

SCOTTISH LAW COMMISSION
(Scot Law Com No 141)



Crofters (Scotland) Bill

Report on the Consolidation of Certain Enactments relating to Crofting

Presented to Parliament by the Lord Advocate by Command of
Her Majesty
May 1993

EDINBURGH: HMSO
£2.80 net

Cm 2187

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Davidson, *Chairman*
Dr E M Clive
Professor P N Love, CBE
Sheriff I D Macphail, QC
Mr W A Nimmo Smith, QC.

The Secretary of the Commission is Mr K F Barclay. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

SCOTTISH LAW COMMISSION

Report on the Consolidation of Certain Enactments relating to Crofting

To: The Right Honourable the Lord Rodger of Earlsferry, QC,
Her Majesty's Advocate.

The Crofters (Scotland) Bill has as its object the consolidation of various enactments relating to crofting.

In order to facilitate a satisfactory consolidation, we are making the recommendations set out in the Appendix to this Report. All these recommendations are intended to remove anomalies.

The relevant government department and other bodies have consulted and they agree with our recommendations.

(Signed) C K DAVIDSON, *Chairman*

19 April 1993

Appendix

Recommendations

1. Subsection (1) of section 1 of the Crofting Reform (Scotland) Act 1976 makes provision for the acquisition of croft land by a crofter. Subsection (3) of that section in defining croft land makes it clear that any part of the croft can be so acquired (subject to certain exceptions including under paragraph (b) of that subsection land comprising any part of a common grazing unless the land has been apportioned for the exclusive use of the crofter concerned under section 27(4) of the 1955 Act and the land is either adjacent or contiguous to another part of the croft or is arable machair.) By virtue of section 3(5) of the 1955 Act land which has been so apportioned is deemed to form part of the croft.

Difficulties have arisen in relation to the acquisition under section 1 of the 1976 Act of apportioned common grazing land in circumstances where the apportioned land comprises the whole croft and there is therefore no other part of the croft to which the apportioned land is adjacent or contiguous. These circumstances have occurred in the following situations -

- (a) Under section 12(4) of the 1955 Act, on a croft being resumed by the landlord, the Crofters Acts cease to apply to the croft, and under section 16(7) or (9) of that Act when a croft has become vacant the Crofters Commission may direct that the croft shall cease to be a croft. It may therefore happen that, when the common grazing land becomes a croft on apportionment, the rest of the croft has already been "de-crofted";
- (b) By virtue of section 15(6) of the Crofters (Scotland) Act 1961, in any of the provisions of the Crofters Acts relating to common grazings, any reference to a crofter includes a reference to any non-crofter who is entitled to share in a common grazing along with other crofters. This provision *inter alia* enables such a non-crofter to apply for an apportionment under section 27(4) of the 1955 Act and the reference in section 1(1) of the 1976 Act to a crofter would presumably include a reference to such a non-crofter. The problem under section 1 of the 1976 Act is that, because the person obtaining the apportioned land is not otherwise a crofter, the apportioned land comprises the whole croft.

Section 3(6) of the 1955 Act provides that where -

- (a) a crofter has acquired his whole croft other than land apportioned to him under section 27(4) of that Act; or
- (b) such a non-crofter has obtained an apportionment of land under section 27(4),

that land shall be deemed to be a croft. It seems likely that Parliament intended that once the land referred to in section 3(6) of the 1955 Act became the croft, it should be capable of being acquired by the person to whom it had been apportioned without restriction. As

section 1 of the 1976 Act is drafted, however, it is doubtful whether that intention has been implemented because what that section appears to authorise is not the acquisition of the croft but of croft land as restricted in relation to apportioned common grazing land.

When referring in this recommendation to the apportioned common grazing land being the whole croft, a small qualification has to be made. By virtue of section 3(5) of the 1955 Act any right in pasture or grazing land held or to be held by the tenant of a croft is deemed to form part of the croft but such a right does not come within the definition of croft land which can be acquired under section 1 of the 1976 Act. In speaking of the whole croft in this recommendation we are consequently excluding from that concept any such right in pasture or grazing land.

We therefore recommend that the re-enactment of section 1 of the 1976 Act should clearly implement what we believe to have been the intention of Parliament by providing that apportioned common grazing land shall be capable of being acquired under that section if that land comprises the whole croft other than any right in pasture or grazing land which has not been so apportioned.

Effect is given to this recommendation in clause 12(3)(b)(ii) of the Bill.

