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Public access to land in Scots law: two cases on the continuing place for public rights of way

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*Where to the mountains, there to him were friends;
Where rolled the ocean, thereon was his home;
Where a blue sky, and glowing clime, extends;
He had the passion and the power to roam.¹*

Lord Byron, in *Childe Harold's Pilgrimage*, at canto 3, stanza 13.

Access to land stirs the soul, stirs emotions, and can stir conflict. Two recent cases, *B v C*² and *Kolhe v Robertson*,³ demonstrate the conflicts that can arise.

To a greater or lesser extent, both these cases related to claims that public rights of way existed. Rights of way afford access by suitable means to members of the public along a course between two public termini. They have a long pedigree in Scots law, although in recent years they have been somewhat subordinated by the statutory right of responsible access that allows passage and access for recreational, educational and even some commercial activities across much of Scotland's land and inland waters. These cases ably demonstrate the continued importance of public rights of way notwithstanding the power to roam conferred by the Land Reform (Scotland) Act 2003, and also demonstrate just how hard-fought issues of access can be.

How not to establish a right of way: *facts are chiels that winna ding*⁴

This first case is best explained with an initial consideration of Scotland's modern access rights, before analysis turns to the much more traditional issue of a public right of way, which is what the case turned on. In addition to serving as an example of what is (not) sufficient to establish a public right of way, *B v C* is also an illustration of the "principle" that every case turns on its own facts.

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¹ Lord Byron, *Childe Harold's Pilgrimage* (1816), canto 3, stanza 13.

² [2018] SC FORF 27, 2018 G.W.D. 16-213, <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018scforf27.pdf> [Accessed 17 February 2019].

³ [2018] SC ABE 43, 2018 G.W.D. 25-324, <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018scabe43.pdf> [Accessed 17 February 2019].

⁴ Robert Burns, *A Dream* (1786).

In the anonymised judgment, Sheriff Murray explains that the case relates to a path that ran north and south through a wood which the pursuers claimed was a right of way. In 2011, it was designated as a “core path” within the meaning of the Land Reform (Scotland) Act 2003. This designation meant that anyone wishing to take responsible access (in terms of Part 1 of that legislation) along the route could be relatively confident they could do so without being faced with a challenge on the basis the land was somehow excluded from the right to roam.⁵ All local authorities and, where relevant, national park authorities had a duty to implement then publicise core path plans shortly after the 2003 Act came into force,⁶ and they retain a continuing role relating to the review and, if necessary, amendment of the relevant core paths plan. In 2016, the core path at issue in this case was realigned by the local authority at the request of the defenders,⁷ in accordance with the scheme of the 2003 Act.⁸

The action was a summary application for declarator that the path in its original form was a right of way. (Some core paths were already recognised as existing rights of way when they were given the extra status of core path, but by no means all of them were. This case would not have been necessary if this path had been such a pre-existing right of way.) From the judgment, it is not entirely clear what exactly prompted this action notwithstanding the existence of the right of responsible access which might have allowed suitable passage for the pursuers anyway: for example, there is no indication that the right of way that was sought was vehicular, a type of access that the right to roam would not provide. Of course, the right of responsible access is in a sense more transient than a right of way, as a landowner is better able to change use of land when there is no right of way (and such a change of use could exclude the land in terms of section 6 of the 2003 Act), meaning the action sought something that was not entirely illogical.⁹ One other point about the right of responsible access should also be made, which is that the statutory right now

⁵ Section 1 of the 2003 Act confers the right of responsible access on everyone and applies it across Scotland, but section 1(7) and section 6 operate to exclude certain land from its scope. The various exclusions in section 6 relate to the characteristics of the land, with examples including buildings, domestic gardens pertaining to a dwelling, and ground where crops are growing. See generally Malcolm M. Combe, *The ScotWays Guide to the Law of Access to Land in Scotland* (Edinburgh: John Donald, 2018) chapter 2 and particularly pages 79-81 (on core paths). Responsible access to core paths can only be restricted in limited and not open-ended circumstances (specifically where there is an animal health outbreak or where there has been a temporary suspension of access by a local authority or national park authority for a specific purpose): section 7(1) of the 2003 Act, discussed in Combe at pages 45, 46 and 48.

