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Working Paper

Learning cooperation from the commons

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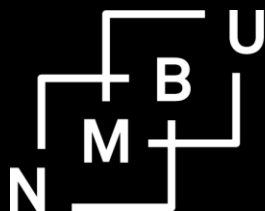
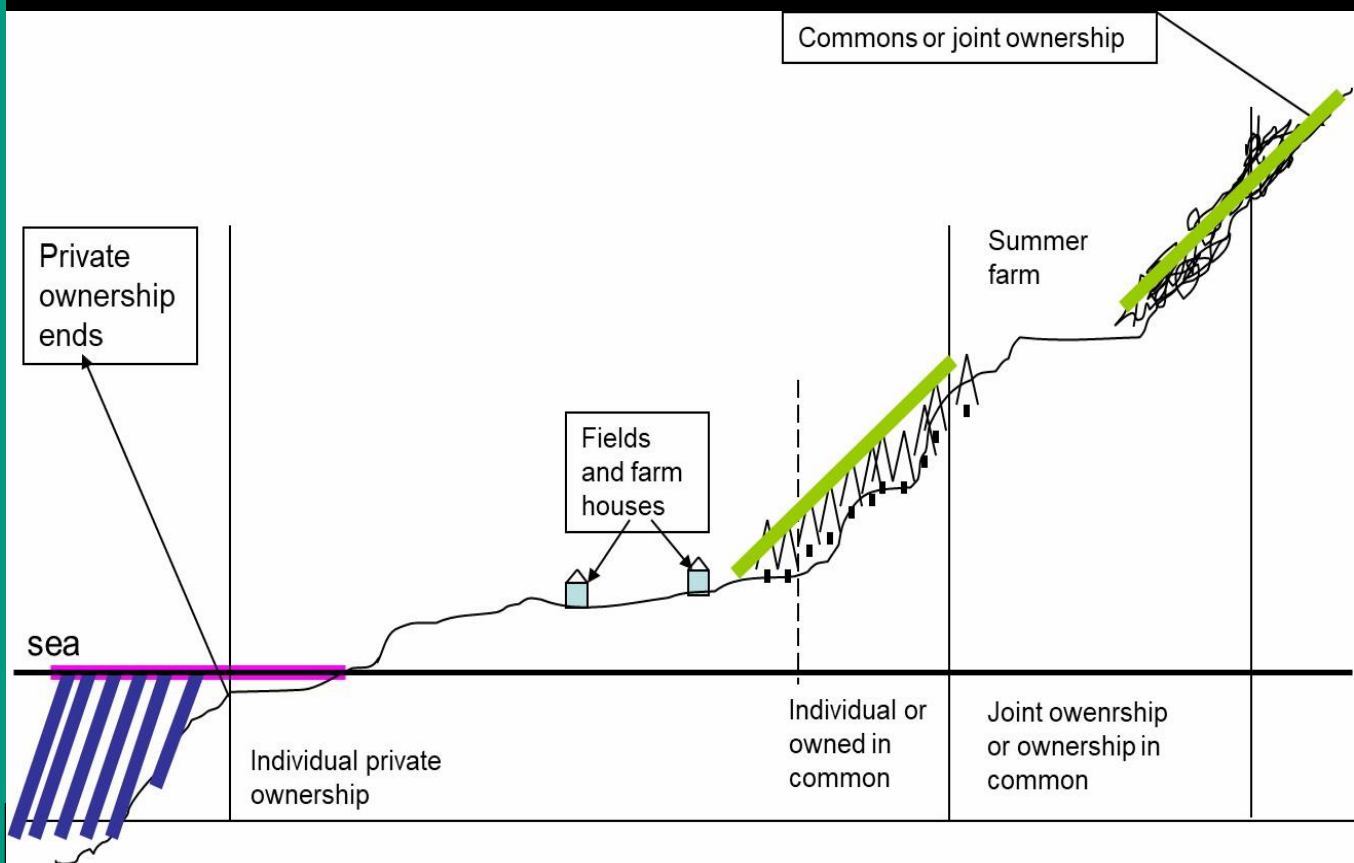
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Learning cooperation from the commons

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Learning cooperation from the commons¹

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Abstract

The paper discusses the link between commons as they might have been used in prehistoric Norway and the rules concerning the exploitation of the commons as found in the oldest known legislation for regions of Norway, Gulating Law and Frostating Law. One clear social dilemma has been identified: the setting of a common date for moving animals from the home fields up to the summer farms and home again in the fall. The problem was obvious and the solution not particularly difficult to institute. Many more problems were of course present, but they did not rise to the level of a social dilemma. All such problems were managed by the rules enacted by the bygdeting along with other problems of a community. In particular the process of inheritance, the problems of fencing, how to change borders between neighbours and between individually owned fields and the commons, were treated by extensive rules. The bygdeting managed such issues from prehistory until the 16th and 17th centuries when reforms initiated by the Danish-Norwegian kings started to take effect, making the rule-of-law more uniquely a task for the central authorities and of less concern for the local communities. Maybe the basic legacy of the long history of local rule was a strong belief in the court system, that it would secure the old saying: "By law the land shall be built, not with unlaw wasted".

Key words: Commons, prehistory, Norway, social dilemmas, legislation

JEL codes: P48, Q15, Z13, Q20, K11

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¹ Revised paper presented at the Workshop on "The Value of the Commons", 20-22 March 2019, Utrecht. The perceptive comments by Håvard Steinsholt are much appreciated.

Learning cooperation from the commons

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Introduction

A commons is a group of people that jointly exploit the resources of an area where they find something of value. The valuable resources managed as a commons may be classified in various ways:

- The resource may be **fugitive** (fish, wildlife) or **stationary** (forests, pasture)
- The resource may be **self-reproducing** (biodiversity) or **not self-reproducing** (hedgerow landscapes)
- The resource may be **subtractable** (pollution sinks, ecosystem services) or **non-subtractable** (knowledge, historical monuments)

Besides the resource classification it is important to see whether

- Appropriators can be **excluded** (Non-members of the commons) or **not excluded** (Members of the commons)

The classical commons of pre-industrial society were seen as stationary, subtractable, and self-reproducing (Ostrom 1990, Sevattal 1998). Originally, one may assume they were open access, but due to population growth, they soon became accessible only for members of the commons, in practice all members of the local community.

An institutional system providing sustainable exploitation of a fugitive, non-subtractable, and not self-reproducing resource (such as knowledge) should not be expected to resemble institutions that provide sustainable exploitation of a stationary, subtractable, and self-reproducing resource (such as pasture).

While the exploitation of the classical commons now seems to be understood well, recent literature has started the exploration of a diversity of urban commons (Colding 2011, Foster 2011, Foster 2013, Foster and Iaione 2016, Jain and Moraglio 2014, Lee and Webster 2006, Rogge and Theesfeld 2018).

Clearly many of the more interesting and attractive aspects of urban commons are not concerned about stationary, subtractable, and self-reproducing resources. For example, in Seoul's Sharing city project², sharing is taken to mean activities

² Seoul Metropolitan Government Act No. 5396 (31 December 2012).

“that create social, economic and environmental values by jointly using resources, such as space, goods, information, talent and experience” (my emphasis; Foster and Iaione (2016, 344)). The resources exploited are often open access: Foster and Iaione (2016, 297) observe that “open access interaction spaces have value as an urban amenity that adds to the attractiveness of cities”. Open access is at the core of the classical problem of the tragedy of the commons (Hardin 1968). Control of access was the key to overcome the process producing the tragedy. A closer analysis of the characteristics of urban resources may indicate where open access should be avoided.

However, urban commons will not be the topic in this essay. Rather the investigation will ask what a group of people might learn in a situation similar to the one where classical commons originate. The topic of this essay is the value of the commons as a teaching device at the collective community level.

The value of the commons

Value is a versatile concept. It has proved difficult to define value(s) in ways useful across disciplines (Hechter 1993). This is apparent also in the study of the commons. Already in the introduction, we have talked about values in three ways: about commoners find something of value in the commons, about activities "that create social, economic and environmental values", and about spaces having "value as an urban amenity". Value is clearly of many kinds also in the commons. This essay intends to explore the commons as a device contributing to collective learning. If the ongoing activities within a commons can teach communities about the practice of collective action, and how to overcome social dilemmas³, it will be of great value for the community.

It is seen as a reasonable outcome that the exploitation of a commons will lead a community to adopt institutions that will help them overcome the social dilemmas they experience. It is also possible that these institutions will keep working as the communities grow and amalgamate into state-like societies.

Based on the information available about Norwegian commons my conclusion is that they learned to manage the commons in a way furthering the growth of the communities and their amalgamation into a state. In the process of governing the commons, the local communities used the local assembly called

³ As these are defined in game theory (Kollock 1998)

the bygdeting⁴. Even if they did not learn to overcome processes we recognize as market induced social traps (tragedy of the commons), the commons governance contributed to the development of the bygdeting⁵. This public assembly became an important tool as these social traps eventually appeared. However, the local community did not get the opportunity to create their own institutional solutions. The Danish-Norwegian state took control and forced solutions onto the local communities. The local communities used the bygdeting to resist and circumvent the actions of the central state. The result became the rather peculiar system of commons Norway recognize today (Berge 2018).

Modelling problems of collective action in a classical prehistoric agricultural community

The commons we are discussing comprise systems of users and natural resources where technology can play a role for exclusion but not for creation or renewal of the resource. This means that for the present exercise “new commons” such as the radio spectrum, the internet, or a scientific body of knowledge are kept out of the discussion. The commons we are focusing on comprise a group of legitimate stakeholders that in various ways are linked to a natural resource. One way or another, usage and management of a resource held jointly or in common⁶ require collective action by the group or a subgroup of the stakeholders.

To get to understand how learning may be generated in a commons we need to understand the social dynamics it provides. This includes how the individual exploitation leads to encounters with other commoners, the nature of the encounters, and the attempts to overcome obstacles to successful and profitable exploitation.

Game theory with studies of action situations characterized as “tragedy of the commons”, “prisoner’s dilemmas”, “game of chicken”, and various coordination problems teach us that in worst-case scenarios the social dynamic

⁴ The correct translation of "ting" in this context would be thing. In Wiktionary it is explained as interpretation no 15: "(chiefly historical) A public assembly or judicial council in a Germanic country." To remind the reader of the very particular assembly we are discussing it will be called "bygdeting" in this paper.

⁵ On the origin of the bygdeting nothing has been found. But it seems reasonable to assume that as private property and commons appeared - and they necessarily had to appear at the same time - also the bygdeting had to be present to supply the basic feature of property rights: security of tenure.

⁶ If something is owned "in common" by 2 or more owners each owns a specified fraction which can devolve on descendants. If something is owned "jointly" by 2 or more owners each owner enjoys all of it as long as it does not exclude other owners. This right devolves on co-owners unless it is explicitly transferred to a new owner. In Norway a right to exploit outfields jointly may be appendant to a farm and thus be transferred only as the farm is transferred to a new owner. If the new farm owner does not exploit the outfield the unused resource devolves on the co-owners (the other farmers who have such rights appendant to their farms).

of the exploitation of the commons leads to tragedy. However, studies also show that frequently people will be able to overcome the tragedy and find ways of coordinating activities that provides a profit for everyone (Ostrom 1990, Ostrom, Gardner, and Walker 1994, Kollock 1998, Camerer 2003, Ostrom 2005, Gintis et al. 2005, Gintis 2009, Bowles and Gintis 2011).

The process of learning to circumvent dilemmas of collective action may be assumed to involve two steps:

- 1) Solve problems as they appear, and
- 2) Insert the solutions and their monitoring into the local system for conflict resolution.

As rules about how to solve problems are developed and resolve conflicts a third step will follow:

- 3) Mandate the local chief to monitor (at least some) activities and arbitrate in conflicts in the commons.

The process of finding solutions to various dilemmas in collective action will provide a most important lesson of high value for the community.

The reasoning within the model is based on some standard assumptions about communities and humans. Humans are assumed to exercise rational choice within their world view and the time frames they know, much as within the IAD framework (Ostrom 2005). The world views are limited by their language and are embedded in the local culture. Solutions to social dilemmas will be remembered through the rules evolved for their solution. Over time the culture will evolve by retaining the rules that work best and by developing new rules to new problems (Boyd and Richerson 2005).

A simple model of a Norwegian commons AD600

Rights of common are in the Norwegian legal tradition said to be ancient. They are not created by particular legislation. This means that their origin is lost in prehistory. We have no documents or other evidence that can tell us about their origin and evolution. Therefore, to explore the social dynamic of exploitation of a commons one can turn to theory to create what one might think of as a model of a prehistoric community⁷.

⁷ Somewhat similar to what Dahlman (1980) does, see his chapter 2, pages 20-29.

