WHO GOES THERE ?

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Amongst Scots who like to escape the beaten track there is a well established and proudly held view that there is no law of trespass in Scotland. Unfortunately this view would find scant support in a court of law and an account of the true position may be useful.

In principle all land in Scotland is the private property of someone. The proprietor may be a "public" body such as a local authority or the National Trust for Scotland, but even then the land is that body's private property and any freedom of public access (other than public rights of way) derives not from any public quality in the body's ownership but from its constitution or policy. The principal right which a landowner has is the right to admit or exclude other persons to or from his land – the admission of others includes the granting of feus and leases as well as allowing casual access and the exclusion of others includes the erection of buildings as well as the erection of walls and fences and the use of guards and gamekeepers. The owner of a field or a farm or a mountain has as much right to exclude members of the public as does a householder and one who intrudes without permission is a trespasser in Scotland just as in England.

What gives rise to the belief that there is no law of trespass in Scotland is the weak position of the landowner in enforcing his right to exclusive possession. Trespass is a criminal offence only when associated with poaching or when the property is subject to specific legislation, as with railway property. Apart from these cases, the police will therefore not involve themselves with complaints of trespass unless there is some further element present such as assault or malicious damage which would be prosecuted as such and not as aggravated trespass. Although not a criminal offence, trespass is certainly a breach of the landowner's right of exclusive possession and as such is a civil wrong. One might therefore expect the landowner to have some civil remedy, but his position in practice is weak. He has in principle two remedies – interdict or damages – but he will succeed in an action of interdict only if he can prove that the same person is likely to repeat the trespass and will succeed in an action of damages only if he has suffered some provable damage and monetary loss; in any event civil action is possible only if the trespasser's identity is known and there is corroborated evidence of the trespass.

The foregoing concentrates on the landowner's viewpoint, but walkers will be more concerned about the position of someone who wants to walk on another's land. Excluding rights of way from present consideration, a walker has in terms of law absolutely no right to walk on another's land without permission and asking permission is not necessarily easy if it is a

mountain that one wants to walk on, as one may not know where to ask or may be miles from the appropriate house or office. Fortunately there has in Scotland traditionally been a good relationship between walkers and landowners and objection is rarely taken to a walker climbing without permission outwith seasons when it may interfere with the landowner's use of the hill for such pruposes as stalking or gathering in sheep.

If a landowner catches a walker on the point of entering his property, he is entitled to stop him or to allow him in subject to conditions about where he may go. If the walker does not take no for an answer, the landowner may use reasonable force to exclude him and this does not count as an assault. If the trespasser resorts to any degree of force in retaliation, or if he even only threatens violence, this amounts to a criminal and/or civil assault, the walker being able to plead self-defence only if the landowner has used more than reasonable force. If the trespasser manages to evade or by-pass the landowner and the latter gives chase, a greater degree of force to stop and turn the trespasser still counts as reasonable but discharging a firearm certainly does not.

If the walker is already onto a resentful landowner's property when he is caught, the landowner is entitled to ask the walker to leave by any reasonable route and if necessary to escort him there and to resort to reasonable force. If this occurs on the hill a question may arise as to whether the walker, willing to turn back and asked to descend in a direction adding significantly to his total journey, could hold out to descend in a direction that suited him better. There is no legal authority on this point, but in principle it would seem that if his preferred route off the hill were not significantly longer than the route requested by the landowner and would not aggravate the objection to the walker's presence on the hill, as by disturbing deer or sheep, the walker would be entitled to hold out for his preferred route. Further, any point on a right of way would count as "off the hill" and the walker could hold out to descend to a right of way.

Rights of way come in different shapes and forms. Motorways, A roads, B roads and unclassified minor roads are highways subject to some measure of statutory definition and control but freely open to walkers except in the case of motorways. At the other extreme are private rights of way, perhaps better thought of as rights of private access, normally leading from a public route across one person's private property to another's, for the use only of that other. The category of right of way that most concerns walkers is that of public right of way. By legal definition this must be a well-defined route used by the public and linking two public places. For this purpose another public right of way or highway can count as a public place, as can the foreshore, but there seems not yet to have been any court decision as to whether a mountain top or beauty spot can

be a public place – Ben Nevis, Ben Lomond, Ben Lawers and Lochnagar are arguably places of public resort.