⁶ Core paths were introduced by sections 17 and 18 of the 2003 Act, which obligated local authorities or, where relevant, national park authorities to provide a network of paths in their respective areas to facilitate access.

⁷ *B v C*, paragraph 62 bullet o. and paragraph 63 make clear the request was by the defenders, but at paragraph 6 it is suggested the request came from the pursuers (which would make less sense, as in this case the pursuers were arguing for continued access albeit in a different legal form). With due deference to the anonymised nature of the judgment, it can be noted that there is a public record of the amendment of a number of core paths in the Angus Council area, available here: <https://www.angus.gov.uk/sites/angus-cms/files/2017-07/289.pdf> [Accessed August 7, 2018].

⁸ The mechanism for reviewing and amending core paths plans was recently refined by the Land Reform (Scotland) Act 2016. It is now found in sections 20-20D of the 2003 Act. Any change in this case would have been made under section 20(2) of the 2003 Act as first enacted.

⁹ Logical in its own terms or not, it can be noted neighbourly relations seemed less than cordial and this litigation may have been part of a wider dynamic. Some of the history is set out in paragraph 63.

makes it more difficult to establish a public right of way. This is because section 5(5) of the 2003 Act provides that the exercise of access rights does not of itself amount to possession for the purposes of positively prescribing a right of way.¹⁰ This will, in many circumstances, rule out access taken by foot or on a bicycle or horseback from any prescriptive calculation. This section was not referred to in *B v C*, or indeed *Kolhe v Robertson* (discussed below), but it may play more of a role in future cases.

For the pursuers to succeed, the court noted the various elements to be established, including public termini, a continuous journey from end to end, a definite route, a right to continuous use, and use for the prescriptive period.¹¹ The parties agreed that there were public places at each end and that the path was continuous. The issue was whether it had been used by members of the public for the prescriptive period of 20 years openly, peaceably and without judicial interruption.¹² To that end, the pursuers averred that the path was generally open and suitable for walking and horseback riding and that both they and their employees had used it for those purposes for over 20 years. It was, they said, well-defined and that members of the public had used it for recreation on foot and on horseback.¹³ Such public usage would have been important because “private” use cannot itself establish a public right of way.¹⁴

The defenders’ averments were that the woods had been used for forestry until late 1996 or early 1997 and that, prior to the felling of some trees, the path was not reasonably accessible, and, in any event, it would have been blocked in 2000 by trees which had been planted to replace those which had been felled. It would also have been closed for several weeks in 2008 during the excavation and infilling of a nearby quarry. Until its creation as a core path, there was no prescriptive use and any use made of it was with the agreement of, or tolerance by, the proprietor of the woods.

Various people gave evidence, and some affidavit evidence and plans were also available. In his careful Note, the sheriff detailed what had been agreed and what was in dispute and, having done so, preferred the evidence by and on behalf of the defenders. He did not form a favourable impression of the First pursuer who tended to speak at length and thus made it difficult to determine the point which he was trying to make. He also came over as obsessed.¹⁵ It did not

¹⁰ See Combe, *The ScotWays Guide to the Law of Access to Land in Scotland*, page 23.

¹¹ Paragraph 44, with reference to the case of *Rhins District Committee of Wigtownshire County Council v Cuninghame* (1917) 2 SLT 169. And see Combe, *The ScotWays Guide to the Law of Access to Land in Scotland*, pages 100-112.

¹² Prescription and Limitation (Scotland) Act 1973, s.3(3).

¹³ Paragraph 12.

¹⁴ Paragraphs 45-47, with reference to Douglas J. Cusine and Roderick R. M. Paisley, *Servitudes and Rights of Way* (Edinburgh: W. Green, 1998) paras 20.24-20.25, *Scotland v Wallace* 1964 SLT (Sh Ct) 9 and *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Limited* 1992 SC 357 (affirmed 1993 SC (H.L.) 44).