The community is located on the Scandinavian Peninsula, and, they are maybe recent immigrants of a Germanic tribe to Scandinavia, maybe some time in the first half of the first millennium CE before the Justinian Plague (541CE). The community must be self-sufficient in the production of food and shelter. It keeps animals like sheep, goats, pigs, cows (milk producing cattle), and horses, and they will have fields with one or more of the cereals barley, oats, rye, and wheat⁸.

Besides producing food, they know how to produce iron (or to trade for iron) for producing tools like axes, knives, and, of course, weapons like swords and spears. They also know how to produce tar to preserve timber in a humid climate (both houses and boats). Along the coast, some produce salt. Production of iron, tar, and salt requires a lot of wood.

The community has more people now than they did when they first settled in the region, but still probably not more than 100-500 people. The settlement is one village-like cluster with long houses where many families as well as cattle are sheltered (Myhre 1980, 371-397). However, the geography seldom allows ordinary villages to develop. New farms move away to find suitable areas for fields: a river or a fjord to one side and the higher-level forests and mountains on the other (see Figure 1 below).

The population is segmented with "haulds" at the top and slaves at the bottom. Probably there are few slaves⁹, the supply is erratic and uncertain, depending on the degree of local unrest and war-like expeditions. A farmer as head of his household is later in our history termed hauld meaning he has held his land for many generations. Being a hauld means to be free, not bound to any landlord. Both slaves who have been given their freedom, and random entrants to the community, will be allowed to rent land from a hauld. Land rent is payable in work for the hauld. Some may be able to buy land, but will not be able to claim the status of hauld until the land has been in the possession of the lineage for a long time¹⁰. A hauld will have rights of odel (allodial right) meaning that at times of conveyancing of the land (inheritance, gifts, sales) the one in the lineage with best odel can claim to take back the land for a reasonably assessed price.

⁸ At the outset, the wheat might be of the types *Triticum boeoticum*, or *Triticum monococcum* (https://en.wikipedia.org/wiki/Einkorn_wheat). They might also have grown *Triticum turgidum* (<https://en.wikipedia.org/wiki/Emmer>).

⁹ The presence of slaves is well documented and the rules for treating them are elaborate in the regional law codes, see e.g. Iversen (1997).

¹⁰ The length of time declines from the oldest to the newest law. In *Gulating Law* it says in sixth generation (Robberstad and Lien 1981 [1969], 241-242 (section 266) but see note to page 250 on page 385)0. In *Frostatting Law* it says in the fourth generation (Hagland and Sandnes 1994, 182, note 44 on page 224). In *Magnus Lagabøte's Law* it says 60 winters (Taranger 1274 [1915], 98).

NORWAY (ca 1950): from sea to mountain

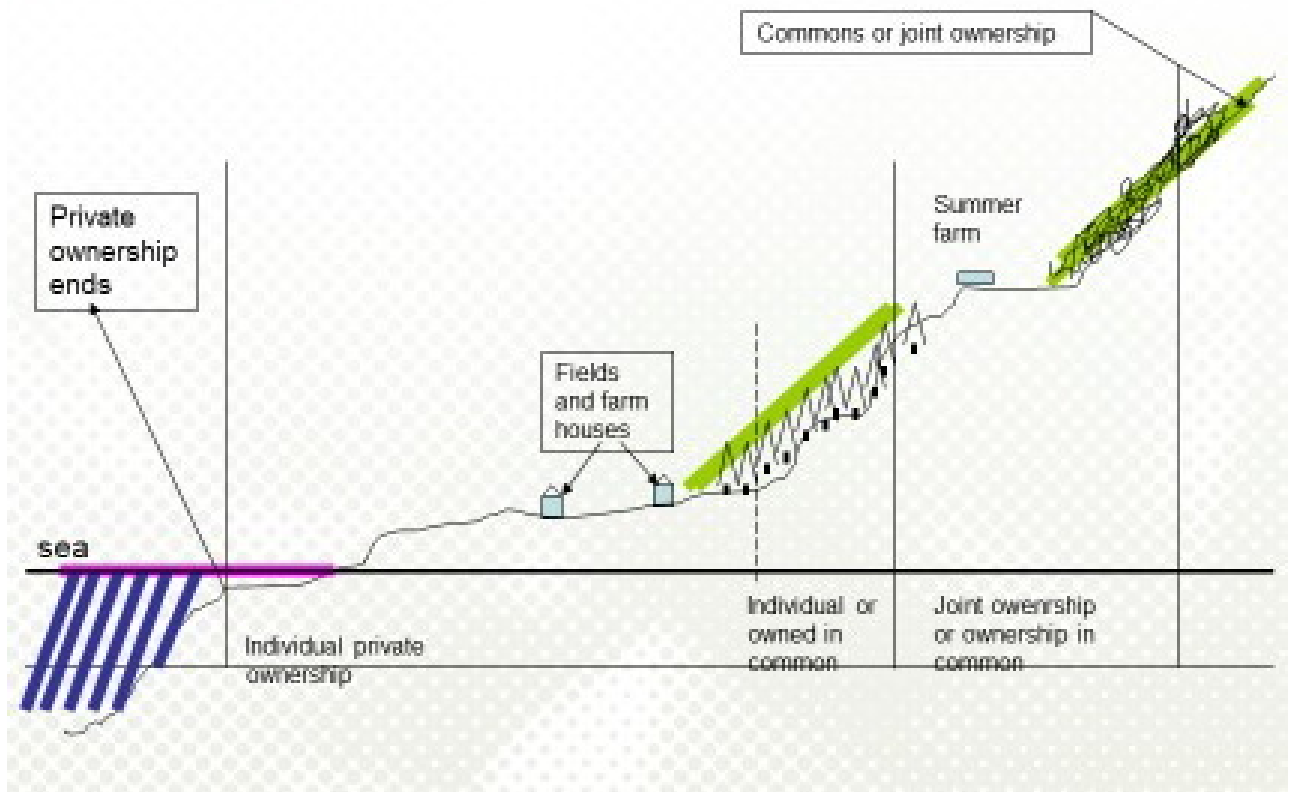


Figure 1 Typical layout of a farming community in a fjord or in a valley around 1950. From individual private ownership of the fields close to the water, individual ownership or ownership in common for the first part of the outfield, to joint ownership for the summer farm areas.

The economy is based on family/ household ownership of animals and plots for growing grain. Besides growing grains and holding domesticated animals, they are fishing and hunting for reindeer, moose, and deer, as well as smaller game animals in the outfield.

The settled area, where people are living, will eventually be called bygd¹¹. Since the land is thinly settled¹² and has a rugged geography. There are extensive wilderness areas available between the various bygds. Here the people will find

¹¹ Here we use bygd as the generic name of the local administrative unit. The literature refers variously to units called "bygd", "herred", "skipreie", "fylke", and later on "sogn" (the church parish). The various names all refer to a local public organisation with tasks related to the organisation of local activities as well as formal contacts with authorities at higher levels (Imsen 1990).

¹² Probably more so than one might expect, due to the recurring Justinian Plague. This plague is supposed to end around 750CE. See https://en.wikipedia.org/wiki/Plague_of_Justinian and <http://historymedren.about.com/od/plagueanddisease/p/The-Sixth-century-Plague>

timber for building houses, firewood for cooking and heating of houses, fodder for the cattle: both pastures in summer and fodder that can be stored for the winter¹³. Close to their established fields, there sometimes may be areas suitable for new fields. The houses for people and cattle will often be located uphill relative to the cultivated plots. In the early spring, the open cultivated plots will be green before the forests and hills above the farmland. The animals are allowed to graze on the cultivated plots early in spring before they can find food in the outfields. The cattle provide a kind of work on the plots that facilitated later work with the ard. This also provides an initial supply of fertilizer. Later on the manure from the winter is easier to transport downhill than if the houses had been located below the fields. If the fields are too small for the number of cattle, the areas just outside the fields will be added. Early in the history of the community, there will be a fence around the fields to separate cattle and arable.

The community we are modelling needs a political organisation. The community members need to be able to resolve disputes not only in relation to the exploitation of the commons, but also among the local inhabitants within the bygd. The assembly in charge of the governance is the bygdeting¹⁴.

The community is illiterate. There may be people who know the runic way of writing. However, the only way of recording is on stones or wood. Hence, their common rules, devised to facilitate interaction within the community have to be committed to memory. The one who memorizes the rules best will be given the office of lawman ("lagmann"¹⁵) and will be in the service of the bygdeting to provide relevant rules for the activities conducted at the meetings of the bygdeting. Based on contemporary observations of tribal communities it seems reasonable to assume that an office of lawman, based on ability to remember, should be present much earlier than the Viking age. The ability to remember would then be displayed at regular public presentations of what is remembered. This will help the community avoid selective rewriting of memory in cases where personal interests are at stake¹⁶. We should take note of the way of

¹³ Since about 500CE, the climate had turned cooler and wetter. This lasted until about 900CE (Fagan 2004, 208-211, Lamb 1995, ch. 10), more on this below.

¹⁴ If we consider the design principles for long lasting systems of resource governance (Ostrom 2005, 255-288) the model community here will be close to conforming to all of them except the first one and the last one. The first one becomes relevant only as communities start to compete for territory. The last one becomes a reality as the local communities start to create assemblies to govern several local communities.

¹⁵ A public office of lawman is supposed to go back at least to the Viking age.

<https://lokalhistoriewiki.no/wiki/Leksikon:Lagmannen>

¹⁶ In Malawian villages, the land register is committed to the memory of the village headman. Each time a new headman takes office, he holds a big feast for all the members of the village. The main activity here is his speech where he explains who owns which parcel in the village lands. Errors of memory are few but will be noted and corrected on the spot. The publicity of knowledge only found in memory is an essential part of making it real.

making memory public by announcing at the bygdeting all kinds of transactions affecting third persons.

The community also needs to be able to defend itself against roving wanderers and bandits, sometimes also neighbouring communities. In a community assembly where all adult free men have the right and duty to meet, the community members will elect a chief to organise the defence and to arbitrate in conflicts. The chief will not be very powerful relative to the farmers who elected him (it would be a "him" in this era). Why a democratically elected chief as a default condition would not be very powerful is explained by Mary Douglas (1986, ch3). However, over time, one will expect the office of the chief to become more powerful. The chief's power is at the outset circumscribed by the necessity to be elected at the community assembly. Over the many generations considered here, many processes will tend to make the chief into a more powerful position. Population growth is a driving force. It leads to less vacant space, as more land in the commons is needed for more cereal production and more cattle. Encounters with neighbouring communities, whether violent or peaceful, is another driving force. More people also mean more local conflicts and, eventually, conflicts with neighbouring communities. The presence of a village assembly (including a court system), and election of lawmen and chiefs¹⁷ are reasonable assumptions within the model.

The geo-political context

The geo-political context of a model community in Norway at the end of the 6th century needs a few comments. The decline of the Roman Empire led to a time where Europe for a couple of centuries experienced large-scale migrations and related wars. In the Scandinavian Peninsula, we did not experience much of this directly. However, trade with the Romans more or less collapsed, and it seems reasonable to assume that the migrations at least indirectly had an impact on established settlements in Scandinavia.

The climate changes we can date to this century are important, particular the disastrous events dated to 535-6 attributed to an extremely violent volcanic eruption (surpassing Mount Tambora of 1815) or a collision with a comet¹⁸. The

¹⁷ The office of chief requires a certain personality, good memory, and knowledge of the community. In times of war, skills with weapons and insights into organised battle become important. Growing up close to a chief facilitates the acquisition of knowledge and insights into the skills of conflict arbitration. Among the many sons of a chief, some may have a more suitable personality and a better memory. These will have higher chance of being elected.

¹⁸ https://en.wikipedia.org/wiki/Extreme_weather_events_of_535-536 and https://en.wikipedia.org/wiki/Late_Antique_Little_Ice_Age

dust clouds of 535-6 led to widespread famine during the years following. This was immediately followed by the Justinian Plague¹⁹ of 541-542. The plague returned regularly for the next 200 years and it has been guessed that some 50 percent of the population of the Eastern Mediterranean died during the first onslaught (Lamb 1995, 146). How this might have affected an agricultural community in Norway is of course unknown. The “Fimbul” winter of 535-6²⁰ would have a severe impact, the plague maybe less. Even if the plague might bypass such a community, the plague would have impact indirectly through less trade and less wanderers. In addition we note that the climate in general cooled considerably from about 500 to 900 (Lamb 1995, 149-152, Fagan 2004, 208-212). For the period we discuss here (the last part of the 6th century) it may be reasonable to assume that the pressure on the resources in the commons would be growing much slower than one otherwise might see.

This changed significantly towards the end of the 9th century. The improving climate starting around 900 provided for some 400 years with good harvests and enough to eat. Populations grew rapidly again. This means that the pressure on the commons would be rising and the regulations developed within the bygd would evolve more rapidly.

