thing must never be permitted to happen again.*

*But is has happened again. And it will happen again. And again. And again. It will go on happening, in fact, until Scots, nationally and collectively, set the ownership of land on a new legislative basis. (Hunter, 1996)*

**Mugabe**

- Land reform is not about attacking landowners. this point was recognised as long ago as 1909 by no less that Sir Winston Churchill, then a radical liberal.

*'It is not the individual I attack, it is the system. It is not the man who is bad, it is the law which is bad. It is not the man who is blameworthy for doing what the law allows and what other men do, it is the State which would be blameworthy were it not to endeavour to reform the law and correct the practice. We do not want to punish the landlord. We want to alter the law.' (Churchill, 1909)*

- Contemporary reforms are a modest but important start on a much longer journey of land reform. We need

a. An act of Restitution providing a judicial process for recovering land improperly obtained
b. repeal of various 17th century statutes
c. Statutory freeze on any further sale of what little remains of common land pending proper legal investigations
d. Suspension and reform of the prescriptive possession rule

e. reform of the law of inheritance
f. Tenancy reform giving all tenants rights to buy

- Reform will not come without a concerted effort. We may no longer have the House of Lords to frustrate such efforts but the landed establishment is well organised

To conclude land tenure is a social construct. it is a body of law that defines the nature, distribution and transfer of rights to land. In a democratic society land tenure reform and wider land reform are a legitimate part of public policy. Unfortunately, i Scotland and in the UK in general, the issue has lain dormant for too long.

**End Slide**

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