
# PROPERTY LAW: CURRENT ISSUES AND DEBATES

Edited by Paul Jackson and David C. Wilde

# Property Law: Current Issues and Debates

*Edited by*

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# Foreword

*On behalf of the Centre for Property Law*

While this is not the place for a general valediction to mark Paul Jackson's retirement from Reading, I hope Paul will not mind that I have, with the connivance of the publishers, added to the proofs of the book this brief foreword on his standing down as Director of the Centre for Property Law. Invited to speak on behalf of the Centre, I should like to thank him for, and pay tribute to, his contribution to it.

Paul was behind the initiative to establish the Centre, and has served as its Director since it was set up in 1995. He is in large part responsible for its success. Many outside Reading will be familiar with the public work he has done for the Centre. To those within the Centre, perhaps his greatest contribution (among many) has been in setting standards of scholarship for others to aspire to.

We shall greatly miss his wisdom - and wit - as chair of the Centre. He has, of course, the very best wishes of all associated with the Centre for his retirement.

DAVID WILDE

# Preface

*By the Director of the Centre for Property Law*

This is the second of two books based on papers given at the conference organised by the Centre for Property Law at Reading in March 1998 under the title, "Contemporary Issues in Property Law". Speakers represented jurisdictions from around the world. Their subjects ranged from the theoretical and jurisprudential to the severely practical. No one who attended the conference - or subsequently reads the papers in this and the preceding book, *Contemporary Property Law* - can believe in the picture of property law as archetypical, dry as dust, black letter, law. Questions of human rights, changes in social structures, technological developments are all shown to have their impact on property law, calling for careful analysis of the present law and practical proposals for reforms to reflect new developments.

The papers printed here must and can speak for themselves. The success of the conference which gave birth to those papers depended, however, on many whose contributions do not appear between these covers. The Centre is very glad to be able to record its thanks to them. Mr Justice Neuberger and David Wood QC, opened the proceedings in inimitable fashion. Lord Justice Millett, as he then was, kindly presided at the Conference Dinner. Judge Paul Baker QC, Professor Kenneth GC Reid, Professor Kevin Gray and Susan Bright undertook the duties of chairing various working sessions.

Mrs Sandi Murdoch again devoted her organisational skills to ensuring the efficient planning and running of the conference. Nicholas King gave up his summer vacation following graduation to assisting in the initial stages of the editorial work involved in reducing a disparate mass of texts and discs to something like a manuscript. More recently David Wilde has again brought his valuable eye for detail to the last, but onerous stage of producing a final version suitable for publication. Mrs Hennessey has again demonstrated her willingness to work far beyond the call of duty. To all of these the Centre is indeed deeply indebted.

PAUL JACKSON

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J ROWAN-ROBINSON

## Introduction

In February 1998 the government issued a consultation paper on the freedom to roam in England and Wales.[1] The paper does not immediately opt for a redistribution of rights in favour of those seeking access. Rather it places the onus on those with the right - the owners and managers of the land - to demonstrate that the expectations of public access can be realised without legislative intervention.

The *Concordat on Access to Scotland's Hills and Mountains,* launched by the Access Forum in 1996, offers a possible model. The Forum is a voluntary body established on the initiative of Scottish Natural Heritage. It comprises representatives of all the main organisations involved in recreation on the hills. Included are those who own and manage land, recreational bodies such as the Ramblers Association (Scotland) and public bodies involved in facilitating access.

The Concordat does not alter the distribution of property rights in the Scottish countryside. As Mackay[2] observes, it is about responsibilities rather than rights. It sets out four key principles relating to access:

(i) an acknowledgement of a common interest in the natural beauty and special qualities of Scotland's hills and the need to work together for their protection and enhancement;

(ii) acceptance by land managers of the public's expectation of having access to the hills;

(iii) agreement that there should be freedom of access exercised with responsibility and subject to reasonable constraints for management and conservation purposes;

(iv) recognition by visitors of the needs of land management and understanding of how this sustains the livelihood, culture and community interests of those who live and work on the hills.

The Concordat aims to create a better climate of opinion with regard to access and to move the debate forward in a positive way.[3]

The purpose of this chapter is *not* to measure the success of the Concordat. I simply do not know whether it is altering attitudes. What I want to do is to highlight some of the problems with the law relating to access which provide the context for the Concordat. I also want to speculate about why the parties have arrived at a Concordat rather than polarising over the prospect of legislation. I will look at the position, first of all, from the point of view of the owners and managers of land and, secondly, from the perspective of those seeking access.