¹⁵ *B v C*, paragraph 67. Conversely, one of the defenders’ witnesses – the second defender’s father – impressed the court by not using the witness box to damn the pursuers, despite there being a long-running dispute between them: paragraph 70.

assist the pursuers' case that the first pursuer was adamant that the path could be seen in an aerial photograph, which it could not.

Meanwhile, the other evidence for the pursuers did not establish "continuous" use over a 20 year period by "the public." And therein lies the rub: as they did not lead any acceptable evidence of use by anyone other than themselves, their visitors and employees (who are not "the public"), there was not even a need for the defenders to rebut the pursuers' case.

While the case did turn on its own facts, one point can be offered about the proceedings in court. It is clear that the first pursuer, in particular, "shot himself in the foot" when giving evidence. In Scotland, we do not coach witnesses, except to the extent of suggesting that witnesses answer questions briefly and as clearly as possible and refrain from "telling it all," making it clear that if the questioner wants more, subsequent questions will perhaps provide that opportunity.

As regards lessons that can be learned, the sheriff's comments about the first pursuer's evidence should be borne in mind by others giving evidence. It is, however, all very well to hand out advice to witnesses but it may not be heeded in the witness box, especially under cross-examination.

That aside about court proceedings apart, the case mainly serves as a useful reminder of the bare minimum that is needed to establish a public right of way. This point then serves as a useful introduction to a second, contrasting recent case, where several pedestrian rights of way and one vehicular right of way were recognised as having been created by positive prescription.

*Oh! I do like to be beside the seaside:*¹⁶ establishing access to privately-owned littoral property

The case of *Kolhe v Robertson* attracted a degree of media attention,¹⁷ perhaps because it appeared to pitch a large landowner against the relative minnows of a group of individuals who took regular access to (and were storing fishing boats and related equipment on) his land. The setting for the dispute was the picturesque village of Cove south of Aberdeen. The pursuer lived in a house overlooking Cove Bay. The coastal land visible from there was the site of the dispute. Apparently, access had been taken to, fishing activities had been launched from, and storage of items (including small fishing boats) had taken place on the overall site for some time, dating back to a time before any land came into the ownership of the pursuer. The area of land at the harbour owned by the pursuer consisted of ground immediately adjacent to a beach, a pier which projected from that beach, a private road extending from the pier to a public road, and part of a rock

¹⁶ John A. Glover-Kind, *I Do Like to be Beside the Seaside* (1907).

¹⁷ BBC News: "Fishermen told to move boats from Cove Bay after legal dispute" (July 12, 2018) <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-44807189> [Accessed August 7, 2018].

formation adjoining the pier and private road (referred to in the Note as “the forelands”). One of the defenders in the case made a living from creel fishing activities, whereas other defenders fished more sporadically. The pursuer decided to take steps to have these boats and related items removed from his land and prevent certain access in the future. As we shall see, Sheriff Miller sided with the pursuer in relation to his first quest but not completely in relation to the second.

In 2014, a sign was put up, which stated, “COVE BAY HARBOUR Private Property”. In April 2014, (mirror) letters were sent by the pursuer’s solicitor to some of the defenders asking, *inter alia*, for their respective boats to be removed. In 2015, boulders were put in place on the private road along with a mound of stones, the effect of which was to prevent vehicular access. All of this crescendoed with action being warranted for service in late 2015. The pursuer sought to prevent the defenders from using the private road for vehicular passage and for parking, and also sought the removal of the boats and equipment on his land. The defenders counterclaimed, contending that a right of way for vehicles and pedestrians existed.

