

A NOTE ON TRADITIONAL FREEDOMS OF ACCESS

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The Countryside and Rights of Way Act 2000 constitutes a quite remarkable advance in the drive towards greater rights of recreational access to open country in England and Wales. In spite of its shortcomings, this legislation places such access on a secure statutory footing in a way which few would have believed possible even a decade or so ago. For the first time in our history, every citizen will have an *entitlement* to enter and remain on any statutorily defined 'access land' for the purpose of 'open-air recreation'. Those involved with the promotion and passage of the Countryside and Rights of Way Bill deserve the unqualified gratitude and admiration of the community of climbers and walkers who, in years to come, will take advantage of its provisions.

1. The large residue of recreational user outside the Countryside and Rights of Way Act 2000

Politics is widely acknowledged to be the 'art of the possible'. The passage of the Countryside and Rights of Way Bill was made possible only by means of many parliamentary compromises and trade-offs. The Act of 2000 is inevitably limited in its scope and many areas of recreational terrain and many popular forms of recreational activity remain *outside* the new statutory entitlement. It may well be that some of the recreational user (or activity) not covered by the CROW Act 2000 is the subject of other statute-based entitlements which have grown up piecemeal over the years (eg public rights of way and certain rights over metropolitan and other commons confirmed by Law of Property Act 1925, s 193). But, for the most part, the legal status of the recreational access which lies outwith the CROW Act 2000 is left to rest, not upon any legislative basis, but upon the traditional common law rules concerning trespass and licensed access to land. It is plain that the CROW Act 2000 is not intended to diminish or abrogate any freedoms of access which pre-existed the Act. It is important, therefore, to be clear about the conventional common law which regulates those kinds of recreational access to open country in England and Wales that remain outside the ambit of the Act.

2. Traditional or customary common law rights of access

The conventionally understood position is, in one sense, fairly easy to explain: it is almost uniformly restrictive and prohibitory.

(1) *No general common law right to roam*

It is a sad fact that, historically, English law has conferred on members of the public only extremely limited rights of recreational user in respect of open country, even though in practice substantial access has tended to be enjoyed *de facto* in a rather ill-defined way.¹ Prior to the enactment of the CROW Act 2000, English common law – however incongruously – treated areas of mountain, hill, crag and moorland on a broadly equivalent basis to any other category of privately owned land. In the result there has been no general

¹ Little account need be taken here of local customary rights of access (which are, in any event, fairly rare and of generally ancient origin). Nor is much assistance to be derived from the extremely remote possibility that public rights of recreational access may, in the most unusual of cases, be presumed on the basis of long use to have been the subject of some valid written grant by the landowner, rather than resting merely on acts of mere sufferance or licence by the landowner (see eg the Doncaster Common case, *R v Doncaster MBC, ex parte Braim* (1989) 57 P & CR 1).

common law right of access to the hills or to ramble over open or uncultivated countryside.² Here the law of access has been dominated by essentially the same concepts of trespass and licensed access which apply in the very different context of, say, the average family home and its curtilage.

(2) *No ius spatiandi (or right to wander at large)*

One reason underlying this resistance to generalised entitlements at common law is highly conceptual in origin and character – but is no less significant for being so. English law has traditionally refused, in all but the most unusual contexts, to accept that members of the public can ever acquire a *ius spatiandi* (or right to wander at large) over land in the proprietorship of another person.³ Such an entitlement is simply not a species of right known to the common law⁴ and cannot therefore be acquired by either grant or prescription (ie long user).⁵ The rationale for this position is the strong belief that such an unqualified and wide-ranging form of entitlement is exactly the sort of right which the *landowner* enjoys over his *own* land – indeed it is the *unrestricted* nature of the owner's right to go precisely where he pleases on his own land which symbolises the essence of ownership.

It was for just these reasons that, in one of the classic early 20th century cases on open air access, the court vigorously denied the existence of any public right to visit and wander around the megalithic monument at Stonehenge.⁶ Indeed the court in this case castigated the claim of general public access as 'simply extravagant' and as an attempt 'to dispossess the [landowner] of his property' for which no 'serious argument' could be adduced.⁷ Other common law jurisdictions have likewise reinforced the legal impossibility of a *ius spatiandi* over open land.⁸ All of this underscores yet again why the CROW Act 2000 was both revolutionary and also quite essential. The Act gives legislative force to a previously impossible idea – a generalised right of self-determining pedestrian access to land – in effect, a statutory *ius spatiandi*.