During the 8th and 9th century the many local communities amalgamated²¹ (by marriages, by agreement, or by conquests) culminating in the unification of the realm in 872. As part of this process, the local assemblies were supplemented with higher-level assemblies. In particular, we see that as we get closer in time to the first known legal codes, the communities had amalgamated their political and legal organisations into regional units (Gulating, Frostating, Eidsivating, and Borgarting) by creating regional legal assemblies, where representatives from the local communities should take care of issues involving two or more of the lower level units. The regional thing assemblies approve of rules promulgated at the start of their sessions, and they judge in cases brought before them. This includes cases involving the exploitation of commons, since a growing population and an increasing number of cattle create conflicts between local communities, not only within.

¹⁹ https://en.wikipedia.org/wiki/Plague_of_Justinian

²⁰ The Fimbul winter is a part of Norse mythology and tentatively linked to the events of 535-536. See <https://en.wikipedia.org/wiki/Fimbulwinter> and <https://no.wikipedia.org/wiki/Fimbulvinter>

²¹ A list of 31 is provided by https://en.wikipedia.org/wiki/Petty_kingdoms_of_Norway

The local community assembly as it appears in the 13th century texts is the bygdeting, an assembly where all free men²² in the community had the duty to meet. The regional assemblies are assumed to have been a meeting of representatives from each bygd (called lawrightmen²³, “lagrettemenn”), not a meeting of every free man. The bygdeting and the regional thing were not courts²⁴, but had the duty to judge in conflicts that had been taken to them. The relevant part of the law used to be presented orally (by the “lawman”, “lagmannen”) before the tribunals at the start of their sessions. However, as the complexity of the legislation grew the need for fixing the law in writing increased. It is suggested that already early in the 11th century there existed private editions of written law codes for both the Frostating and the Gulating (Hagland and Sandnes 1994, IX-XLV).

The election of kings by the regional assemblies is important. Probably the most important part of the election was the king’s promise as to certain conditions for his reign, such as upholding the law. The contract between the king and the assembly was called “håndfesting”. By the end of the 11th century, one may question if the way of electing king was a real election or a mere symbolic ritual within political struggles between candidates claiming royalty by blood. It became a power struggle with weapons, ending in a long civil war (1130-1240)²⁵. However, the further back in time we go, the more real the election can be assumed to be. This way of electing the king ended in 1163. But the ceremonies around the "håndfesting" continued. The King was not above the law. He should uphold the law.

The simple model of a relatively isolated village community some centuries before the start of the Viking age (750-800 CE) suggests some topics for rulemaking in relation to the exploitation of the commons. Next will be an investigation of such features in the medieval texts containing the legal codes of Viking age Scandinavia.

²² The meeting of the bygdeting was a duty for all, both fully free men (hauddar, kauplendingar) and those renting land (leiglendingar). For a thing at the aggregate level of a region, it was a duty to meet for all those the law stipulated should meet, representing their bygd in various ways (Imsen 1990, 197). Magnus Lagabøte's Law, Book I, Chapters 1-12, provides details on how the regional thing (Gulating/ Frostating/ etc.) should be constituted (Taranger 1274 [1915], 5-16).

²³ But to be a certified lawrightman you had to be sworn in by the lawman, the law specialist for the thing.

²⁴ In the 14th century we see that judging in criminal cases and civil disputes usually was done by a suitably selected tribunal of 6, or 12 men. Often each party could name half of them. (Imsen 1990, 28-34)

²⁵ During of the civil wars (1130-1240) the Norwegian Crown became an inherited office in 1163 (Robberstad and Lien 1981 [1969], Innleiing, Kap. 2, side 14). The rule is included in the section on the Christian faith and is assumed to be new in 1163. This lasted until 1450. In 1397 Norway entered a union with Sweden (ended in 1523) and Denmark (ended in 1814). Between 1450 and 1660 the king was elected by the Danish and Norwegian “riksråd” (a group of the realm’s most powerful people, created early in the 1200s to advise the king).

Evidence of collective learning

The model will be used to reason about the possible collective action problems such a community might encounter. If such problems were solved and committed to the institutional memory, presumably they will have left traces in the regional law codes as these were recorded later on in the period 1050-1274.

By the 10th century Norway was divided into 4 regional law districts as discussed above, each with a law code enacted by the regional assembly of delegates from the various bygds.

The texts of two early legal codes have survived: Gulatingslova and Frostatingslova²⁶. The two other regional law districts, Borgarting and Eidsivating, have no surviving law text (except the Church rights). Gulatingslova was the law code for the south-western part of Norway (from East Agder to Sunnmøre and into the mountain areas in Valdres and Hallingdal) while Frostatingslova was the law code for the Trøndelag region²⁷.

All four law codes are supposed to have been written down in the period 1050-1260. Surviving manuscripts are dated to the latter part of this period and were used in preparing the nationwide law code of 1274 known as Magnus Lagabøte's²⁸ Law (Taranger 1274 [1915]). This law code was basically in force until 1687 (but of course with some additions). The rules about exploiting the commons did not change very much even in the new 1687 law code beyond being elaborated (Kong Christian V 1991 [1687])²⁹. The most important new rule for the commons was a rule for stinting the logging to the timbers needed on the farm³⁰.

The oldest law code, Gulatingslova, is known to have existed before 930 since it is cited as a model for the Icelandic law code at the establishment of the Icelandic commonwealth in that year (Robberstad and Lien 1981 [1969], 7)³¹. In

²⁶ The two law codes of Gulating and Frostating have been translated to contemporary Norwegian as well as to English (Robberstad and Lien 1981 [1969], Hagland and Sandnes 1994, Larson 1935).

²⁷ The differences between the West Coast and Trøndelag are reflected in the kind of rules retained in the texts. The Gulating Law, Gulatingslova, (Larson 1935, 35-210) is more concerned with other aspects of the "outer" commons than the Frostating Law. There is for example two sections on whaling rights (no 149 and 150). At the end of section 150, it is stated that if a whale comes ashore in the commons it belongs to the king. In the Frostating Law, on the other hand there is one section on whales with rules for how to reward the finder, but nothing about whales in the commons (Larson 1935, 396-397, XIV section 10). Magnus Lagabøte's Law (Taranger 1274 [1915], 158-160, VII Ch.64) seems to combine the two with some more details.

²⁸ "Lagabøte" literally translates as "Law Mender".

²⁹ The fate of the Norwegian commons after ca 1660 is explored in Berge (2018), available from <https://www.nmbu.no/en/faculty/hh/research/centers/clts/research/working-papers>

³⁰ However, restrictions on the logging had been in the rule book at least since 1568 (Fryjordet 1968, 118).

³¹ https://en.wikipedia.org/wiki/Gray_Goose_Laws; Also introduction to Dennis, Foote, and Perkins (1980, 1).

studies of the rules concerning the exploitation of the commons, we need to be aware of the considerable differences in geography between the Gulating and Frostating regions. The size and resources of the commons are different.

Based on the suggested collective action problems from the model we shall look for traces of their solution in the two regional codes and the unified national code. If there are rules concerning the suggested problems, they will be interpreted as evidence of collective learning.

Most of the problems people within our model community will encounter are not first order collective action problems. Only one such problem has been identified: collective grazing on individually owned fields.

A second order collective action problem lies at the level of institutional design³². Creating institutions for collective action is not related to the commons in any particular way, but its solution has clear implications for the exploitation of the commons. A commons requires a system of rulemaking and sanctioning. The establishment of a community assembly with power to enact rules and to design a system for judging the rule breakers is a requirement for the model.

It is a fact from history that this was done. The required community assembly is the bygdeting. A Hobbesian state of nature will never persist for long. Over time, communities manage to design institutions to enforce property rights. This includes the commons.

Problems encountered in the exploitation of the commons concerns pasture, timber, firewood, meadows for hay, land for growing cereals, fishing and hunting.

Problems of collective action according to the model community

Most of the legal texts referred to below, are reproduced in the appendix.

Grazing in the home fields and at the summer farm³³

From Figure 1 it seems reasonable to expect the fields around the farmhouses to be green first and the hills later. The assumptions about the climate also make it

³² The first order problem consists in the incentives that make a Nash equilibrium inferior to a covenant where participants promise to cooperate. The second order problem consists in designing rules that ensure that the promise of high reward from defection will not destroy the outcome of cooperation. However, the process of designing institutions for collective action is not well understood. On second order collective action problems, see Ingram and Clay (2000), Smith and Bird (2005), also see Gintis (2009).

³³ The Norwegian word is "seter or sæter". Larson translates the original "sætr" as shieling (Larson 1935, 427). Larson (1935, 427) explains "The mountain pasture and the huts provided for those who had charge of the cattle in the grazing season."

reasonable to assume that every so often there will be too little of the stored winter fodder. Getting the cattle out to pasture is often critical for their survival.

In using the individually owned fields for pasture for all the cattle, the village population encounters two related problems of collective action: Should each owner fence his plots and keep his animals only on his own plot? Or, should they save the cost of fencing and let the cattle graze wherever they wanted? In the latter case, how could each cattle owner be persuaded to take his animals away in time for the sowing of cereals? The most common solution to this would seem to be to allow grazing in the spring before planting cereals and in the fall after harvest (see e. g. Dahlman (1980, 24-25)). The savings on fencing costs would be substantial. This implies a collective action of setting a date for moving animals up into the hills probably to a summer farm located conveniently in a good grazing area. Like moving the animals up to the summer pastures, the collection of the animals in the fall and driving them home to the farms became a collective undertaking. The organisation with collective grazing, jointly moving animals into the hills, and collecting them in the fall to drive them home, saves on total labour costs. Each farmer by himself, doing the same, would need extra help. How much depends on the number of animals. More animals needs more people but not in proportion to the number of animals. There is, however, a lower threshold making it costly for small enterprises (e.g. young newly established households) to drive the animals to the summer farm on their own. Within the model, this kind of collective action seems to be a reasonable arrangement.

*The evidence*³⁴

The regional law code of Gulating provides rules for exactly this situation including a last date for moving to the summer farm and an earliest date for taking the animals home, as well as sanctions for those breaking the rule (Larson 1935, 94 (section 81)). The same rules are found in Magnus Lagabøte's Law (Taranger 1274 [1915], 138, Kap.40). The Gulating Law provides more details about how neighbours shall behave, particularly in regards to animals straying out of bounds (Larson 1935, 93-96 sections 80-83). Magnus Lagabøte's Law adds more detailed rules about fences and how to handle cattle that strays onto land not owned by the cattle owner (Taranger 1274 [1915], 129-133 Kap.29-34). The Frostating law does not provide rules for moving cattle to the summer farm. There are rules for neighbors where one has corn in the field while the other has harvested his field close by and wants to put his livestock to

³⁴ The core of legal texts referred to here are presented in the appendix.

pasture in the field (Larson 1935, 386 section 20). There are also rules on how to fence (Larson 1935, 385-387 Sections 18-22).

A judgement in the Norwegian Supreme Court from 1894 (Høyesterett 1894) alerts us to the fact that also the opposite of too late movement of cattle, i. e. too early movement, can be a problem. If one person moves his cattle to the summer farm much earlier than the rest of the community, the best pasture on the summer farm might be damaged by the time the rest arrives. Our conclusion must be that the joint movement of cattle on an agreed date, as our oldest legislation stipulates, would be best for all. They were well aware of the problems of the holdout that wanted to profit from individual action at the expense of the majority.

Summer farms

The location of summer farms is important in several ways, for example, the pasture quality early in spring and access to firewood for heating and production of dairy products. On good locations, the building of houses for the summer farm would be an important investment.

Therefore, in the old legislation, the houses on the summer farms are protected just like farmhouses. The punishment in cases of arson on the summer farm is similar to arson elsewhere (Taranger 1274 [1915], 128-129 Kap.28) . The laws of Gulating and Frostating are not as explicit about summer farms but come close (Larson 1935, 105 section 98; 383 section 13).

Border markings for summer farms are protected, particularly, those between the areas used by different bygd. If there are more summer farms belonging to the same bygd, then border markings between them cannot be moved unless no one suffers from it. In general, however, for pasture on the summer farm, it is said: "Other people's small ruminants shall not be moved home to the owner³⁵; there horn shall meet horn and hoof meet hoof." (Magnus Lagabøte's Law, Book VII, Chapter 41)³⁶. The same rule is found in the Gulating Law in the Law of Tenancy, section 84, "Concerning the shieling and its boundaries" (Larson 1935, 96). In section 86, "Concerning the shieling and parcels of forest land" (Larson 1935, 97-98), the focus is less on borders between summer farms than with meadows in the commons and boundaries between commons and private land. Finding land for new fields and for production of hay became an increasing priority with cooler climate and a growing population.

³⁵ This is in contrast to the rules for ruminants entering the fields of another farmer. The regulations of fencing and procedures for handling stray animals are elaborate. See Magnus Lagabøte's Law, Book VII, Chapters 29-34.

