

UNION TERRACE GARDENS

Historic and Legal Status



Union Bridge in 1807. Reproduced by kind permission of University of Aberdeen ABDUA 30581

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INTRODUCTION

Sir John Cope, having missed the rebels in the north, entered the burgh on the 11th September with over two thousand men and encamped at the Dove Cot Brae, where Union Terrace Gardens now are.

Munro, Alexander M. 1897 Memorials of the aldermen, provosts and lord provosts of Aberdeen, 1272-1895 pg. 229

The Denburn would seem to have been the most popular of these out-door “laundries” and as recently as the 19th century, the side grassy verges of this stream - then flowing open through what is now Union Terrace Gardens and the railway-line were the most favoured bleach-greens. Here, the demand for bleaching-space was particularly keen during February for then, after the winter’s snows, the sun’s rays were said to be purer and stronger than in any other month. In those days, Nature provided the only detergent.

Wyness, Fenton, 1965 City by the grey North Sea” Aberdeen, p70

The aim of this study is to research the history of the ownership of Union terrace Gardens, to determine its current legal status, and to advise on the implications of any findings.

Sources of information for this research have included Aberdeen City Library, the National Archives of Scotland, City of Aberdeen Archives, historical books and material supplied by individuals.

HISTORY OF THE SITE



Figure 1. Jacob Gordon map of 1661

Union Terrace Gardens sits in the Denburn Valley, the lower part of which was historically known as Corbie Haugh To the east was Mutton Brae and to the west Dovecot Brae. As Figure 1 shows, the land was then outside the built up area of the burgh and formed cultivated farmland.