2. Section 6(6) of the Crofting Reform (Scotland) Act 1976 gives to a crofter acquiring the site of the croft dwelling-house and to his spouse, so long as either of them continues to occupy that site, any right to cut and take peats for the use of the house which the crofter enjoyed immediately before the acquisition. This provision does not appear to supersede any such rights which attach to the tenancy of the croft. Doubt, however, has arisen as to whether (assuming a change of tenancy of the remainder of the croft) the peat cutting rights of the former crofter and his spouse and the new tenant are to be exercisable simultaneously or whether the rights are to be exercisable by the new tenant only after the former crofter and his spouse cease to occupy the site. It seems reasonable to assume that Parliament intended that the rights should be exercisable at the same time and we recommend that this should be put beyond doubt in the re-enactment of section 6(6) of the 1976 Act.

Effect is given to this recommendation in the proviso to clause 17(6) of the Bill.

3. Section 9(1) of the Crofting Reform (Scotland) Act 1976 provides in effect, that where the Land Court authorises the landlord to resume croft land, the crofter shall be entitled to receive from the landlord a share in the development value of the land resumed. Subsection (4) of that section relates to the case where the land resumed forms part of a common grazing and provides for the apportionment of that share among the crofters sharing the grazing. The subsection is silent as to who is to make the payments to the crofters.

Section 24 of the Crofters (Scotland) Act 1955 contains provisions for the appointment of a grazing committee or grazings constable to administer a common grazing and, where such an appointment has been made, the Land Court has adopted the practice, on an application for resumption by a landlord, or ordaining the landlord to pay any such share to the clerk of the common grazings committee or the constable for distribution by him among the crofters. If, however, in any case a crofter has been unhappy with this arrangement, the Land Court has ordained the landlord to make payment to him directly. Recently, however, doubt has been expressed as to whether it is clear that it is competent for the distribution to the crofters

to be made through the clerk to the grazings committee or the constable. There may be as many as eighty, or even more, crofters sharing in the common grazing and to make the landlord responsible for the distribution would impose a costly administrative burden on him.

We therefore think that in the re-enactment of section 9 of the 1976 Act it should be made clear that in the case of resumption of common grazing land, where a grazings committee or grazings constable has been appointed, the share in the development value should be paid to the crofters through the clerk to the grazings committee or the constable, unless any particular crofter wishes to receive payment directly from the landlord.

Effect is given to this recommendation in clause 21(4)(c) of the Bill.

4. Section 16(9) of the Crofters (Scotland) Act 1955 provides *inter alia* that "Where a croft is vacant, the [Crofters] Commission may, on the application of the landlord, direct that the croft shall cease to be a croft". Section 16A(1) provides *inter alia* that "the Commission shall give a direction under section 16(9) of this Act that a croft shall cease to be a croft if -

- (a) subject to subsection (2) below, they are satisfied that the applicant has applied for the direction in order that the croft may be used for some reasonable purpose ..."

And section 16A(2) provides *inter alia* that "... the Commission, in determining whether or not to give such a direction, shall have regard to the general interest of the crofting community in the district in which the croft is situated". Finally, section 16(13) provides that "The provisions of this section shall have effect in relation to a part of a croft as they have effect in relation to a croft"; but there is nothing in the Act which expressly states that section 16A also applied to a part of a croft.

In the case of *Hastings v Crofters Commission* (No 2) 1992 SLT (LC) 45, a direction was sought under section 16(9) for the decrofting of a small portion of a croft, and the question arose as to whether the Crofters Commission, in determining whether to give the direction, were required to have regard to the general interest of the crofting community under section 16A(2) where the application related to only a part of a croft. The Land Court held that, despite the fact that section 16A was not expressly applied to part of a croft, that section was intended to apply to part of a croft. The Court held that view because "section 16A is supplementary to section 16(9) and it is only by virtue of the latter that decrofting orders are authorised to be made and to which section 16(13) [the provision which applies section 16 to a part of a croft] does apply.".

We recommended that in the re-enactment of sections 16 and 16A of the 1955 Act effect should be given to the decision of the Land Court in the *Hastings* case by expressly providing that section 16A applies to a part of a croft. Effect is given to this recommendation in clause 23(11) of the Bill.

5. Section 22(1) of the Crofters (Scotland) Act 1955 confers power on the Secretary of State to make schemes for providing grants and loans to crofters for the purpose of aiding and developing agricultural production on crofts. Any such scheme has to be contained in a statutory instrument which is laid before Parliament. The Joint Committee on Delegated Legislation has recently challenged two provisions contained in such schemes in purported

exercise of that power -

- (a) a provision enabling the Secretary of State in certain circumstances to recover a grant or loan; and
- (b) a provision to the effect that where the grant or loan is made in respect of a common grazing, the Secretary of State shall pay the grant to the grazings committee or a grazings constable.