³⁶ This means that the rights to grazing at the summer farm were held jointly. See note 6 above.

Expanding the fields for growing cereals

Increasing populations required an increasing area for growing cereals. Arable areas in the commons close to the existing fields would be desirable.

Presumably, first in time would be first in right in this process. As the number of farms in the bygd increased and spread out, conflicts might be expected. These conflicts required arbitration and judgements. It would be cases for the bygdeting.

The evidence

Magnus Lagabøte's Law, part VII, Chapter 61 "If people quarrel about commons", section 2, provides procedures for solving just such disputes (Taranger 1274 [1915], 155-156). The Frostating Law, part XIV, 7, "On commons" provides the same rules a little bit more elaborate (Hagland and Sandnes 1994, 204-205, Larson 1935, 394-395).

Hay for the winter

In securing fodder for the winter, the people would take their scythes and visit the meadows located closest to the house to harvest the grass³⁷. Suitable meadows producing grass closer to the living quarters would be preferred by all, before those further away. People from different households wanting to harvest the same meadow could easily end up in conflict.

The evidence

In the law of Frostating, XIV, Chapter 8, it is stated the "Any parcel of meadow that one finds in the common shall belong during the twelvemonth to the one who first puts his scythe to the grass." It is further specified that "If two men go out at the same time to mow grass, let each one have what he mows; but if they disagree as to who began the labor first, he shall have his claim who proves it with his own oath, unless the other man has witnesses to the contrary." (Larson 1935, 395-396). Magnus Lagabøte's Law, VII, Chapter 62, "How to use the commons", contains the exact same phrases, the first sentence in Ch. 62, section 2, and the second in Ch. 62, section 6 (Taranger 1274 [1915], 156-157).

The sections in the Frostating law, XIV, Chapter 8, and Magnus Lagabøte's Law VII, Chapter 62, both starts with the same rule: "The king may lease the

³⁷ Fodder for the winter consisted of more than grass. Thin branches from trees, typically from pollards and coppices, and shrubs of many kinds were also collected. I do not find any mention of these.

common[s] to whomever he wishes." In the Gulating Law the wording is a bit different: "Every man shall have such rights in the common[s] as he had of old. But if farms are cleared in the common[s], they shall belong to the king." (Larson 1935, 124 section 145). This is a rule that we shall discuss later on. At the outset, it is not something one might expect from the model community used as reference point here. But before going into this question, let us take a brief look at the other resources of the commons.

Timber, firewood, fishing, hunting

Timber

Timber for housebuilding or boatbuilding as well as fencing and other constructions was an important resource in the commons. Cutting timbers with the axe tools of that time would be heavy labour and it would be reasonable to let timber lie in the forest for some time before one would be able to take it to the farm buildings.

The default rule is that everything you cut should be taken out the same day. But in Magnus Lagabøte's Law, Book VII, Chapter 62, it is stated "Timber and plank can, if needed, stay in the commons for 12 months." The wording suggests that this had to be announced at the bygdeting for it to be a valid procedure.

Firewood

Firewood is an important resource from the commons. However, firewood is not a big topic in any of the old law books. In the Gulating Law, Book VII, Chapter 15, it is said "Every man shall have the use of water and wood in the common[s]." (Larson 1935, 124 section 145). Other than that, it is mentioned a couple of times in the Law of tenancy (Larson 1935, 90-91 sections 73 and 75). In Magnus Lagabøte's Law it is said that "If more men than one lives together in one house, then they shall take firewood according to number of people, not according to size of landholding, because it is people that need fire, not land." (Taranger 1274 [1915], 120 Kap.16 section 3). However, the translator of the text (Taranger) comments that this section is new, i.e. not found in any of the surviving text from the regional law codes. It might indicate that firewood was getting scarce at this time.

Fishing

Fishing in lakes within the commons was an important food supply. Many of the smaller lakes probably had no fish naturally. Originally, fish was carried and

their breeding conditions manually improved. Such activities are mentioned on runic stone carvings³⁸. This, and the actual performance of fishing, could be one of more reasons for more individual forms of fishing rights.

In the Gulating Law in the Law of tenancy, section "Concerning pools and fishing grounds", it is said that "Everyone shall have the pools and the fishing grounds that he had in former times." (Larson 1935, 103 section 93). In section 85 "Concerning fishing waters" fishing rights along rivers are outlined. The concern is about not stopping fish from going up into a neighbour's part of the river (Larson 1935, 96-97 section 85)³⁹.

Magnus Lagabøte's Law basically says the same (Book VII, Chapter 48, "On salmon rivers and catching constructions made by people"), but it also has much more to say about fishing, particularly fishing in salt water (Book VII, Chapter 49-51) (Taranger 1274 [1915], 142-148). Also in the Frostating Law the salt water fishing is a topic (Book XV, Larson (1935, 399-400 section 5 and 6)). In Book II, The church law, there are rules allowing poor people under certain conditions to fish on church holidays (Larson 1935, 236-237 section 26 and 27).

Hunting and catching

Digging pitfalls, building traps, and erecting fences for hunting activities were technologies available to hunters.

The rules about hunting in Magnus Lagabøte's Law are found in Book VII, Chapter 58-60, 63, 65 (Taranger 1274 [1915], 153-161). Chapter 63 concerns hunting in the commons. Here it is explained how pitfalls and fencing for driving the animals into the pitfall belong to the one who constructs them. However, they have to be constructed in a way not damaging other people's prospects for hunting. If such constructions have been unused for 10 years, anyone can reconstruct them and use them as their own.

Summary

There is nothing in the evidence that suggests anything in the way of social dilemmas was encountered in the exploitation of these resources. There are conflicts and there are procedures for resolving the conflicts and sanctioning those who break the rules. These conflicts belong to the large group of issues

³⁸ Fjellheim (2010) refers to a runic inscription: "Eilífr Elgr bar fiska í Rauðusjó". Translated to English it becomes "Eilífr Elg carried fish to Rausjøen".

³⁹ Also see section 95 "concerning the deer hunt" (Larson 1935, 103-104).

referred to the various tribunals of the bygdeting⁴⁰. For the discussion here the working of the bygdeting may be the most important fact to take note of. The bygdeting may be the most important legacy this early tribal society brought into later ages. But before commenting on this we need to think about the rule that the king can rent out land in the commons.

Land ownership and the commons

The model of a commons framing the discussion here is located in Scandinavia around 600CE. During the next 300 years we know that the regional laws developed. The various bygds within the regions joined, one way or another, constituting small kingdoms, and the various bygdeting joined, selecting delegates to more encompassing tings⁴¹, eventually to create the regional ting (Gulating, Frostating, etc.) where their representatives could join in deciding matters such as enacting legislation, electing a king, organising a defence, and punishing criminals that roamed across the country.

At the level of the bygd the development in the form of an increasing population demanded more fields and more summer farms. But more important, as generations replaced each other, the existing fields went through a process of inheritance. Subdivisions occurred. Some farmers had many sons; some had few and some none. It would seem reasonable that at first one could expand into the commons. This was done, and soon the forests closest to the farms came to be seen as a part of the farm. The commons closest to the farms became individually owned property.

The inheritance processes and the unequal distribution of young people created a problem of reallocating farmland to new families. Dividing an inheritance among several inheritors in a just way requires an elaborate system of rules. In the Frostating Law there are used 92 different terms for kinship relations (Hagland and Sandnes 1994, XLVI-L). They did not inherit equally, but all had some conditional stake in the inheritance. The kinship distinctions were not used only in inheritance cases but also in allocating responsibility for payment of damages after killings and murders. Then there were slaves. Some of them earned their freedom, sometimes female slaves got children by the farmer. They had special rules for inheritance. The result became an elaborate system of land

⁴⁰ The tribunals are called doom by Larson. The word "domr" is used both about the decision of a competent body and about the body pronouncing the judgement. The size and composition of such a body varied by the nature of what was to be decided, see e. g. (Larson 1935, 170-177) on "The redemption of odal land". In this paper I call this body a tribunal.

⁴¹ This is of course conforming to design principle 8 (Ostrom 2005, 269-270).

rentals for land already in individual ownership. If the circle of inheritors got their lawful share in each generation, the size of the land each got would soon be too small. Those inheriting parcels too small to live off, could then rent out the land to some neighbour, most probably to a relative who co-inherited. Land that had belonged to the same lineage for a long time (60 years, 4 generations; the length varied across the law books) came to be known as allodial land. Here the rules of inheritance and the rules for renting out are special. Rules about keeping the land within the lineage developed. Eventually these rules came to be known as "odel" right and "aasetes" rights. The odel right worked to keep the land within the lineage, and the aasete rights to avoid fragmentation of the fields⁴². Eventually the inheritance was handled by awarding those who did not become a farmer with aasete, a suitable fraction of the taxable income from the farm.

During the time period we consider, finding land for new farms in the commons in a way that did not create serious conflicts among neighbours would have become increasingly difficult. The solution we see in the regional legislation is to delegate this topic to the king, and to make the new farmer a tenant of the king. This may be a reasonable solution to the problem in the social and economic context of this period. In both the Frostating Law (Larson 1935, 395) and Magnus Lagabøte's Law (Taranger 1274 [1915], 156) it is said that "The king can rent out land in the commons to whom he wants" (my translation)⁴³. In the Gulating Law, Book VII, Chapter 15, it is said "Every man shall have such rights in the common as he had of old. But if farms are cleared in the common, they shall belong to the king. If a man has built a fence around his cornland and his grassland, he shall possess the ground as far from the fence as he can throw his sickle⁴⁴, but what lies beyond is common." (Larson 1935, 124)⁴⁵

In the dynamic of the model community one may think that some started to go far into the commons to create new farms. This would be problematic if many did the same. Both the question of doing it at all, and the question of where, would likely be issues within the bygd. Giving the chief or king the right to decide and to take rent from the new farms would seem like a reasonable outcome. As the community ruled by a chief grew in size there was need for more income for the activities of the chief both for preparing defence and for

⁴² See Larson (1935, 98-100, sections 87-88)

⁴³ Larson's translation in the Frostating law is "The king may lease the common to whomever he wishes." (Larson 1935, 395)

⁴⁴ *Snidill*: a kind of sickle used for cutting leaves.

⁴⁵ The translator to Norwegian, Knut Robberstad (1981 [1969], 364), comments that from the wording it is apparent that there is no indication that the king is seen as the owner of the commons. He guesses that the rule that the king becomes the owner of new farms in the commons is a relatively new rule introduced on the suggestion of the king to promote new settlements.

other public activities. Rent from new farms in the commons would be a reasonable way of increasing the funds available for the king's activities.

Later on, in the 16th century this old rule would create trouble for local communities in Norway. It was used by the Supreme Court as proof that the King's relationship to the commons was as owner, while the commoners had use rights limited by traditions and needs.

Discussion

Exploiting the commons forced one type of social dilemma. Moving cattle from the farm fields and to the summer farms had to be done by all farmers at the same time. If anyone wanted to stay at home longer, it would cause problems for sowing the fields. If anyone wanted to go to the summer farm earlier, the pastures at the summer farm would have been degraded. The bygdeting and the chief got powers to enforce the rules. The participants themselves easily did the monitoring.

The other ways of exploiting the commons: getting hay from meadows, creating new fields, logging timbers for construction, fetching firewood, catching, hunting, and fishing created conflicts and left their imprint on the legislation, but they did not represent problems of the social dilemma type.

However, conflicts growing out of these ways of exploiting the commons gave a substantial input to the institution of the bygdeting. The commons created (mostly) local conflicts that should be, and were, solved at the local bygdeting. The bygdeting turned out to be a most useful institution, when the tragedies of the forest destructions came along in the 16th century. But their usefulness to the commoners was not as theory would predict.

By the time of the Viking age (750-1100) the various bygds had amalgamated by unifications (marriage, inheritance, conquest) at the level of chiefs that now tended to be called kings⁴⁶. By the time of the unification of the realm (872-930) the two regions of the Gulating Law and the Frostating Law were well established. We know less of the Borgarting and Eidsivating regions. By the time of the unified Law of Magnus Lagabøte (1274), the law still had to be enacted separately for each region. However, the development during the 13th

⁴⁶ Melberg (1949) provides an interesting discussion of the incongruous pair "konge" (king) and "dronning" (queen). The traditions of Germanic languages are to call the two something like the German "König" and "Königin". Melberg's (1949, 493) suggestion is that the term "dronning" was the result of intermarriages between daughters or widows of local leaders and victors after a conquest of Scandinavia by a tribe calling themselves "Danes" during the period 200-500.

century after the end of the civil wars in 1240 was towards more power for the king's bureaucracy, not least by way of the defence system called "leidangen" with corresponding less attention to the bygd. But one aspect of this proved important. The king ordered that his representative in the bygd, the lensman, should be selected among the best men in the bygd. This forged a link between the bygd and the king that lasted into the 17th century. It also provided a link between the bygd and the king that circumvented the ordinary nobility/ bureaucracy and was used actively by both king and bygd to halt the power of the nobility/ bureaucracy.