## The Owners and Managers of Land

Some landowners are genuinely interested in promoting public access to the countryside and will have little hesitation in subscribing to the objectives of the Concordat. The "not for profit owners",[4] such as the National Trust for Scotland, are an example. For others, the prospect of avoiding a compulsory redistribution of property rights through legislation is likely to have been an important motivating factor. In terms of property rights, the Concordat preserves the *status quo,* although it aims to introduce into land ownership something akin to a limited form of stewardship ethic. For others still, there will have been recognition that, by permitting freedom of access, landowners would be able to portray themselves as conceding something which, in practice, it is already very difficult to resist. This is because of shortcomings with the remedies available against trespass. These shortcomings are now examined.

It is sometimes suggested that there is no law of trespass in Scotland. This is probably because, unlike the position in England and Wales, trespass is not a wrong for which damages may be sought (in the absence of proof of damage). However, like England and Wales, the ownership of land in Scotland carries with it the right to exclusive use.[5] If a person enters land without right or permission, the owner may act to exclude that person. In other words, the landowner has control of the position in law. The problem is exercising that control in practice.

Control over trespassers may be exercised in practice through an application to the court for interdict or through self-help. These are considered in turn.

*Interdict*

Interdict is the Scottish equivalent of an injunction and, as in England and Wales, the award is discretionary. For example, in *Steuart v Stephen*[6] the Second Division declined to grant an application for interdict in respect of an alleged trespass. The defender appeared to be taking a short cut across the owner's land from time to time with the knowledge of, but without objection from, the tenant. To secure an interdict a petitioner will have to demonstrate reasonable anxiety that the trespass will be repeated. As Lord Gifford observed in *Hay's Trs v Young*,[7] "there must be reasonable grounds for fearing that the respondent in a petition such as this will do the act which he is to be interdicted from doing". Interdict is, therefore, essentially, a remedy against future acts of trespass and is suited to the case of persistent and known trespassers.

There is a further problem with what Reid refers to as "public trespass".[8] "There are", he says, "often formidable difficulties in identifying the persons concerned in order that they may be interdicted, and in any event an interdict against persons who trespassed on one occasion is no protection against different persons trespassing on another". He goes on to add that interdict will not be granted where the threatened trespass is considered too trivial to warrant the full weight of the law. Since, by definition, trespass is always temporary, an application for interdict may often be vulnerable to arguments of triviality. In other words, unless the petitioner can show that the trespasser is, in effect, asserting some right against ownership, the prospect of securing an interdict is not good. Interdict, therefore, has quite serious practical limitations as a remedy.

*Self-help*

Some seventy years ago, Gloag[9] commented that when people ask their legal adviser how far they may go with self-help, "the answer they get is qualified and cautious". That comment is as true today as it was then. The caution arises because by taking the law into their own hands, landowners may expose themselves to the risk of a civil action for damages by a trespasser for personal injury and/or a criminal prosecution for assault or worse.

There is no doubt that a landowner may take defensive measures to prevent or discourage trespass from happening. These could include putting up walls, fences and railings, installing lights and alarms, posting

warning notices and operating security patrols. Defensive measures of this sort should be apparent so that if a person, nonetheless, trespasses and is injured by, for example, being caught on barbed wire, the owner should be able to establish the defence of *volenti non fit injuria* to a civil action for damages.

However, some of these measures might still expose the owner to potential criminal liability for recklessly causing injury to another, for recklessly endangering a subject or for causing real injury. Although no such prosecutions have been brought in Scotland in the context of trespass, these crimes are so broadly based that it is, in theory, possible that an owner might be criminally liable if a trespasser is injured by, for example, broken glass cemented into a wall.

More active defensive measures, such as the construction of electrically charged fences or the placing of mantraps or spring guns intended to injure trespassers, would be likely to expose the landowner in the event of injury to an intruder to both civil[10] and criminal[11] liability.