² See *Earl of Coventry v Willes* (1863) 9 LT 384 at 385; *Hammerton v Honey* (1876) 24 WR 603 at 604. There is, similarly, no public right to walk upon the foreshore or to have access to the seashore for the purpose of swimming (see *Brinckman v Matley* [1904] 2 Ch 313 at 324; *Alfred F. Beckett Ltd v Lyons* [1967] Ch 449 at 482E-F). Such rights may be enjoyed only by way of licence. The fact that members of the public have a right to swim or bathe in the sea implies no right to cross the foreshore in order to exercise that right (*Adair v National Trust for Places of Historic Interest or Natural Beauty* [1998] NI 33 at 41j per Girvan J).

³ This common law distaste for *iura spatiandi* has been set aside in only one modern case, where the Court of Appeal upheld as an easement the right of a small group of *private* homeowners to share the benefits of a communal garden adjacent to their homes. Even here, however, the Court was adamant that 'no right can be granted (otherwise than by Statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription' (*Re Ellenborough Park* [1956] Ch 131 at 184 per Evershed MR).

⁴ See *Skrenty v Harrogate BC* (Chancery Division, 26 October 1999).

⁵ See *Attorney-General v Antrobus* [1905] 2 Ch 188 at 198-199 per Farwell J. Nor does even a prolonged user of open or scenic country for recreational purposes support any inference that the landowner has impliedly dedicated an access way as a public right of way (see *Antrobus* at 205-208), a proposition widely accepted not merely in England (see *Behrens v Richards* [1905] 2 Ch 614 at 619-620), but also in Scotland (see *Duncan v Lees* (1870) 9 M 274 at 276) and in Ireland (see *Abercromby v Fermoy Town Commissioners* [1900] 1 IR 302 at 314).

⁶ *Attorney-General v Antrobus* [1905] 2 Ch 188 at 208 per Farwell J (proceedings brought by a group of individuals concerned to conserve open spaces and prehistoric relics).

⁷ The force of the *Antrobus* ruling on *iura spatiandi* has not been diminished by the passage of time approach. See *Skrenty v Harrogate BC* (Chancery Division, 26 October 1999) ('it might be more than a little presumptuous for me not to follow *Antrobus*').

⁸ See eg *Smeltzer v Fingal CC* [1998] 1 IR 279 at 286 (Irish High Court); *Murphy v Wicklow CC* (Irish High Court, 19 March 1999).

(3) **No relevant general freedom to do whatever one likes**

It is sometimes suggested that a general common law 'right to roam' has always existed in England and Wales under the broad banner of some fundamental, quasi-constitutional principle of liberty. It is certainly true that, from time to time, judges have emphasised that the 'starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law, including the law of contract, or by statute.'⁹ Everybody 'is free to do anything in this country, subject only to the provisions of the law.'¹⁰ There are, however, severe limits to this high-sounding rhetoric (which rhetoric has emerged, in any case, largely in the context of the citizen's freedom of expression). These general statements of fundamental liberty may actually do little more than confirm that 'England is not a country where everything is forbidden except what is expressly permitted.'¹¹ The more important reservation is, however, that all such expansive presumptions of the citizen's general freedom are crucially bounded by the reference to the curtailing influence of common law and statute. True it is that the citizen may do what he/she likes, go where he/she likes, say what he/she likes – but only in so far as common law or statute is not successfully invoked in order to cut back this freedom. A generalised concept of liberty could never, for instance, be claimed as a valid basis of some right to trespass upon another citizen's land.

3. **Trespass and licence**

The true starting point of the law of recreational access in England and Wales is the age-old concept of trespass. 'By the laws of England', declared Lord Chief Justice Camden in *Entick v Carrington* (1765),¹² 'every invasion of land, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence.'¹³ This fundamental proposition still governs the common law relating to the access to recreational space desired by the climber or walker. Unauthorised entry upon another's land still constitutes the quaintly medieval civil wrong of trespass – or, as the cause of action used to be more graphically described, 'trespass *quare clausum fregit*' (ie the complaint that the wrongdoer has 'broken' or 'breached' the 'close' belonging to the victim of the trespass). The idea was, and still is, that the landowner may claim that his land comprises an area which is sacrosanct, inviolable and immune from unconsented access (with the corollary that any unconsented entry represents, in some primitive sense, a sort of proprietary rape). It is of course debatable whether, in the crowded conditions of a modern urban society, this absolutist concept of ownership remains wholly viable. But it is undeniable that the common law rules about access are deeply rooted in this kind of thinking.