Since about 750CE, the climate had turned warmer and more benign for the population in Scandinavia. Enough food, population growth, and good weather facilitated the sea voyages of the Vikings. The king used the power to rent out land in the commons for new farms. By 1300 the Norwegian Kingdom had reached its largest extent and highest power.

This trend changed dramatically in the 14th century. The European wide hunger of 1315-17 led to a large number of deaths⁴⁷ and a significantly weakened population. Food production did not return to normal until 1322. Since about 1300 climate had turned cooler. Then in 1348-50 the Black Death struck for the first time and in Scandinavia probably worse than the Justinian Plague of 541. As in the 6th century the plague returned regularly for 300 years. Climate continued cooling and the harvests became more uncertain. The cooling lasted until the 19th century⁴⁸. In Norway it has been estimated that by 1520 the population was just 40% of what it was at the time of the onset of the Black death (Erslund, Sandvik, and Dimola 1999, 40-63). The population size of Norway did not reach the level it had in 1300 until about 1650. Norway was then part of the Danish-Norwegian Kingdom. In 1537 the Kingdom left the Catholic Church. The Crown took over as landlord of the lands of the Church (except for the lands supporting the priests) and became the single largest landowner with control of 52% of the land values ("skyld") of Norway (Sevatdal 2017, 44).

The decline in population led to a decline in demand for land and resources in the commons. Many of the new farms from the 13th century were abandoned. During the period 1350-1600, the problems of management of the resources in the commons could be handled according to the old legislation, the regional legislation from the Viking age as enshrined in Magnus Lagabøte's Law of 1274. The bygdeting worked as before. This lasted until mid-16th century. By

⁴⁷ In England it is estimated that 10-25 % of the population died,

https://en.wikipedia.org/wiki/Great_Famine_of_1315-1317

⁴⁸ On climate during this period see Fagan (2000).

the end of the 16th century, the king, Christian IV (1588-1648), concluded that a translation of the Magnus Lagabøte's Law was needed. He called the result Christian IV's Norwegian Law. In the translation the expression "King's commons" was introduced. Before that, they were just the "commons"⁴⁹.

During the 16th century new markets for timbers grew. New technology in the form of the water driven sawmills, waterway based timber transportation, a growing work force, and markets, particularly in Holland and England, led to forest depletion some places along the coast, somewhat similar to a tragedy of the commons. In addition to the timber trade, population growth led to need for more timbers for housebuilding, the cooling climate led to need for more firewood for heating the houses, and the growing mining industry needed a lot of firewood and charcoal. In addition, production of tar should be mentioned as a significant consumer of wood. The extent of forest destruction became more apparent in 18th century (Fryjordet 1968, 117-119). Observations from around the world suggest that new markets do have this impact on a commons with no experience with timber markets. How the experience of the forest trade might have affected the commons, we shall never know. The Danish-Norwegian King intervened, mostly through regulations designed to maximize the revenue going to the Crown and in this creating a long lasting fight between the Crown and the local communities.

The farmers were first in starting with water driven sawmills in rivers close to the sea. The Crown followed suit on Crown lands. Soon also urban merchants and Danish nobles holding land or office from the Crown participated in the timber trade. The logging did not target the commons in particular. Land was logged, provided it was close enough to a point where ships could fetch the timbers (Erslund, Sandvik, and Dimola 1999, 182-184, Dyrvik et al. 1979, 41-47). The Crown started out by trying to prohibit export entirely but ended up with prohibiting sale of timbers that could be used in the production of war ships. The Crown owned forests and sawmills, and earned good money, but it needed more. The timber trade became an object for many kinds of taxes. In the 17th century, this got worse. After losing many wars with Sweden, the king needed cash. The king sold logging rights to sawmill owners, and later on forestland to merchants, but the king was careful to state in the sales documents that the farmers' rights of common had to be respected.

⁴⁹ Both Christian IV's law book and Christian V's law book use the expression "kongens alminde" (King's commons) e.g. Christian IV in Chapter 58 and Christian V in Chapter 12, section 2. In the corresponding section in Magnus Lagabøte's book (Chapter 61, section 3) it is referred to the duties of the King's representative (ombudsmand) in relation to settlements in the commons. Imsen (1990, 196, note 8) suggests that Christian IV was the first to maintain the dominium directum position of the Crown in the commons.

Concluding

The forest destruction of the commons (“the tragedy”) was by the turn of the 16th century apparent. However, the commoners were given no chance to learn to manage their common forest. The king claimed ownership to the residual resources of the commons (that which the commoners did not exploit) and intervened. The bureaucracy in Copenhagen had become convinced that the king had dominium directum in the commons. The farmers had dominium utile. The commoners’ loggings in the commons were eventually stunted by saying that the farmers could only take the timber they needed on the farm (Kingdom of Denmark/Norway 1687 [1991], Book 3, Chapter 12, Section 6). Selling on the market was prohibited for the commoners.

The interesting part of this process is that the farmers started to fight back, both politically and within the court system. If questioned their argument was that the commons was not a “King’s commons”. The commons belonged to the bygd, they maintained, owned in common by the farms in the bygd. In this fight, the local communities had two advantages: 1) The crown had only limited knowledge of where the “King’s commons” were located and in particular their boundaries. 2) The communities had by 1550 at least 1000 years of experience managing their own affairs through the bygdeting. The long tradition of the bygdeting no doubt assisted many bygds in diverting the label “King’s commons”. The large areas sold to business interests by the King ended up, for some, through a land consolidation process, as partly privately owned forests, and partly as areas owned by the commoners, today known as “bygd commons”. Other commons were sold directly to groups of farmers, often after the commercially valuable forest had been logged. If the majority within this group also were commoners, the whole area became a bygd commons. But large areas without timber or anything else of commercial interest were left alone to be exploited by the farmers of the bygd and are today known as co-ownerships, to a large extent with unregistered ownership in the cadastral system.

Technically these areas may be called hamlet commons, but they are not known as commons in Norway since only state commons and bygd commons are recognized. But in area these unregistered co-ownerships may be larger than what remains of king’s commons, now called state commons (Sevatdal 1998, 152).

The commoners strong belief in- and use of the court system, even after the old system started to change in the 17th century, may be illuminated by one of the oldest rules of the regional law codes, found in “Frostatingslov” (Hagland and

Sandnes 1994, 15, Larson 1935, 224). It says (my translation⁵⁰) "By law the land shall be built, not with unlaw wasted"⁵¹. Norway, even in the Viking age, was a rule-of-law state. Later on, during the union with Denmark, the importance of the rule-of-law is evident, see (Imsen 1990, 23-39, 1994, 41). The King and Commoners shared a belief in the importance of the rule-of-law⁵².

A second feature apparent from the old legislation is the importance of transparency of the activities at the bygdeting. This feature is fundamental in a society without written records. Even with written records, it remains a fundamental feature of a rule-of-law state.

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⁵⁰ Larson's translation is "Our land shall be built up by law, and let it not be laid waste by lawless behavior."

⁵¹ Robberstad (1950) suggests that this sentence was introduced to the Frostating Law from Roman Law sometime in the 12th century.

⁵² It might be said that the king used the rule-of-law and the farmers as a counterweight to stem the power of the Danish nobility and his own bureaucracy.

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Appendix to Learning cooperation from the commons⁵³

Translations of old legal rules about the commons

Introduction

Below original texts are taken from 3 different sources. Texts from Gulatingslova are taken from Knut Robbestad's translation from old Norse as presented in the 1981 edition Robberstad and Lien (1981 [1969]). Texts from Frostatingslova are taken from the 1994 translation by Hagland and Sandnes (1994). Absalon Taranger's (1274 [1915]) translation of Magnus Lagabøte's Law from 1274 is the final source for texts in Norwegian. These translations are based on texts in old Norse as they were written down in the 13th century.

Laurence M. Larson (1935) has translated Gulatingslova and Frostatingslova to English. For texts from those two laws, his translation has been used. Magnus Lagabøte's Law has not been translated into English. The texts taken from this law book are translated by this writer.

The excerpts are presented in the order of assumed age:

1. Gulatingslova (assumed to be older than 930)
2. Frostatingslova
3. Magnus Lagabøte's Law (enacted 1274 based on the existing 4 regional laws)

⁵³ Revised paper presented at the Workshop on “The Value of the Commons”, 20-22 March 2019, Utrecht

Translations of old legal rules about the commons

1. The Law of Gulating

Norwegian text	English text
<p>Source: Robberstad, Knut, and Carsten. Lien. (1981 [1969]). <i>Gulatingsslovi</i>. Vol. 33, <i>Norrøne Bokverk</i>. Oslo: Samlaget.</p>	<p>Source: Larson, Laurence Marcellus. (1935). <i>The earliest Norwegian laws: being the Gulathing law and the Frostathing law</i>. New York: Columbia University Press.</p>
<p>Book V [Landleigeboik], (Section 80) Kap.9 Um gjerding og øydejord, page 108</p>	<p>"The law of tenancy", section 80 "Concerning untilled land and the building of fences", page 93</p>
<p>No vert ein mann utlæg på (medan han leiger) annanmanns jord, då skal eigaren ha leiga, um ho ikkje var greidd, og all rotfast avling. Um det ligg øydejord attmed, då skal den som eig øydejordi, setja gard um eller gjæta henne, for ingen skal stå til gardstaur for ein mann. Vil han ikkje gjerda, skal det inkje bõtast um det vert beitt der.</p>	<p>If a tenant on another man's land is outlawed, he [the owner] shall have the rent, if it is unpaid, and also the standing grain. If there is untilled land close by, the owner shall build a fence around this land and shall keep it in repair, for no man shall serve as a fence post for another. But if he will not build it, no one shall owe compensation if [the grass] is eaten.</p>
<p>Book V [Landleigeboik], (Section 81) Kap.10 Her vert det utgreidt um grannehøve, page 108-109</p>	<p>"The law of tenancy", from section 81 "The legal relations of neighbors on the same farm are defined here", page 94</p>
<p>Um folk bur saman i grend, skal dei flytja or heimehagen når det har gått 2 månader av sumaren, um ikkje alle tykkjer at noko anna er betre. Vert ein sitjande nede lenger, skal grannen forbjoda han å sitje der. Sit han i ro likevel, skal han stemna han til tings for ran og ulovlegt tilhelde, då skal tingmennene døma til kongen ein baug, til jordeigaren dubbelt landnåm, og 6 øyrar til grannen for grasran.</p>	<p>If men live near together on the same farm, they shall drive [their cattle] out of the farm pasture [to the shieling] when two months of the summer are spent⁵⁴, unless some other plan seems better to all. If one keeps his live stock longer [on the farm] below, the other shall forbid him to remain there [with them]; if he continues to keep them there none the less, his neighbor shall summon a thing to try him for robbery and unlawful pasturing. And it shall be the duty of the thingmen to award a baug to the king, a double fine for trespass to the landlord, and six oras to his neighbors for stealing grass.</p>

⁵⁴ Summer in the North was reckoned from April 14; the removal to the mountain pasture would begin about June 14.

<p>Saksøkjaren skal krevja so mange bønder og bygdemenn som han vil ha, til å føra bufeet åt den andre ut or heimhagen, saka 3 øyrar er kvar som nektar. Det same gjeld um han fer ned (frå sætri) fyre tvimånad.</p> <p>Hå har dei rett til um hausten. Då skal ingen beita [til skade] for den andre; den som gjer det, skal bøta grasransbaug.</p>	<p>And he [the complainant] shall call upon the freemen and the men of the herath⁵⁵, as many as he needs, to drive the offender's cattle out of the home pasture; every one who refuses to join in this shall owe a fine of three oras. The penalty is the same if one leaves the upper pasture before the end of the fifth summer month⁵⁶.</p> <p>The aftermath [that grows] in the autumn shall belong to all; but no one shall begin to graze before the rest, and whoever does shall pay the penalty for stealing grass.</p>
<p>Book V [Landleigeboik], (Section 82) Kap.11 Meir um grannehøve, page 109-110</p>	<p>"The law of tenancy", section 82 "More about the legal relations of neighbor farmers", page 94-96</p>
<p>Gard er grannesemjar.⁵⁷ No bur to eller fleire menn på ein bø, då skal dei halda gard etter som dei har jord til og som det har vore frå gamal tid.</p> <p>Dei skal ha sett garden i stand til siste fardagane,</p> <p>og kvar skal ha ansvar for sin gard som står um avling, til vinternettene.</p> <p>Men den som ikkje gjerder sin gard, han skal svara for all skaden som vert gjort, anten det er hans eller annanmanns fe som gjer skaden.</p> <p>Um ei ku har til vane å bryta gard eller smyga igjennom, skal dei gå til grannane sine og lata dei sjå garden. Um dei tykkjest garden er lovleg, skal den som eig gardbrytaren, bøta all skaden som vert gjord.</p> <p>Um bufe går or kvei og gjer skade for andre, skal eigaren bøta skaden etter verdsetjing.</p>	<p>Now as to fences that are maintained by neighbors, [the rule is that] if two men, or more than two, occupy [parts of] the same farm, they shall maintain the fences according to the extent of their [respective] holdings and [in such repair] as they were in days of old; and the work shall be finished by the last of the moving days.</p> <p>And each one shall be responsible till the winter nights⁵⁸ for his part of the fence that encloses the grain fields; and the one who fails to keep his own fence in repair shall be answerable for all the damage done to the other [farmers], whether by his cattle or by those of other men.</p> <p>If a cow is a fence breaker or crawls through fences, the neighbor farmers shall go forth to inspect the fence. If it seems to them that the fence is satisfactory, the one who owns the fence breaker shall make good whatever the damage is.</p> <p>If cattle break out of a cattle yard and do damage to the other [farmers], the one who owns the cattle shall compensate for the</p>

⁵⁵ The Norwegian word is spelled «herred». It is one of several names used to refer to a local public unit, that which elsewhere in this text is called "bygd".