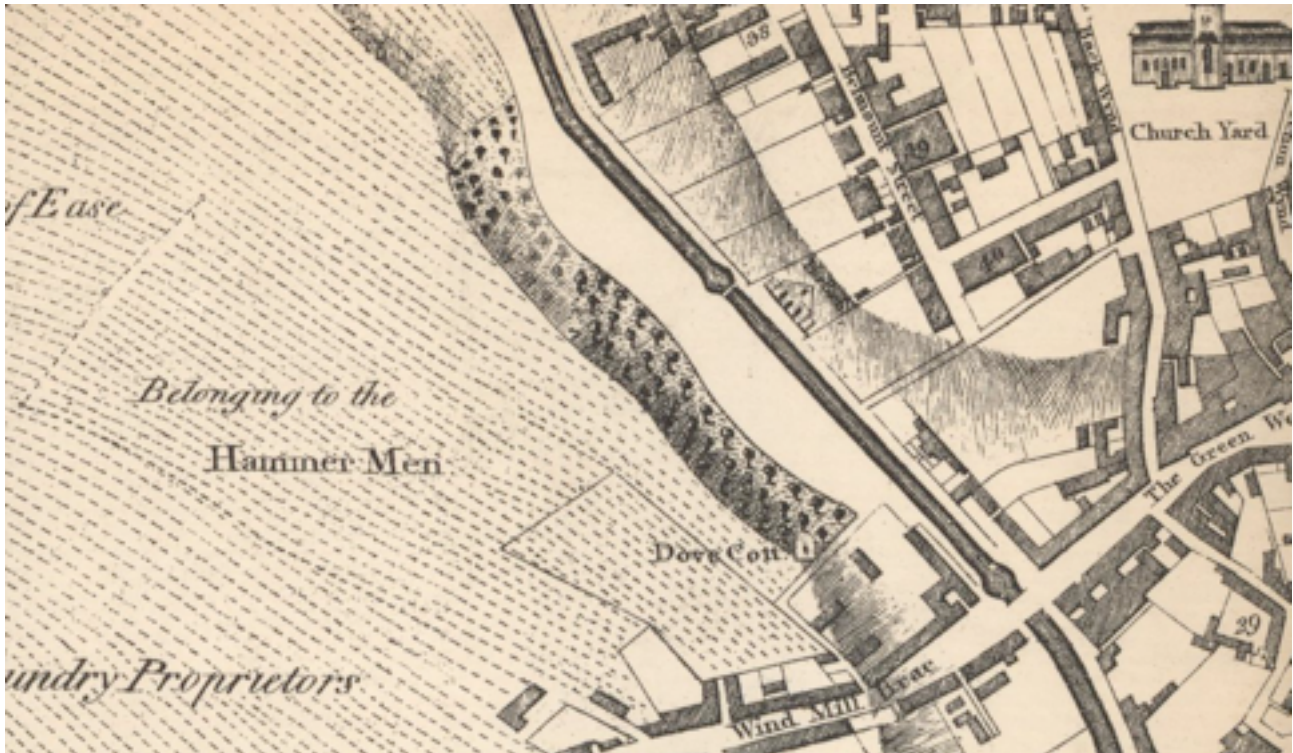


Figure 2. Alexander Milne map of 1789

By 1789, the land formed part of the Dovecot Croft or Ducat croft on the west side of the Denburn (see Fig. 2). In the 17th century this croft had been feued to the Findlater family. In 1740, it was sold to Alexander Cushnie, farmer at Bridge Stone of Ferriehill. In 1758 it was acquired by John Leslie, Merchant and in the same year sold on to James Duff, Advocate on 23 August 1758.

Less than one year later, in 1759, James Duff sold the croft to Daniell Cargill, a merchant in Aberdeen and the then Master of the Kirk and Bridge Works. For the sum of 1300 Scots pounds, Duff

“have sold, alienate & disposed to & in favours of the said Daniel Cargill & his successors in office, Masters of the said Kirk & Bridge Works of Aberdeen for the use and behoof of the bridge of Dee charges All & whole that croft taill or piece of land called the Dovecott brae, comprehending and including also the Corbiebrae and the rigg of land at the foot of the brae excepting and reserving the Dovecroft situate on the south end of the said brae bounded as follows viz. having the road commonly called the Summer road, lying on the north end of the Tenement of Land & yeard, sometime of the saids Mr John, Bessy, & Christian Finlaters, and Alexander Cushnie & now belonging to me the said James Duff at the south, the Croft sometime of Mr. George Bissett, and now of John Martine fflesher at the west, the croft sometime of Martine Howison, now of Robert Joyner Taylor in Aberdeen, called the Craigwall Croft at the north, and the foresaid burn called the Denburn at the east parts ..”¹

From the written description, the croft clearly comprises the low lying west bank of the Denburn, the wooded slopes to the west, and some cultivated ground bounding with the lands of the Hammer Men’s ground. The buildings associated with the croft at the south end appear to be excluded from the sale.

¹ Disposition by James Duff to Daniel Cargill, recorded in Burgh Register of Sasines 3 March 1759

Daniel Cargill was an officer of the Town Council and thus, by this disposition of 1759, the Dovecot Croft was now the property of the Town Council and comprised a low lying haugh (the Corbie Haugh) and a wooded slope leading up to what is now Union Terrace. The haugh was used as a public bleaching green. In the 19th century, the burgh feued land to develop Union Terrace (see Fig. 3).



Figure 3. John Wood Map of 1828

Something of the character of the area can be gleaned from the sketch on the cover of this report which shows the Denburn valley looking south to the newly completed Union Bridge, the Bow Brig and the Green. An additional parcel of land was acquired from John Martin in March 1759. As the deed states,

“It is judged proper that the said Braes should be inclosed and Fenced, and a Hedge planted round on top of the same, But in executing the said Design, It is found Necessary to have two feet of the said John Martins Ridge all along the head of the said Braes. In order to plant a Hedge therein, and for digging, dressing and pruning the said Hedge.”