This note will eschew any commentary on the background to the dispute and the issue of personal bar (that is to say, whether the defenders could rely on the pursuer’s apparent tolerance of the apparatus up until this point).¹⁸ Instead, it will focus on the issues relating to the establishment of several rights of way. However we make a tangential observation, which relates to the recently-repealed White Herring Fisheries Act 1771. This legislation could have perhaps offered a legal basis for use of the land for purposes connected with fishing without any payment to the landowner, although owing to the restricted nature of this statutory right there might have been arguments about where this right could apply (as it only applied to waste or uncultivated ground up to 100 yards inland) and also about whether the fishing activities in question (which mainly related to crab, lobster and other shell fish) qualified for this entitlement.¹⁹ As it happens though, this legislation was repealed by the Marine and Coastal Access Act 2009. Part 9 of that statute relates to coastal access in England and Wales, but the rest – as its name suggests – relates to marine matters, including fisheries. The impact of this largely English and Welsh legislation in relation to a Scottish dispute might seem surprising,²⁰ but it certainly removed one potential argument for the defenders. Some other points relating to fisheries matters were also raised, but unsuccessfully.²¹

The sheriff’s judgment begins with 88 findings-in-fact, confirming uncontroversial matters such as the pursuer’s ownership of land at the harbour (including the pier and the private road), and that boats had, since time immemorial, been berthed on the pursuer’s land with related equipment,

¹⁸ Paragraphs 113-130.

¹⁹ See William M. Gordon and Scott Wortley, *Scottish Land Law*, 3rd edition, volume 1 (Edinburgh: W. Green, 2009) paragraphs 8-08 – 8-09.

²⁰ Although note that sea fishing is reserved to the UK Parliament under the Scotland Act 1998 Sch. 5, Part II, Head C6.

²¹ See paragraph 163, and the related discussion on the (pre-Union) Fisheries Act 1705.

such as motorised winches, also positioned there. He found that members of the public had indeed fished from the pier for time immemorial. No objection was taken to these activities by the pursuer's predecessors in title, but, equally, no permission for these activities was sought or given. Importantly, the sheriff found that any storage had in fact taken place on land that was not technically the foreshore – namely, the area between the high and low spring tide marks that is submerged from time to time.²² This had implications for the establishment of one vehicular right of way (discussed below). Meanwhile, whilst it is not within the scope of this short note, the finding that the storage of boats and equipment had taken place for such a long time did not amount to a proprietary right to continue to do so.²³

Having heard from a large number of witnesses, the sheriff held that public rights of way for pedestrians existed between the public road and: a) the pier; b) the forelands; and c) the beach. (The latter was agreed by the parties in a rare meeting of minds.)²⁴ The aforementioned test and the required prescriptive usage (in terms of section 3(3) of the Prescription and Limitation (Scotland) Act 1973) had been met for all three routes. Perhaps the most comment-worthy aspect of these findings is that the forelands were accepted as a public place: whilst the case of *Duncan v Lees*²⁵ was cited uncritically and can be taken as authority for the proposition that a curious natural object such as a large rock is not a public place,²⁶ in *Kolhe v Robertson* the sheriff still held this rocky tidal area, which was occasionally submerged and inaccessible to pedestrians at high tide, was a public place, being an area that members of the public have had significant resort to.²⁷

Meanwhile, the sheriff also recognised a vehicular right of way to the pier, but did not recognise a similar vehicular right of way to the beach where the boats were being stored. As noted above, the boats were actually stored slightly away from the foreshore, and so the evidence of vehicles attending them on the pursuer's land above the foreshore did not assist to establish a vehicular public right of way to the foreshore.²⁸ Regarding the vehicular right of way to the pier that was established, this came with a corresponding right to park vehicles on the pier (for purposes related

²² Lord Eassie and Hector L. MacQueen (eds), *Gloag and Henderson: The Law of Scotland* 14th edition, (Edinburgh: W. Green, 2017) paragraph 34.06. See paragraph 145 of the Note. Whilst the sheriff was tracking the wording of the Record, the agreed usage of “foreshore” for the beach and the occasional technical usage of foreshore sometimes causes confusion. Another trap in the judgment for a reader is that coincidence serves up a couple of namesakes. One Robert Sutherland acted as counsel for the pursuer and another Robert Sutherland gave evidence. The case also featured two Mrs Moirs.

²³ This finding in fact and the pursuer's (successful) attempt to curtail it no doubt adds to the press-worthiness of the case, but the long-term storage did not lead to any customary right: cf Gordon and Wortley, *Scottish Land Law*, paragraph 7-49.