⁵⁶ August 14- September 14.

⁵⁷ This sentence is not included in Larsons translation. It means something like "Fences make good neighbors"

⁵⁸ About October 14. Winter was reckoned as beginning at that time.

<p>No bur menn på kvar sin bø i same grend, og den eine vil ha merkegard millom dei, men den andre vil ikkje, då skal den som vil ha, stemna hin til gjerdeskifte og fastsetja ein dag med vitne og gjera kravsmål um gjerding.</p> <p>Um hin ikkje vil koma til gjerding, skal han lata bera vitnesburd um at han stemnde hin til det, og skifta gjerdingi for vitne og kasta lut um henne; sidan skal han gjerda den parten som fall på hans lut.</p> <p>Um hin ikkje vil gjerda, og det kjem fe innangjerdes og et der av åker og eng, kven det so er som eig det bufeet, skal dei som ikkje vilde halda gard, bøta all skaden som vert gjort der.</p> <p>På same måten skal det vera med hageskifte; då er hagegarden (hagfellegard) felt rett, når kvistene rekk jamhøgt med munnen; då kann bufe sendast med heimbod sidan.</p> <p>Han kann gjeva heimbod med vitne kvar han vil, kvar dei so møter hin. Då kann han drepa bufeet som hin eig, um han møter det i sin hage og vitne veit det.</p> <p>Bufe fell ugildt (d.e. han som slær det i hel, skal ikkje bøta eller gjeva skadebot) um det går yver hagegard eller merkegard, når han har gjerdt sin part, endå um hin ikkje har gjort sin.</p>	<p>damage according as men assess it. If men live in a neighborhood,[close together], but each one on his own homestead, and one wants a line fence built between them, but the other does not, the one who wants the fence shall summon the other to a moot to allot the length of fence to be built. And on the appointed day he shall make a statement before witnesses and shall demand the building of a fence.</p> <p>Now if the other refuses to come to the fence building [moot], the summoner shall produce witnesses that he did summon him, and he shall allot the length of fence to be built by casting lots in the sight of witnesses; let him build that part later that the lot assigns.</p> <p>Now if the other refuses to build and cattle come inside the garth and graze in the cornland and the meadow, no matter whose the cattle are, the men who neglect to keep the fence in repair shall pay all the damage that is done there.</p> <p>The home pasture shall be parceled out in the same way. A fence on a pasture line is properly set up if the branches reach up to the [workman's] mouth⁵⁹, and the [straying] cattle will then have to be sent home with a warning. [One is allowed to] drive them home to the owner with a warning in the presence of witnesses, if one wishes [to do so], no matter where they are found.</p> <p>If he finds these cattle in his pasture [after that] and the facts are known to witnesses, he may kill them. For no compensation is due after that for cattle that have gone through a pasture fence or a line fence, if the one [whose land they have entered] has built his part of the fence but the other man has not [built] his.</p>
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⁵⁹ Such fences were built of felled trees.

<p>Book V [Landleigebolk], (Section 83) Kap.12 Den som opnar grind, skal lata henne att, page 111</p>	<p>"The law of tenancy", section 83 "One who opens a gate shall close it again", page 96</p>
<p>No går folk gjennom gardsled, då skal den som opnar grindi, ha ansvar for at ho vert attlati. Um bufe eller hest kjem innangards og gjer skade på åker eller eng, skal han som opna grindi, bøta all skade etter takst.</p>	<p>If men pass through a fence gate, the one who opened the gate shall have the duty to close it again. And if horses or other live stock come within the enclosure and damage the cornland or the grassland, all the damage that is done shall be paid for, according as men assess it, by the one who left the gate open.</p>
<p>Book V [Landleigebolk], (Section 84) Kap.13 Um sæter og um merke, page 111</p>	<p>"The law of tenancy", from section 84. "Concerning the shieling⁶⁰ and its boundaries", page 96</p>
<p>No skal for sætrane uppe på fjellet vera dei same merke som har vore få gamal tid , dei skal ikkje flytjast utan når det er ingen mann til meins.</p> <p>Det same gjeld um tilhaldet på sætri. Der skal fe ikkje sendast med heimbod; der skal horn møta horn og hov møta hov.</p>	<p>Now the boundary markers of the shieling pasture up on the mountain shall be where they were of old. Let no one move them from their places unless it is done so that no one suffers damage thereby.</p> <p>[The use of] the pastures shall be [determined] in the same way.⁶¹ No one is there allowed to send cattle home [to the owner] with a warning, for there horn shall meet horn, and hoof [shall meet] hoof.⁶²</p>
<p>Book V [Landleigebolk], (Section 86) Kap.15 Um sæter og um marketeig, page 112-114</p>	<p>"The law of tenancy", section 86. "Concerning the shieling and parcels of forest land", page 97-98</p>
<p>Alltid når men er usamde um sæter og den eine let halda dom, skal domsavgjerdj vera den som han har vitne til, utan hin har fleire vitne.</p> <p>No er folk usamde um marketeig og den eine let halda dom, då skal domsavgjerdj vera den som han har vitne til, utan at hin har fleire vitne.</p> <p>Alltid når folk er usamde um sæter eller um marketeig eller um markerein utangjerdes, skal den vinna saki, som fører vitne for [retten sin]. Har begge vitne, skal den vinna</p>	<p>Whenever men are in dispute about a shieling pasture and one of them calls for a doom, the pasture shall be awarded to him, if the witnesses give it to him, unless the other man has a greater number of witnesses.</p> <p>If men are in dispute about a lot in the forest and one of them calls for a doom, the lot shall be awarded to him, if the witnesses give it to him, unless the other man has a greater number of witnesses.</p> <p>Whenever men are in dispute about a shieling pasture, or a parcel of forest land, or a boundary furrow outside the garth, he shall have the decision to whom the</p>

⁶⁰ Shieling: the Norwegian word is "sæter/ seter" . Larson (1935, 427) explains "The mountain pasture and the huts provided for those who had charge of the cattle in the grazing season."

⁶¹ They shall be used as they have been used in years past.

⁶² Rights were equal on the mountain pasture.

saki, som vil sverja [retten sin]. Vil begge sverja, eller ingen, skal dei byta etter midten det [stykket] som dei er usamde um.

Um merkereiner som folk er usamde um, kann kvar fri og fullmyndig som vil vitne. Han skal segja dei ordi at "her er skilet", og då er det rett.

No er folk usamde um sæter eller marketeig, då skal den ha [tvistemnet] som har hatt (vore havar av) det 20 vintrar eller lenger enn 20 vintrar, utan klander og uspilt, um vitne veit det med han.

Den som har hatt, skal halda dom fyre; men den som ikkje vil unna han det, skal stemna han til marketeigen og til dom, ikkje stuttare enn 5 netter i fyrevegen. Dit skal han då fara når dagen kjem, med domsmennene sine og alle dei vitni som han treng; domsmennene sine skal han setja der han segjer merket er. Hin, som fører saki mot han, skal setja halv dom med han.

Den som søker skal føra vitne på det at han stemnde hin hit og dinæst vitne på det at merki er dei som han segjer; då er det sant, um det ikkje vert ført andre og fleire vitne imot, for då er merki so som dei vitnar. Er dei like mange på begge sidor, då skal dei vinna som vitna fyrst.

Um det ikkje finst vitne, skal den vinna saki, som vil sverja på [retten sin]. Um ingen vil sverja, eller begge, skal dei byta etter midten det som dei er usamde um. Soleis skal alltid gjerast, som eg no har sagt, når folk er usamde um merki; og dei skal setja dom der på marketeigen.

Når dei har sett domen, skal søkjaren føra vitni sine. Alle kann vera vitne um dette, endå um han var træl og arbeidde i den

witnesses award it. If both have [the same number of] witnesses, let the decision go to him who is willing to swear [to his claim]. If both are willing to swear or if neither is, the matter in dispute shall be divided into halves.

In cases of dispute about a boundary furrow, any man, free and of major age, shall [be allowed to] testify, if he is willing [to do so]; he shall make a formal statement that here runs [the boundary], and that is final.

If men have a dispute over a shieling pasture or a lot in the forest, let him have it who has been in possession of it with a right unquestioned and unimpaired for twenty winters or more than twenty, if the facts are known to witnesses.

The one who is in possession shall offer to submit to [the judgment of] a doom and the one who is not satisfied [with the situation] shall summon the possessor to appear at the forest lot and at a doom after a period of five nights at least. When the day comes he shall go to that place with his doomsmen and all the witnesses that he will need and he shall place his doomsmen where he claims the boundary to be. The defendant in the case shall set his half of the doom over against that of his opponent.

The complainant shall produce witnesses that he summoned his opponent to that place and others to testify that the boundary runs as he has stated, and that shall be [held for] truth, unless a greater number [of witnesses] give stronger evidence for the other side; in that case the boundary shall be as they testify. If both sides have the same number, those who testified first shall have the decision.

If there are no witnesses, let him have the decision who is willing to swear to his [claim]; but if neither is willing to swear, or if both are, the matter in dispute shall be divided into halves. And whenever men disagree about boundaries, they shall [proceed] as I have just set forth; and they shall also set their doom in the forest lot.

When they have set the doom, the complainant shall produce his witnesses. Now any man may bear witness even

<p>teigen, når han er fri den tid han skal vitna. Den av dei skal ha teigen, som har fleire og betre vitne til han, endå um søkjaren fører sine vitne fyrst.</p> <p>Er begge havarar til jordi, då skal den nemna dom, som valdar at dei er usamde.</p>	<p>though he may have labored on that lot as a thrall, if he has [since] been liberated. The one who has the better witnesses and the greater number shall have the lot, though the plaintiff led forth his witnesses first.</p> <p>If both are in possession of the land, the one who has caused the dispute shall appoint the doom.⁶³</p>
<p>Book V [Landleigeboik], (Section 93) Kap.22 Um vatn og veidestader, page 120</p>	<p>"The law of tenancy", from section 93. "Concerning pools and fishing grounds", page 103</p>
<p>Vatn og veidestad skal kvar ha sine, so som dei har hatt frå gamal tid.</p> <p>Ingen skal gjera gildre på annanmanns jord; men um han gjer, skal han bøta landnåm og veida åt jordeigaren.</p>	<p>Everyone shall have the pools and the fishing grounds that he had in former times.</p> <p>No man shall set traps on [another] man's land and, if he does, he shall pay the fine for trespass and deliver the catch to the owner of the land.</p>
<p>Book VII [Um tingbod], (section 145) Kap.15 Um rak og ålmenningar, page 156</p>	<p>"Miscellaneous provisions", section "145 Concerning drift goods and rights to the common"⁶⁴ page 124-5</p>
<p>Kvar mann skal nytta vatn og ved i allmenning.</p> <p>Kvar skal ha ålmenningen sin, som han har hatt den frå gamal til. Men um det vert rudt upp gard i ålmenning, då eig kongen garden. Um det er åker og eng og stengt um med gjerde, då skal han (rudningsmannen) ha so langt frå gjerde som han kan kasta med snidelen (lauvsigden) sin; men so er det ålmenning.</p>	<p>Every man shall have the use of water and wood in the common.</p> <p>Every man shall have such rights in the common as he had of old. But if farms are cleared in the common, they shall belong to the king⁶⁵. If a man has built a fence around his cornland and his grassland, he shall possess he ground as far from the fence as he can throw his sickle⁶⁶, but what lies beyond is common.</p>

⁶³ The import of this sentence does not seem to be clear.

⁶⁴ Larson consistently writes "common" where current scholarship will write "commons".