The Town Council thus acquired a two foot strip of land along the top of the ridge of the wooded slope. In return, John Martin was granted the right to mow the grass in the “*sunken terrace*” and to carry it off though it was expressly forbidden for him

“to carry in any beasts whatsoever within the Inclosure to eat pasture or feed on the Grass of the said sunk fences.” ²

² Disposition by John Martin to Daniel Cargill 20 March 1759 City of Aberdeen Archives NStT/5/122

THE DEVELOPMENT OF THE GARDENS

During most of the 19th century, the haugh was in use as a bleaching green. The new proprietors of Union Terrace were granted a right of servitude and liberty for themselves and their tenants of walking in the wooded slopes and it was declared in their titles that the "plantation" should be used for that purpose alone and that no houses were to be built between the terrace and the Denburn. These conditions (which were laid down by the Town Council) increased the value of the Union Terrace feus.

In 1815 the plantation had fallen into a neglected state and the Town Council entered into a contract with the Union Terrace proprietors and the proprietors of Belmont Street by which the Belmont Street proprietors were granted a servitude and privilege of walking in the plantation in common with the Union Terrace proprietors. It was agreed that the plantation should be enclosed and that the proprietors should lay out the ground in a neat and proper manner with paths, planting and shrubberies and maintain it in all time coming as a pleasure ground for the proprietors. The costs were to be borne by the proprietors.

It was further agreed that should the subjects again fall into a state of disrepair, the Town Council would have the power to take action and charge the proprietors accordingly. In 1871, the plantation did indeed fall into disrepair once more and the Council called upon the proprietors to undertake the work necessary to tidy the place up. However, a dispute arose between the proprietors and the Council and, as a consequence a second contract was drawn up in 1872 by which it was agreed that,

"with the view of preventing litigation and in order to obtain an amicable settlement of the questions which have arisen between the Council and the Proprietors, and in consideration of the counter obligations aftermentioned et pro bono publico, it is contracted and agreed between the Council and Proprietors in manner underwritten. That is to say, on the one hand the Proprietors in consideration of the obligations hereby undertaken by the Council, agree in so far as they have a right so to do, for themselves individually and their successors in the respective subjects situated in Union Terrace, and the westside of Belmont Street aforesaid, that the servitude and privilege or liberty of walking upon and using the said plantation of planted bank situated on the east side of Union terrace aforesaid, shall from and after the date of delivery hereof, be shared and enjoyed by the Public along with the Proprietors under such regulations as may from time to time be fixed by the Council; and further, the Proprietors agree simul ac semel with the delivery hereof, to pay over to the Council as a contribution towards the necessary repairs required to be made on the said plantation and enclosures thereof, and towards the cost of a new laying out and improving its condition, the sum of One Hundred pounds sterling."

The contract went on to bind the Council to undertaking such repairs and improve and maintain the land as a "recreation ground for the Public" free of all costs to the proprietors. The Council relieved the Proprietors of all their contractual obligations.

*"The Council hereby agree and bind and oblige themselves and their Successors in office without hurt or prejudice to the rights and privileges competent to the proprietors that, on no account whatever shall the said plantation be hereafter appropriated to any other use than that of a recreation ground for the Public."*³

³ The Contract was subscribed by the Town Council on 30 October 1872 (CA/1/1/89 pg.111) and recorded in the Sheriff Court Books of Aberdeenshire on 30 November 1872. The above extracts are derived from Public Parks Memorial & Opinion of Counsel 1878. Public Parks (Victoria Park, Denburn Valley), 1878 SRO/7/1/21 held at City of Aberdeen Archives.

On 22 February 1872, the Improvements Committee of the Town Council resolved to ask the architect, James Matthews, to prepare a report on the laying out of the Denburn as a public park.⁴

"I beg to submit a Plan and two elevations showing generally the improvements I have to suggest I propose to erect a light iron bridge for foot passengers across the valley from Woolmanhill to Union Terrace

I propose to remove the present long iron railing at the foot of the Wooded bank and to throw the whole ground between Union Terrace and the Railway wall as far up as the iron Bridge into a recreation ground

The flat portion of the ground at the North end may be laid out for Bowling or Croquet Greens while the Wooded bank may be intersected by walks planted with evergreens and properly sloped and sown with grass