(a) Until recently challenged by the Joint Committee schemes made under section 22(1) have for many years contained a provision setting out the circumstances in which a grant or loan paid under it may be recovered by the Secretary of State and specifying the person from whom the recovery may be made. For a scheme to be workable it must contain conditions relating to its operation and there must be a sanction to enforce the conditions, the obvious sanction being recovery of the grant or loan. The power contained in section 22(1) of the 1955 Act is very general in its terms and does not seem to prevent the scheme including conditions or provision relating to breach of such conditions, the obvious sanction being recovery of the grant or loan. The power contained in section 22(1) of the 1955 Act is very general in its terms and does not seem to prevent the scheme including conditions or provisions relating to breach of such conditions. The Joint Committee has not objected to the inclusion in the scheme of conditions and it is therefore difficult to see how they justify their challenge to provisions relating to breach of conditions. In view of that challenge, however, we recommend that it should be made clear in the re-enactment of section 22(1) of the 1955 Act that the scheme may include provision setting out the circumstances in which the grant or loan may be recovered by the Secretary of State and the person or persons from whom the recovery may be made.

Effect is given to this recommendation in clause 42(2)(b) of the Bill.

(b) Section 3(5) of the Crofters (Scotland) Act 1955, as amended by section 14 of the Crofting Reform (Scotland) Act 1976 provides that any right in pasture or grazing land held by the tenant of a croft, whether alone or in common with others, shall be deemed to form part of the croft. Section 24(1) of the 1955 Act makes provision for crofters who share in a common grazing to appoint a grazings committee or a grazings constable (who has the like powers and duties as a grazings committee) if the crofters themselves fail to appoint a grazings committee. Under section 24(6) of that Act the grazings committee appoint a person to be the clerk of the committee. The functions of the grazings committee as set out in sections 25 and 26 of the 1955 Act are in effect to administer the common grazings, including the carrying out of works on them.

Until recently challenged by the Joint Committee, schemes under section 22(1) of the 1955 Act have provided that, where the grant or loan relates to a common grazing and a grazings committee or grazings constable has been appointed, the grant or loan shall be paid to the clerk or constable. The objection by the Joint Committee was that section 22(1) enabled schemes to provide for the payment of grants and loans to crofters, not to the clerk or constable of a grazings committee. In fact under the scheme the grants and loans were paid to the clerk or constable to be used not for his benefit but for the benefit of the crofters sharing in the common grazing e.g. for the carrying out of works by the grazings committee on the common grazing in exercise of its functions under section 25(1)(b) of the 1955 Act. Payment to the clerk or constable rather than to the crofters sharing in the common grazing

was administratively convenient and avoided expense. The power in section 22(1) of the 1955 Act to pay grants and loans to crofters is very general in its terms and does not in our view restrict the manner in which such payment is to be made and payment to the clerk of the grazings committee or constable for the benefit of the crofters appears clearly to deal only with the manner of payment. In view of the challenge by the Joint Committee, however, we recommend that it should be made clear in the re-enactment of section 22(1) of the 1955 Act that the scheme may include provision that, where the grant or loan relates to a common grazing and a grazings committee or grazings constable has been appointed, the Secretary of State shall pay the grant or loan to the clerk of the grazings committee or grazings constable for the benefit of the crofters.

Effect is given to this recommendation in clause 42(2)(c) of the Bill.

6. Two points of difficulty arise under section 27(4) of the Crofters (Scotland) Act 1955 which provides that "The Commission may, on the application of any crofter interested, after consultation with the grazings committee, apportion a part of a common grazing for the exclusive use of the crofter so applying.".

(a) Where the croft dwelling-house is situated on a common grazing, the Crofters Commission have often been asked, on an application under section 27(4) of the 1955 Act, to apportion the site of the dwelling-house for the exclusive use of the applicant, and such an application seems perfectly competent. It appears, however, that many crofters have not been aware that it is possible to obtain such an apportionment, and we therefore recommend that it should be made clear that, if the croft dwelling-house is situated on the common grazing, an application to obtain such an apportionment is competent.

Effect is given to this recommendation in clause 52(4) of the Bill.

(b) Where all the shares in a common grazing, except one, have already been apportioned under that provision, the Crofters Commission have felt unable to grant an apportionment to that one remaining shareholder on the ground that the grazing can no longer be regarded as a common grazing. Section 3(5) of the Crofters (Scotland) Act 1955 provides that a part of a common grazing which has been apportioned for the exclusive use of a crofter under section 27(4) becomes part of the croft, which effectively turns a right to graze into a right to work the land apportioned fully by ploughing, cropping and for other uses. It seems unfair and unlikely to have been intended by Parliament that a shareholder should be deprived of this right because all the other parts of the grazing had already been apportioned. We therefore recommend that in the re-enactment of section 27(4) of the 1955 Act it should be made clear that one remaining shareholder should be entitled to apply for an apportionment under that provision.

Effect is given to this recommendation in clause 52(5) of the Bill.