The law as to the constitution of public rights of way was changed when the Prescription and Limitation (Scotland) Act 1973 came into effect on 25 July 1976 and there seems to be scope for argument as to some detailed aspects of the law as it now stands. A public right of way could and still can be created by express written grant by the landowner, but while many landowners will acquiesce in public access, few will take active steps to create a public route over their land. The normal way for public rights of way to come into being was and is through the operation of prescription. In general terms, if a route has been regularly used by the public, openly, peacably and without interruption, for the full prescriptive period (formerly 40 years, now 20) the existence of a right of way becomes exempt from challenge. Before 1973 interruption of a practical nature (the erection of a locked gate which the public acquiesced in or the advertised closure of a route one day a year) broke the running of the prescriptive period, and a landowner could defend a right of way claim on the ground that use had been by tolerance and not as of right. Now, however, it appears that use for the prescriptive period constitutes the right of way, whether the use is attributable to tolerance or to right, and that only "judicial interruption" (a claim in a court action or an arbitration) or a definite break in the continuity of public use break the running of the prescriptive period.

A public right of way can be a footpath and bridleway or a cart track. Which of these it is depends upon how it has been used by the public within the last 20 years. A cart track can be used as a bridleway or footpath and a bridleway as a footpath, but not vice versa. However a pedal cycle seems to be accepted as an extension of a pedestrian and to be legitimate transport on a footpath.

Users of a public right of way must do so in the manner least injurious to the interests of the landowner. They must keep to the established route, must close gates which they find closed, and must not damage crops, trees or anything else. They have no automatic right to camp at the trackside, although presumably they are entitled to take their weight off their feet and to slake their thirst at a burn. If they are challenged by a landowner they are not obliged to state their destination, although they should be prepared at least to confirm that they mean to keep to the right of way. Restrictions on voluntary access to the hills during the stalking season have no application to rights of way, even in their higher sections.

The landowner who has a right of way passing over his land is not entitled to cause an unreasonable interference with the right of way. A low locked gate might not be an undue interference to an energetic walker but should not be acquiesced in lest it should be the beginning of an attempt to close the route (a public right of way is lost by 20 years non-use).

Damage by a walker to crops or trees planted along the line of a right of way so as to obstruct it would not be a wrong, and activities such as ploughing for tree-planting could be interdicted by court action by any member of the public. It is irksome for walkers to find a pleasant track converted to a hard stony bulldozed road, but as long as passage is not adversely affected the public have no legal ground of objection.

It is not always easy for a member of the public to ascertain if any particular route is a right of way. Until recently there was no system whatever of registration of public rights of way and no-one could say authoritatively that any route was a right of way unless it had been the subject of a court action (for example Glen Tilt and Glen Doll) or was publicly referred to as a right of way without demur from the landowner (for example various of the Mounth tracks). One might enquire of local residents, but commonly the nearest resident might be the keeper or factor who would be reluctant to admit that a route was public. The Scottish Rights of Way Society has for a long time kept records of known rights of way and fought litigations to protect them, but they would be the first to point out that there may be rights of way which for lack of definite proof or otherwise have never been reported to them or listed by them. The Countryside (Scotland) Act 1967 introduced the idea of listing of rights of way by local authorities, but not all local authorities have responded enthusiastically. Certainly it can never be argued by a landowner that a route cannot be a right of way because the local authority have not listed it.

To some extent this article touches on matters which most walkers would not wish to put to the test in a situation of conflict with a landowner and which even landowners would consider too inconsequential to go to law over. To this extent it contains some degree of conjecture as to what the law is. However, anything said above by way of conjecture is based on extrapolation from established principles and the filling in with reasoned conjecture of gaps between the certain areas of the law should, it is hoped, facilitate understanding of the basic principles which are so often misunderstood or misrepresented. The writer's last Journal article (Glissando! 1977) ended with an editorial disclaimer of the consequences of practising what was described. Perhaps this one should do likewise.