In carrying out these improvement, it would be necessary to remove the Bleach green, but as it is a great convenience to many persons, I propose to form a new bleach green, north of the new bridge

The covering of the Denburn would also be necessary to carry out the plan. I need hardly refer to the present condition, which is well known to the Council, further than to say that I have been there frequently of late and although I believe it is fully as clear as usual, there is a most disagreeable effluvia arising from it, which in the heat of Summer cannot fail to be most injurious to the general health of the City

The Corbie well should be neatly fitted up with a polished Granite Fountain I have not referred particularly to the laying out of walks, planting and shrubs, sowing grass, forming bowling and croquet greens as it will be much better to put these under the direction of a tastefully and competent Landscape Gardener."

James Matthews provided an estimated cost of establishing the gardens at £1735. His report was presented to the Town Council on 5 August 1872. There then followed a period during which little progress was made but on 7 February 1876, the Town Council approved the plan and work started in 1877 to lay out the whole of the haugh and wooded bank as a public park. The bleaching greens were relocated to a site to the north of the iron bridge.

Union Terrace Gardens were opened to the public in August 1879. Figure 4 shows the completed works in 1884 with bandstand and iron bridge to the north. Figure 5 reproduces a postcard published by the London and North Western Railway Company in 1910.

⁴ Meeting of Improvements Committee 22 February 1872. CA/1/1/88 pg. 383 The Report is reproduced in the Minutes of the Town Council, 7 February 1876 CA/1/1/91 pg. 247.



Figure 4 Union Terrace Gardens, 1884



Figure 5 Union Terrace Gardens, 1910

COMMON GOOD

Common good is a term dating back to the 15th century and enshrined in the Common Good Act 1491 which remains on the statute book.⁵

“Item it is statut and ordinit that the commoune gud of all our souerane lordis burrowis within the realme be obseruit and kepit to the commoune gude of the toune and to be spendit in commoune And necessare thingis of the burght”

Burgh charters had granted lands and tax powers to burghs and the 1491 Act was intended to remind Town Councils that the property of the town was for the common good of the citizens. Until the introduction of legislation regulating the affairs of Town Councils and allowing them to, for example, improve sanitation, carry out specific improvements and develop public housing, the town's charter was often the sole governing document.

In the 19th century a number of legal cases were brought by townspeople concerned about the encroachment of their rights by local landowners or the Town Council. The key legal case of this period was *Murray vs Magistrates of Forfar* in 1893 that came to be regarded by many as a case which defined common good. It concerned plans by the Town Council to lease land for a market (which previously had only been used as such for 8 days in the year under the terms of the burgh charter) and, in so doing, to exclude the recreational users of the ground. The case did not, in fact, concern itself with what was or was not common good but merely with the characteristics of that category of common good land that was inalienable and which, before the Council could dispose of it, would require the approval of the courts.⁶

It was to be another 50 years before a definition of what constituted common good land was provided and which accorded with the logic of the origins of burgh property. The case of *Magistrates of Banff vs Ruthin Castle Ltd* in 1944 concerned the leasing of Duff House in Banff.⁷ The case turned on whether or not Duff House formed part of the common good and, in his ruling, Lord Mackay observed that,

*Burghs proper are the creature of the sovereign right over the land of Scotland. They are endowed from their origin with certain gifts of land or, it may be, other capital endowments.....The property rights of all sorts are common good. It must, lastly, be said that the ancient authorities make it clear that ‘accessions’ to the original property endowments, whether emanating from the sovereign or from the wealthy landowners who set up the burgh of barony in their lands or other endowments, were contemplated. It is matter of the clearest assumption in decision after decision that such ‘accessions’ are contemplated, and when accepted fall into and form part of the common good.*⁸

⁵ See www.legislation.gov.uk/aosp/1491/19/introduction and, for further information on Common Good, see [Common Good Land. A Review and Critique](#) and [Quick Guide to Common Good](#) at www.scottishcommons.org

⁶ For further explanation, see Andrew Ferguson (2006), *Common Good Law*, Avizandum, Edinburgh pg. 52. 52

⁷ *Magistrates of Banff v Ruthin Castle Ltd*. 1944 SC 36. See Ferguson, chapter 5 for a discussion.