²⁴ Paragraph 10.

²⁵ (1871) 9 M 855.

²⁶ George L. Gretton and Andrew J. M. Steven, *Property, Trusts and Succession* 3rd edition (Haywards Heath: Bloomsbury, 2017) at paragraph 19.16.

²⁷ Paragraph 137.

²⁸ Paragraph 149.

to the exercise of that right of way, at a terminus of the right of way),²⁹ but any such right to park did not exist between the public road and the beach. This meant that any boulders on the fringes of the right of way could remain,³⁰ but any boulders restricting access to the pier had to be removed.

Whilst this case might not be viewed as developing the law, there are several points of interest about vehicular access. The first is that right of way cases involving vehicles will continue notwithstanding section 5(5) of the Land Reform (Scotland) Act 2003. That section notes access that is ascribable to the right of responsible access cannot count towards the positive prescription of a public right of way, but vehicular access (subject to a narrow exception in relation to mobility enhancing vehicles) is not possible under that regime. As such, vehicular access will normally count towards the prescriptive equation in a manner other access might not, which elevates vehicular access to another level of importance for the constitution of new rights of way.

A second point is that recognition of an entitlement to park at a terminus is important. In relation to *this* terminus, the pier is just about wide enough for two cars to pass each other and as such passage should not generally be affected by a reasonable number of parked cars, but in other situations anything that interfered with passage overall would be problematic.³¹

A final observation relates to what has happened on the ground since the ruling. With these public rights of way, the pursuer must respect properly taken access by members of the public, including the fishermen. Regarding the boats and equipment, apparently the remaining boats on the beach were initially squeezed onto a parcel of land not owned by the pursuer at the westmost section of the beach.³² As such, whilst the pursuer successfully deployed property law in relation to storage of items on his land, the goings-on on neighbouring land are beyond his control. Subject, that is, to any controls from the law of nuisance, but that is for another article entirely.³³ More recently, a fire broke out at the site where the boats and gear had been gathered. (One can only speculate as to whether the newfound proximity of the boats aided the spread of the fire.) The various defenders then received a bill for the legal expenses of the pursuer. If this is the end of the line for the

²⁹ Paragraph 156.

³⁰ A point that had been conceded by the defenders' agent, under reference to *Elrick & Co v Lovie* A 32/84, Banff Sheriff Court, in Roderick R. M. Paisley and Douglas J. Cusine, *Unreported Property Cases from the Sheriff Courts* (Edinburgh: W. Green, 2000) page 338.

³¹ Consider *Sutherland v Thomson* (1876) 3 R 485. See also the *Scottish Outdoor Access Code* prepared by Scottish Natural Heritage in relation to the Land Reform (Scotland) Act 2003. Whilst it at no point asserts that there is a right to motorised access under that legislation, it implores that vehicles are parked in a way that does not obstructs access (at paragraphs 3.38 and 3.58): <https://www.outdooraccess-scotland.scot> [Accessed August 10, 2018].

³² Kieran Beattie "'Final generation' of Cove fishermen to cast off after court orders them to move their boats" *Press and Journal* August 9, 2018 <https://www.pressandjournal.co.uk/fp/news/aberdeen/1537338/final-generation-of-cove-fishermen-to-cast-off-after-court-orders-them-to-move-their-boats/> [Accessed August 10, 2018].

³³ Consider Douglas J. Cusine, "Coming to the Nuisance" in Andrew J. M. Steven, Ross G. Anderson and John MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L. Gretton* (Edinburgh: Avizandum, 2017) 54.

fishermen involved in the case, it seems fair to surmise that they will not be happy with the net result.

Conclusion

Public rights of way remain important in the modern era. These cases highlight where they can and cannot come into play, with the case of *Kolhe v Robertson* demonstrating their continuing role in ensuring public access to places that the public have resort to. These cases also highlight that public rights of way can only go so far (in a figurative sense), and whether arguments about their existence are a good proxy for any essentially private disputes might be debated.