⁶⁵ The translator of the Norwegian edition, Knut Robberstad (Robberstad and Lien 1981 [1969]), comments on page 364 that from the wording it is apparent that there is no indication that the king is seen as the owner of the commons. He guesses that the rule that the king becomes the owner of new farms in the commons is a relatively new rule introduced on the suggestion of the king to promote new settlements. On the question of the king's owner position in the commons also see Hagland and Sandnes (1994, 216-7, XVI, 2) where the kings Sigurd, Øystein, and Olav (ca 1105 CE) is said to have given the farmers all their commons "as they were at the time of St Olav, both the outer and the upper, in the south and in the north." At that time there apparently were some doubts about this.

⁶⁶ *Snidill*: a kind of sickle used for cutting leaves.

Alt det rak som rek i ålmenning, det eig kongen. No sigler folk frammed landet eller inn frå havet og forliser, då skal kvar ha det gods som han kallar sitt og har vitne for, kven det er som eig jordi det rek inn på. Alt anna havrak eig kongen.	All the goods that drift in upon the [shore of the] common belong to the king. If men sailing forward along the shore or [coming] in from the ocean suffer shipwreck, every man retains ownership in whatever property he can prove by witnesses to be his, no matter who owns the shore to which it has drifted; but all other wreck goods belong to the king.

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Translations of old legal rules about the commons

2. The Law of Frostating

Norwegian text	Translated text
Source:	Source:
Hagland, Jan Ragnar, and Jørn Sandnes.(1994). <i>Frostatingsloven</i> . Oslo: Samlaget i samarbeid med Frosta historielag.	Larson, Laurence Marcellus. (1935). <i>The earliest Norwegian laws: being the Gulathing law and the Frostathing law</i> . New York: Columbia University Press.
Kapittel XIV [Andre landsleigeboik og tjuveboik], avsnitt 7 Om allmenningar, s. 204-205	Chapter XIV [The law of tenancy - concluded. The law of theft], Section 7 Concerning the commons, p. 394-395
<p>Allmenningane skal vera som dei har vore frå gammalt av, både dei øvre og dei ytre. Men om menn er usamde, og den eine kallar det sin eigedom det den andre kallar allmenning, då skal den lovfesta som kallar det sitt, og lysa ting, om det no er fylkesting eller halvfylkesting som skal handsame saka, og han skal senda ut tingbodet med fem dagars frist.</p> <p>Men om han ikkje gjer det, då er lovfestinga hans ugyldig denne gongen. Men på tinget skal dei nemna opp tolv hauldar eller gode bønder om der ikkje er hauldar, seks frå kvar av dei to partane, i dét tinglaget. Og baa skal føra fram to dei kan få av dei tolv til å sverja om det er hans eigedom eller allmenning. Men med fem dagars frist frå det tinget skal den som kallar jorda sin eigedom, lysa stemne, og på det stemnet nyta dei vitnemåla som var nemnde på tinget.</p> <p>Men om femdagarsfristen fører til ein helgedag, då skal stemnet haldast på den fyrste romheilage dagen etter, og vitnemåla først fram der, fullgilde som på femtedagsstemnet. Men eiden skal sverjast slik:</p> <p>«Der har eg høyrte er skilmerket mellom bøndene sin eigedom og allmenningen, og ikkje veit eg sannare i den saka.» Deretter skal det setjast femtedagsstemne, og der skal</p>	<p>The commons shall remain as they have been of old, both the upper and the outer commons⁶⁷. But if men come to a disagreement, the one claiming for his own what the other calls common land, let the one who claims it for his own place a ban upon [the use of] it and then appeal to the thing where such a case can be decided, whether it be the shire thing or a thing for half [a fylki]; and let him have the thing summons sent forth within the five-day period.</p> <p>But if he fails to do so, his ban is worthless for the time being. And at the thing there shall be chosen twelve "hauldar" or the best freemen, if "hauldar" are lacking, each litigant [naming] six from his own thing district. And [the claimant] shall have any two of the twelve whom he can get and who are able to swear whether the land belongs to him or is common land. And at that thing the one who claims the land shall appoint a five-day moot; and at that moot he shall be allowed to present such witnesses as were named at the thing.</p> <p>If the fifth day falls on a holy day, the moot shall be held on the earliest lesser holy day following; for the evidence may be presented as completely on such a day as at a five-day moot. And the oath shall be sworn in this wise:</p> <p>"I have heard that this line marks the boundary between the commons and the farmers' [own] land and I know nothing more nearly true in this case." Then the five-day moot shall be set,</p>

⁶⁷ "Upper" ("øverste") refers to the mountains and "outer" ("yderste") refers to the coast (coastal waters and coastal islands) (Hagland and Sandnes 1994, 204, note 52 (p.225)).

<p>det dømmast kva kvar av dei to skal ha.</p> <p>Men om år mannen eller kongens ombodsmann skuldar ein mann for at han sit med jord som er rudd i allmenningen utan løyve frå kongen, og mannen svarar at jorda var rudd før tida til tre kongar som ingen var stuttare tid i landet enn ti vintrar, men om år mannen eller ombodsmannen til kongen tvilar på det, då skal mannen nyta sine vitnemål slik som det før er sagt at ein skal gjera i saker om merke mellom allmenning og manns egedom.</p>	<p>and this body shall determine what each one shall have.</p> <p>But if the bailiff or the king's agent charges a man with having land in his possession that has been cleared in the common without the king's permission, and if he replies that this land was cleared before the time of three kings, none of whom was in the land less than ten winters, and if the bailiff or the king's agent doubts this statement, the man who is in possession shall, as stated above, be allowed to present such testimony as one is allowed to present [in disputes] as to the boundaries between the commons and private land.</p>
<p>Kapittel XIV [Andre landsleigebolek og tjuvebolek], avsnitt 8, Kongen kan bygsla bort allmenning, s. 205-206</p>	<p>Chapter XIV [The law of tenancy - concluded. The law of theft], Section 8 The king may lease the common, p. 395-396</p>
<p>Kongen kan bygsla bort allmenning til kven han vil. Men den som leiger, skal setja opp gjerde omkring i dei fyrste tolv månadene og har ikkje lov til å flytta gjerdet sidan, og han skal kunna taka vyrke til å bøta gjerdet så langt ein kan kasta med ein lauvkniv frå gjerdet rundt omkring.</p> <p>Alle slåtter i allmenningen skal den ha i tolv månader som fyrst set ljåen sin i dei.</p> <p>Sel kan kvar mann gjera seg i allmenningen om han vil og ha sommarsete der om han vil.</p> <p>Men om han sår i allmenningen utan løyve av kongens menn, då eig kongen både kornet og det høyet som vert slått der.</p> <p>No brenn ein mann ned eit sel i allmenningen, eller ei smie eller vyrke til tjørebrenninga eller veidebuer eller noko anna som folk har budd til, då skal han bøta femten merker til</p>	<p>The king may lease the common⁶⁸ to whomever he wishes. And the one who takes the lease shall enclose the land during the first twelvemonth and shall have no right to move the fence afterwards. He shall have [the right to gather materials] for his fence within a knife's⁶⁹ throw in all directions.</p> <p>Any parcel of meadow that one finds in the common shall belong during the twelvemonth to the one who first puts his scythe to the grass.</p> <p>Whoever desires to do so may set up a shieling [on the upper common] and may remain there through the summer if he chooses.</p> <p>If any one sows seed in the common, but has no lease from the king's agent, the harvested grain and the hay that is mown there shall both belong to the king.</p> <p>If a man sets fire to a shieling hut on the common or to a smithy or to hunting shacks or to a tar kiln or to other materials whatever they be, he shall owe the king a fine of fifteen marks,</p>

⁶⁸⁶⁸ Larson comments: "Common: (*almennigr*). All that part of the country, including the water front and the plateau lands, which was not private property was regarded as a common possession. To all this the king held the title, but the subjects were allowed to make such use of the common as custom permitted." The translator to Norwegian of the Gulatings Law, Robberstad, disagrees about the king holding title and says that there is no indication that the king is seen as the owner of the commons. He guesses that the rule that the king becomes the owner of new farms in the commons is a relatively new rule introduced on the suggestion of the king to promote new settlements (Robberstad and Lien 1981 [1969], 364, note to page 156).

⁶⁹⁶⁹ In the Gulathing Law Larson translates this as "sickle" and explains the original's "*Snidill*" as a kind of sickle used for cutting leaves.

<p>kongen med mindre det var vådeverk, og likevel bøta for skaden til den som åtte det.</p> <p>Men om to menn kjem samtidig til ei slåtte, då skal baa ha det dei slår. Men om dei er usamde om kven av dei to som slo fyrst, då skal den ha retten som kan prova det med einseid, med mindre den andre har vitne imot.</p> <p>Fiskevatn i allmenningen har alle same retten til. Tømmer og fjølved kan liggja i allmenningen så lenge ein mann treng det, innan tolv månader, men elles kan det hoggast berre så mykje som kan førast bort før kvelden, elles har alle same retten til det.</p> <p>Men om det trevyrket vert teke innan tolv månader som det før er sagt kunne liggja, då skal den som tok det, bøta tre merker til kongen, og den som åtte det, skal ha verdet.</p>	<p>unless the fire was due to carelessness; in any case he must compensate the owner for the damages done.</p> <p>If two men go out at the same time to mow grass, let each one have what he mows; but if they disagree as to who began the labor first, he shall have his claim who proves it with his own oath, unless the other man has witnesses to the contrary.</p> <p>Fishing grounds in the common belong equally to all. Timbers and boards may lie in the common for a twelvemonth, if need be; but as for other [wood], only so much may be hewn as can be removed before nightfall; otherwise [hewn wood] is common property.</p> <p>But if such wood as might be allowed to lie in the common, as stated above, is carried away before the end of twelve months, the one who takes it shall owe three marks to the king, and the owner of the wood shall have the worth of it.</p>
<p>Kapittel XIV [Andre landsleigebolck og tjuvebolck], avsnitt 9 Om dyregardar, s. 206</p>	<p>Chapter XIV [The law of tenancy - concluded. The law of theft], Section 9 Concerning traps, p. 396</p>
<p>Dyrgardar og dyrgraver kan kvar den som vil gjera i allmenningen, om han ikkje spiller veidevonene for andre.</p> <p>Han skal ikkje gjera garden nærare ein dyrgard som stend frå før, enn at ein ikkje kan høyra hogg dit. Han kan gjerda frå ein annan gard om han vil.</p> <p>Om ein dyrgard stend lenger unytta enn tjue vintrar, då kan den setja han i stand som vil, og nytta han for seg medan han held han i stand.</p> <p>Men ein spjotgard skal ikkje standa lenger unytta enn ti vintrar, og om han det gjer, då skal det farast fram som før er sagt.</p>	<p>Whoever wishes to set traps for wild animals in the common shall set them so as not to spoil another man's chances to get game.</p> <p>No man shall set [a trap] so near to one already set that the stroke of his ax can be heard in that place; but he may place [his own contrivances] quite close to [the end of] his neighbor's game hedge, if he chooses.</p> <p>If a game pit is left unused longer than twenty winters, whoever will may repair it and use it as long as he keeps it in shape.</p> <p>A spear hedge shall be allowed to stand no longer than ten winters; if it is left to stand [longer], it shall be dealt with as set forth above.</p>

Kapittel XIV [Andre landsleigeboik og tjuveboik], avsnitt 15 Om å taka hø, s. 209	Chapter XIV [The law of tenancy - concluded. The law of theft], Section 15 Concerning the taking of mown grass, p. 398
Om ein mann fer etter vegen med hest og det stend hø nær vegen, då kan han taka det hesten hans treng å eta, men om han tek hø med seg bort og vert funnen med det, då er han tjuv.	If a man travels the highway with a horse and there is grass near the road, he may, if he has need [for it], take as much as his horse requires to eat; but if he takes [hay] with him and is found in possession of it, he is a thief.
Kapittel XVI [Rettarbøter], avsnitt 2 Om rettarbøter, s. 216-217	Chapter XVI [Later enactments], Section 2 Concerning new enactments⁷⁰, p. 405
Dei har òg gjeve bøndene alle allmenningane slik som dei var på heilag Olavs tid, både dei ytra og øvre, i sør og i nord.	Moreover, they have allowed them ⁷¹ to have the commons as they had them in the days of the holy King Olaf, both the outer and the upper [common] to the south and to the north.

References:

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- Kong Christian V. 1687 [1982]. *Kong Christian den Femtes Norske Lov: 15de april 1687 : med Kongeloven 1665*. Oslo: Universitetsforlaget.
- Larson, Laurence Marcellus. 1935. *The earliest Norwegian laws: being the Gulathing law and the Frostathing law*. New York: Columbia University Press.
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⁷⁰ The addition to the law (rettarbot) is attributed to the kings Sigurd, Øystein, and Olav (ca 1105 CE).

⁷¹ The farmers.