⁸ Lord Mackay in *Magistrates of Banff v Ruthin Castle Ltd*. 1944 SC 36. at pg. 49.

Lord Wark observed that,

*I do not think it necessary to enter into the history and meaning of the expression common good, for two reasons, first, that these have been discussed at length by Lord Mackay, with whose observations I entirely agree, and, second, that there was in the end no dispute between the parties that **all property of a royal burgh or a burgh of barony not acquired under statutory powers or held under special trusts forms part of the common good.** (my emphasis)⁹*

Lord Wark's opinion that common good comprised all property of a burgh except that held in a Trust or acquired using statutory powers is now the leading decision on the matter and was cited with approval as recently as 2003 in the case of *Wilson vs Inverclyde*

It (common good property) was thus the ordinary property of a burgh, held for the general purposes of the community. It is owned by the community, and the town council or other local authority is regarded in law as simply the manager of the property, as representing the community. Typically, the common good included public buildings such as churches and the municipal chambers, the streets of the burgh, public open spaces and markets. It might also include lands, houses and other forms of property. In a coastal burgh, the harbour would typically form part of the common good.¹⁰

IS UNION TERRACE GARDENS PART OF THE COMMON GOOD?

The determination of what is and what is not common good is often made out to be a complex legal question when in fact, for most purposes, is a straightforward matter of applying the test set out by Lord Wark (although there may, of course, be situations where it is difficult to apply the test because of poor or incomplete information).

The test should be applied to the circumstances of the acquisition of land by a burgh when it last happened. In other words, if a Town Council purchased some land in 1830, then sold it in 1850 and re-acquired it in 1890, the test needs to be applied to the circumstances of the 1890 acquisition.

In the case of Union Terrace Gardens, the land was acquired in 1759 and has remained in the ownership of the Town Council and its successors ever since. So, is it common good?

Question 1 - Was the land acquired by a Royal Burgh or Burgh of Barony?

Yes. Aberdeen is a Royal Burgh and was in 1759.

Question 2 - Was Dovecot Croft acquired using statutory powers?

No. Few, if any such statutory powers existed in 1759 and all the evidence suggests that the transaction was a straightforward acquisition of land following a resolution by the Town Council.

Question 3 - Was Dovecot Croft acquired and held in a special Trust?

No. It was acquired by an Officer of the Town Council in his official capacity has been owned by the Town Council and its statutory successors ever since.

Thus Union Terrace Gardens forms part of the Common Good of the City of Aberdeen.

⁹ Lord Wark in *Magistrates of Banff v Ruthin Castle Ltd.* 1944 SC 36. at pg. 60.

¹⁰ Lord Drummond Young in [Andrew Wilson and Others v Inverclyde Council 2003](#) at [4]

IMPLICATIONS OF COMMON GOOD STATUS

The law governing disposal of common good land is complex.¹¹ However, much depends on the circumstances of each case as to how complex it need be. In certain cases where land is deemed to be inalienable or where a question arises as to the authority of the Council to dispose of it, a petition to the Courts seeking approval for such a disposal is necessary.

Section 75(2) of the Local Government (Scotland) Act 1973 states that

Where a local authority desire to dispose of land forming part of the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorise them to dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to dispose of the land accordingly.

An important question is thus whether Aberdeen City Council are required to seek court approval in order to be able to pursue the City Garden Project (CGP) project.

IS COURT APPROVAL REQUIRED?

Court approval will be required if the Council wishes to dispose of the land where a question arises as to their authority to alienate it.

Alienating land means simply to interfere with the rights of the inhabitants of the burgh by, for example, making it impossible for them to enjoy a historical use or by putting the land beyond the control of the Council by lease or outright sale.