The more difficult question with regard to self-help is how far a landowner may use force to evict a trespasser once it happens. The position at criminal law would seem to be that reasonable force may be employed to remove a trespasser provided there is no intention to assault that person and there is no culpable recklessness. In *HMA v Harris*[12] a bouncer at a night-club seized and pushed a young woman so that she fell down a flight of stairs and into a road where she was struck and injured by a car. The bouncer was charged with assault or, alternatively, with reckless injury. In the course of his judgment, Lord Morrison said:

> Persons such as policemen, bus conductors or ambulancemen and others [*eg*, gamekeepers and wardens] have from time to time to seize and push people, without any criminal intent, in the course of their employment. I do not think that a bouncer is in a different position. He may have to eject people from the premises for which he is responsible by manhandling them with reasonable force. No criminal intent can be imputed to that. Of course, even lawful handling of another may spill over readily into assault. However, if reasonable force is not exceeded, ejection may nonetheless be culpably reckless, I consider, if insisted upon in the face of danger to the person being ejected or to that person's actual severe injury.[13]

The position seems to be much the same with regard to civil liability[14] and is well summarised in the *Stair Memorial Encyclopaedia of the Laws of Scotland*:[15]

> A peaceful trespasser should first be invited to leave of his own accord and force should only be used as a last resort. In all cases where force is justifiable, the degree of force used must be properly matched to the circumstances of the trespass. Only the minimum force required by the circumstances may be employed and excessive force is actionable in delict.

The problem in practice is knowing what is reasonable in the circumstances. Even if that can be established, reasonable force can so easily escalate during the heat of a confrontation to the point at which a landowner may be exposed to criminal or civil liability.

There are, therefore, quite severe practical difficulties facing a landowner attempting to rely on a confrontational approach against trespassers. Interdict as a remedy has severe limitations and self-help is hedged around with uncertainties. There is also the further consideration that, with the large highland estates, effective control through interdict or self-help could only be exercised by employing an army of wardens to police the boundaries, an unrealistically expensive course of action. It may have been considerations such as these which have contributed to the decision by those representing the owners and managers of land to reject the "thou shalt not" approach in favour of the "let's work together" approach implicit in the Concordat.

**Those Seeking Access**

The motivation of those representing members of the public seeking access to the countryside to favour a "let's work together" approach is also fairly clear. To avoid being a trespasser, a person must show that they are on land either by right or by permission. There are difficulties in Scotland with both categories.

*Access By Right*

There are a number of circumstances in which a person may have a right in Scotland to be on land owned by another. For example, he or she may be a tenant in possession; a neighbour may have a servitude right to enter for specified purposes; a heritable creditor may enter land in exercise of powers under the security; or a group of people may negotiate a contractual right to enter land. The British Horse Society, for example, has

been successful in negotiating a right of access to certain land for its members.

The public, generally, may have a right to be on someone else's land. This right may arise by virtue of a statutory agreement such as an access agreement or a public path creation agreement entered into under the Countryside (Scotland) Act 1967, as amended. Research suggests that only limited use has been made of these provisions, mainly in connection with long distance footpaths and country parks.[16] The former Countryside Commission for Scotland expressed disappointment at the low level of use of these powers.[17] It seems that neither landowners, nor planning authorities, welcome the commitment resulting from a formal agreement or order. There is also a feeling amongst some planning officers that agreements operate to restrict and regulate rather than extend access for the public and they see no reason why authorities should pay for something which hitherto has been enjoyed by tradition.[18]

Access may also be obtained by the public as of right because of the existence of a public right of way. Such a route is generally created by continuous use by the public, as of right, of a more or less defined line, running from one public place to another, for the period of 20 years prescribed by section 3(3) of the Prescription and Limitation (Scotland) Act 1973. The evidence must be sufficient to exclude the idea of tolerance.

Uncertainty about the status of linear routes in Scotland has resulted in a steady erosion of the heritage of public rights of way. The uncertainty stems from the lack of any definitive map, from the difficulty in satisfying the criteria for establishing a public right of way (for example, a "public place" is a place where the public have a right to be - most people have no right to be on top of a munro), and from the fact that prescription operates to extinguish as well as create routes.[19] In Scotland, it is manifestly not correct to say "once a highway, always a highway". The result is that owners, developers and those undertaking public works have no easy way of establishing what routes stand in the way of their plans and little incentive to enquire too closely. The public and planning authorities, for their part, do not have the resources, or cannot collect evidence, to safeguard routes. It is thought that a substantial part of the heritage of public rights of way has been lost to the public because of afforestation, hydro-electric schemes, agricultural improvements, changing estate management practices, major road schemes and the electrification of railways.[20]