Translations of old legal rules about the commons

3. The Law of Magnus Lagabøte

Norwegian text	English text
Taranger, Absalon. 1274 [1915]. Magnus Lagabøter's Landslov. Translated by Absalon Taranger. Oslo: Universitetsforlaget.	
VII Landsleiebolken. Kap. 16 [At en mand skal bo paa sin odelsjord], paragraf 3, side 120	VII On Land Tenure. Ch.16 [A man shall live on his allodial lands], section 3, page 120
<p>3. Nu om flere mænd end én bor i hus sammen, da skal de veda (viða, ta brændeved) efter folketallet og ikke efter jordmængden (brukets størrelse); ti det er husfolkene som trænger ild, men ikke jorden¹.</p> <p>¹Jfr. Kap. 22 i Landsleiebolken Kilde: §3 nyt.</p>	<p>3. If more men than one live together in a house, then they shall take firewood according to number of people, not according to size of landholding; because it is people that need fire, not land.</p> <p>[Taranger comments that paragraph 3 is new, meaning it has not been found in any of the older legal texts]</p>
VII Landsleiebolken Kap. 40 [Om folks sæterfærd], side 138	VII On Land Tenure. Ch.40 [On going to the summer farm], page 138
<p>1. Overalt hvor der er sætre til gaardene (til bøera manna) da skal man fare fra hushagen (hjemmehagen) naar 2 maaneder er gaat av sommeren¹, medmindre de alle finder at noget andet er bedre.</p> <p>2. Nu sitter én lengre dernede, da skal man forbyde ham at sitte der.</p> <p>3. Nu sitter han allikevel rolig videre, da skal han (naboen) stevne ham til herredstinget for ran og for hans sæte dernede; da skal tingmændene tildømme kongen en halv mark sølv for græsran, men leilændingen en halv mark sølv for græsværdet.</p> <p>4. Nu skal han kræve bønder og herredsmænd saa mange som han tarv for at føre hans bufæ fra sin hushage; enhver som ikke farer med, skal bøte 1 øre sølv til kongen, hvis han var opnævnt.</p>	<p>1. Everywhere where summer farms are present, one has to leave the home fields no later than after 2 months of the summer has gone¹, unless all agree something else is better.</p> <p>2. Now, one sits longer at the home fields, then he shall be forbidden to do so.</p> <p>3. Now, he continues to sit, then his neighbour has to call him before the bygdeting for theft, and for his sitting at the home fields; then the ting representatives shall judge that half a mark of silver goes to the king for theft of grass, and that half a mark of silver goes to the tenant for the value of the grass.</p> <p>4. Now he shall demand of farmers and men of the bygd a number of them as many as needed for driving his animals from the home fields; anyone who does not come along, shall be fined 1 penny [øre] to the king, if he was elected.</p>

<p>5. Samme straf rammer den, som farer hjem i hushagen før tvimaaned.²</p> <p>¹ Da sommeren begynner 14de april, blir sidste termin for sæterfærden 14de juni. ² Tvimaaned er maaneden fra 14de august til 14de september. Før midten av august maa ingen føre buskapen ned fra sæteren.</p>	<p>5. The same punishment is due to those who go to their home fields before two-month [tvimaaned]².</p> <p>¹ As summer starts 14th April, the last date for going to the summer farm will be 14th June ² "Two-month" is the month from 14th August to 14th September. Before the middle of August, no one is allowed to take his livestock home from the summer farm.</p>
<p>VII Landsleiebolken Kap. 41 [Om folks sætermerker³], side 138-139</p>	<p>VII On Land Tenure. Ch.41 [On delineating the summer farm], page 138-139</p>
<p>Nu skal der til sæteren oppe paa fjeldet være [de] merker, som har været fra gammel tid (at fornu fari); de skal ikke flyttes, medmindre han flytter dem ingen mand til mén. Det samme gjælder om sæteropholdet (sva skal thar sætr at somu). Der skal [andres] smale (smaafæ) ikke sendes med heimbud⁴ [til eieren]; der skal horn møte horn og hov [møte] hov. Kilde: Gulatingslova 84.</p> <p>³ Jb. landsleieb. 43: «Om hvor sætre skal gjøres», viser meningen. [Det er uklart kva dette viser til: Lansleieb. 43 har overskrifta "Om landeveier og haandran og brohold". I G. 86 er det eit kapittel som heiter "Um sæter og um marketeig"] ⁴ Heimbud bestod deri , at den som traf fremmed fæ paa sin jord, sendte det hjem igjen til eieren med opfordring til at passe bedre paa det; denne regel gjælder ikke paa sætrene, hvor de forskjellige eieres kvæg gresser om hverandre (horn møter horn og hov [møter] hov).</p>	<p>Now, on the summer farm up in the mountains, there shall be markings as from old on; they shall not be moved unless they are moved to no one's disadvantage. The same applies for the stay at the summer farm. Other people's small ruminants shall not be moved home to the owner; there horn shall meet horn and hoof meet hoof.</p> <p>Source: Gulating Law 84</p>
<p>VII Landsleiebolken Kap. 61 [Om folk tvistes om almenning], side 155-156</p>	<p>VII On Land Tenure. Ch.61 [If people quarrel about commons], page 155-156</p>
<p>1. Saa skal alle almenninger være, som de har været fra gammel tid, baade det øvre (dvs.: til fjelds) og det ytre (dvs.: til havs). 2. Men om folk er uenig og én kalder det sit, som en anden kalder almenning, da lovfæste den, som kalder det sit og stevne ting dit, hvor man skal avgjøre det maal, og han maa ha utsendt tingbudet før femt (dvs.: inden 5 dager); men om han ikke gjør saa, da er hans</p>	<p>1. The commons shall remain, as they have been of old, both the upper and the outer⁷². 2. If people disagree and one calls it his and another calls it commons, then the one who calls it his, shall appeal to the law and demand a ting meeting at the spot to determine the issue. The demand for ting has to be issued within 5 days; if this is not done</p>

⁷² "Upper" ("øverste") refers to the mountains and "outer" ("yderste") refers to the coast (coastal waters and coastal islands); Hagland and Sandnes (1994, 204; XIV 7), Taranger (1274 [1915], 155; VII, Ch 61-1), Kong Christian V (1687 [1982], 3de Book, Ch 12-1). Our oldest regional law code, Gulatingslovi (Robberstad and Lien 1981 [1969], 156), applies to the west coast. It does not contain this exact phrase. It is edited differently, but in book VII, chapter 1,5 it comes close. The law of Gulating is clearly more concerned with the "outer" commons than with for example timber rights.

<p>lovfæsting unyttig for den gang. Men paa tinget skal de opnævne 12 haulder eller de bedste bønder, hvis haulder ikke er til, 6 hver av dem fra det tinglag; og 2 av disse 12 skal de ha til at bære vidnesbyrd og sverge, om det er bondeeiendom eller almenning. Men paa tinget skal den, som kalder jorden sin, lægge femtestevne [til aastedet] og der nyte de vidner som var opnævnt paa tinget. Men om femten indtræffer paa helligdag, da skal stevnet holdes paa næste romhelgedag og da kan disse vidner føres like saavel som paa femtestevnet. Saadan ed skal vidnene¹ sverge: «Det har jeg hørt, at dette merke skiller mellem bondeeiendom og almenningen og ikke vet jeg sandere for Gud i dette maal.» Men derefter sættes femtestevne og dette skal tildømme hver det, han skal ha.</p> <p>3. Men om kongens ombudsmand tiltaler nogen for at han er eiendomsbesidder (handhati) til den jord, som har været bygget (ryddet) i almenning uten kongens lov og eiendomsbesidderen svarer saa: «Denne jord har jeg hat (dvs.: besiddet) og de som eiet den før mig i 60 vintre eller længre.» Men om kongens ombudsmand tviler paa dette, da skal eiendoms besidderen nyte sine vidner saaledes som ovenfor er skilt om [tvister mellem] privateiendom og almenning.</p> <p>Kilde: Frostatingslova XIV 7. ¹ Det er de 2 av de 12.</p>	<p>his appeal to the law will be lost for this time. At the bygdeting, they shall appoint 12 "hault" or the best farmers if they are no hault, 6 by each of them from the bygd; and 2 of these 12 they shall require to witness and swear an oath whether this is farmer owned or commons. But at the bygdeting the one who calls the land for his, decide the fifth-moot [at the actual site] and there benefit from the witnesses appointed at the bygdeting. But if the fifth-moot occurs on a holy day then the fifth-moot shall be moved to the next day after the holy day and then one may present these witnesses in the same way as on the fifth-moot. The witnesses¹ shall swear this oath: "This I have heard, that this marks the boundary between farmer's land and commons, and I do not know anything more truthful before God in this case." But after that the fifth-moot is adjourned and have to judge for each what he shall have.</p> <p>3. If the kings representative accuses anyone for holding land that has been tilled in the commons without permission from the king, and the accused answers: "I have held this land and those who held it before me for 60 winters or longer. But the king's representative doubts it, then the landholder shall have access to witnesses in the same way as explained above for disputes between private lands and commons.</p> <p>¹ That is the 2 of the 12.</p>

VII Landsleiebolken Kap. 62 [Hvorledes man skal ha [bruke] sit [almennings]bruk (bœli)], side 156-157	VII On Land Tenure. Ch.62 [How to use your commons], page 156-157
<p>1. Kongen kan bygsle almenning til hvem han vil. Men den, som leier, skal sætte gard om det første aar - og han har ikke ret til at flytte garden oftere - og snidelskast⁷³ fra garden paa alle kanter til gardsbøter.</p> <p>2. Alle slaatter, som er i almenning, skal den, som først sætter ljaen i dem, ha i 12 maaneder.</p> <p>3. Sæter skal hver, som vil, gjøre i almenning og sitte der sommersæte.</p> <p>4. Men om nogen saar i almenning og ikke leier av kongens ombudsmand, da eier kongen baade korn og høi, om høi er slaat.</p> <p>5. Nu brænder nogen sæter i almenning eller smidje eller tjærevirke eller veideboder eller hvadslags virke det er, da sakes han til kongen 3 mark sølv, men til den som eiet virket skal han bøte efter lagadom, medmindre det blir vaadeverk, da han dog skal bøte skaden efter 6 skjønnsomme mænds takst.</p> <p>6. Men om 2 mænd samtidig gaar i en slaatte, da skal begge ha det de slaar. Men er de uenig om, hvem som først arbeidet der, da skal den vinde, som sander [sin paastand] med ensed, hvis ikke hin har flere vidner imot.</p>	<p>1. The king can rent out land in commons to whom he wants. But the one who rents shall put up a fence during his first year and he has no right to move the fence. The length of one throw of a scythe from the fence on all sides will be forest available for mending his farmhouses and fences.</p> <p>2. All meadows in the commons shall belong for 12 months to the one who first uses his scythe there.</p> <p>3. Summer farm in the commons can all make for staying there during the summer.</p> <p>4. If anyone sows in the commons without renting from the king's representative, then the king owns both cereals and hay, if hay has been cut.</p> <p>5. Now if anyone burns a summer farm in the commons, or smithy, or tar-production facility, or hunting hut, or whatever construction there is, then he is fined 3 mark silver to the king, but to the owner of the construction he shall pay damage according to a judgement of the lawrightmen within the bygd unless it is an accident in which case he shall pay for the damage according to the assessment of 6 knowledgeable men.</p> <p>6. If two men come to a meadow to cut hay at the same time, then both shall have what they cut. If they disagree on who first started work there, then the one shall win who verifies his status with a one-oath if not the other have more witnesses to the contrary.</p>

⁷³ Snidill er en stor, tung løvkniv, som endnu brukes paa Vestlandet og den dag idag kaldes snidel.

<p>7. Alle fiskevand i almenningene er alle jevnhjemlet.²</p> <p>8. Tømmer og bord kan, om det trænges, ligge indtil 12 maaneder i almenning. Men av alt andet maa der kun hugges saa meget, som kan føres bort inden kveld; ellers er det alle jevnhjemlet. Men om det trævirke blir tat inden 12 maaneder, som før var skilt kunde ligge, da er den som tok, saket 6 ører sølv til kongen, men eieren skal ha værdet for det og avindsbot efter lagadom.</p> <p>Kilde: F. XIV 8.</p> <p>² Ett hds. Tilføier: «og likesaa dyreveide».</p>	<p>7. All fishing lakes in the commons belong to all equally².</p> <p>8. Timber and plank can, if needed, stay in the commons for 12 months. But of everything else one can cut only as much as can be taken out before the evening. Otherwise, it belongs to all equally. But if timber is taken within the 12 months it previously was allowed to lie, then the one who took it is fined 6 pennies (øre) silver to the king and the owner shall have the value of the wood and a damage payment according to the judgement of the lawrightmen.</p> <p>Souce. Frostating Law XIV 8.</p> <p>² One manuscript adds "and also for deer traps"</p>
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