Disposing of land means selling land but it also, in the context of common good law at least, includes leasing land for significant lengths of time - as short as 10 years in the case of *Murray v Magistrates of Forfar* 1893.¹²

A further question is when does a question arise as to the right of a local authority to alienate land? The *Murray v Magistrates of Forfar* case referred to earlier define those categories of common good that are inalienable (and thus require court approval) and these provide clear guidance in the case of Union Terrace Gardens. Lord McLaren asserted that common good land which was inalienable could arise in any of three ways.

*“The land may be appropriated to public uses in the Charter or original grant; the land, after it is vested in a public body, such as a Town-Council, may be irrevocably appropriated to public uses by the act of the Town-Council itself; and, again, it may be so appropriated, or rather the inference may be drawn that it was originally appropriated to public uses from evidence that the land has been so used and enjoyed for time immemorial.”*¹³

The second of these categories clearly applies to Union Terrace Gardens. In the 1832 contract between the Town Council and the Proprietors of Union Terrace and Belmont

¹¹ For further details see Ferguson (2006), Common Good Law Ch. 6.

¹² See also *East Lothian District Council v. National Coal Board* 1982, SLT 460, Lord Maxwell at 468.

¹³ *Murray v Magistrates of Forfar* (1893) 20 R 908, 1 SLT 105, Lord McLaren at 918-919.

Street, it was expressly decided and resolved that the wooded bank would be a public park an the low lying haugh had been in public use since time immemorial as both a bleaching green and a public park.

This appears to satisfy Lord McLaren's test of being "*irrevocably appropriated to public uses by the act of the Town-Council*" and *originally appropriated to public uses from evidence that the land has been so used and enjoyed for time immemorial*.

UNION TERRACE GARDENS and the CITY GARDEN PROJECT

The proposal to develop the City Garden Project involves two aspects relevant to the status of the Union Terrace Gardens as common good.

1. The proposals may involve terminating the existing legal status of the gardens as a recreational park dedicated to public use which has been used since time immemorial.

Much depends on the specifics of the proposals that emerge for the future of Union Terrace Gardens. However, any other use of the land other than as a recreational park dedicated to public use would require the approval of the courts.

2. The proposals appear to involve putting the gardens beyond the control of Aberdeen City Council via a long lease to a third party special purpose vehicle.

If any part of Union Terrace Gardens ceases to be a recreational park dedicated to public use and/or it is disposed of by way of a lease or sale to a third party, then, as part of the City's common good, Aberdeen City Council will require the consent of the courts. This will involve the Council raising a petition in either the Sheriff Court or the Court of Session. In the paper presented to the Council in October 2010, a timetable is presented for the development of the City Garden Project.¹⁴ Nowhere in this timetable is there provision for presentation of a petition to the courts for approval to dispose of common good land. This may be because the Council do not consider this necessary or because they are, as yet, unaware of the necessity of doing so.

As things stand at present, it is probable that the Council is required by law to seek consent of the courts for the City Garden project. Much, however, depends on the eventual proposal and whether any disposal of land is involved. If it appears that such consent will be necessary and the Council fail to seek such consent, it is open to the citizens of Aberdeen to mount a legal challenge.

It should be noted that recent developments have made it easier for community based organisations to become involved in Court actions on issues of the wider public interest. The courts have now recognised that where issues are being raised in the wider public interest, it is appropriate to place a cap on the liability for expenses that might otherwise arise. In other words, a group can seek an early ruling from the courts that they should not be liable for expenses in raising or defending a common good case.¹⁵

¹⁴ City Garden Project - timetable for key decisions and arrangements for short-listing design proposals
Report EPI/10/240 6 October 2010
Available at <http://committees.aberdeencity.gov.uk/mgConvert2PDF.aspx?ID=9525>

¹⁵ See [McGinty vs Scottish Ministers \[2010\] CSOH 5](#)