(1) **Relationship between trespass and licence**

Trespass can be avoided by the entrant upon another's land if he enters and remains on that land by the permission or 'licence' of the person in possession of the land. The utterly basic dynamic of the common law relating to access is that the grant of a *licence* negatives what would otherwise be a *trespass*; and that the commission of trespass can be averted only by the express or implied conferment of a 'licence' or permission to be present on land (or by some common law rule or statute authorising entry).

⁹ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 178E-F per Sir John Donaldson MR.

¹⁰ *DPP v Jones* [1999] 2 AC 240 at 278D-E per Lord Hope of Craighead, quoting *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283F per Lord Goff of Chieveley. See also *Derbyshire CC v Times Newspapers Ltd* [1992] QB 770 at 811B per Balcombe LJ.

¹¹ *Malone v Metropolitan Police Comr* [1979] Ch 344 at 366E per Megarry V-C.

¹² (1765) 19 Howell's State Trials 1029 at 1066. 'Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave' (2 Wils KB 275 at 291, 95 ER 807 at 817).

¹³ For widespread acceptance of this proposition throughout the common law jurisdictions of the world, see *Morris v Beardmore* [1981] AC 446 at 464C-D per Lord Scarman; *Cadman v The Queen* (1989) 51 DLR (4th) 52 at 56-57; *Newbury DC v Russell* (1997) 95 LGR 705 at 715.

(2) **Negative function of the licence**

It is vital to understand that the legal effect of a licence to be present on someone else's land is purely negative: it does not confer any 'rights' on the entrant, but merely prevents the entrant from being relegated to the status of a trespasser.¹⁴ The 'licensee' is saved from being a trespasser simply by virtue of his/her licence. The licence (or permission) suspends trespass liability by converting what would otherwise be an *unlawful* entry into a *lawful* presence on the land.¹⁵ Moreover, this suspension of trespass liability lasts only so long as the licence is not withdrawn and only in so far as the licensee remains within the four corners of the licence granted.¹⁶

(a) **A licence confers no 'rights', merely an immunity from the allegation of trespass**

It is sometimes supposed that, because a licence transforms an 'unlawful' presence into a 'lawful' presence on land, it therefore connotes a presence which is 'rightful', ie supported by some *legal entitlement* to be on the land. Nothing could be further from the truth. To be sure, the presence of the licensee is 'lawful' (ie not trespassory) – he/she is a 'lawful visitor' – but the licensee has no *right* to remain on the land. The point was never better made than in the Exchequer Court in *Bolch v Smith* (1862),¹⁷ where Baron Martin stated:

'Permission involves leave and licence, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a licence, not of a right. It is an abuse of language to call it a right: it is an excuse or licence, so that the party cannot be treated as a trespasser.'¹⁸

So clearly was this understood by the great judges of the common law that they frequently attributed the 'liberality' of the access permitted by landowners to recreational visitors to the very fact that the landowners knew well that a *licence* of reasonable access to their land could never mature into, or be confused with, an *entitlement* of access.¹⁹ (And the courts were consistently anxious not to construct entitlements of access from 'acts of kindly courtesy' lest this should 'drive landowners to close their gates in order to preserve their property'.²⁰)

¹⁴ If the entrant 'is there by excuse or licence, he cannot be treated as a trespasser. The owner of the land has, by his acquiescence, abrogated his right to say to such a person that he has no business there, that he is a trespasser' (*Lowery v Walker* [1910] 1 KB 173 at 189 per Buckley LJ).

¹⁵ In the time-honoured words of Vaughan CJ in *Thomas v Sorrell* (1673) Vaugh 330 at 351, 124 ER 1098 at 1109, a licence 'properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful.' See similarly *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 188 per Viscount Simon, 193 per Lord Porter.

¹⁶ If the licensee strays beyond the geographical or temporal scope of the permission given to him, his status becomes automatically that of a trespasser (see *Hillen and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65 at 69 per Lord Atkin; *O'Keeffe v Irish Motor Inns Ltd* [1978] IR 85 at 94, 100). In the famous phrase of Scrutton LJ in *The Carlgarth* [1927] P 93 at 110, '[w]hen you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters'. See also *Wandsworth LBC v A* [2000] 1 WLR 1246 at 1251G per Buxton LJ.

¹⁷ (1862) 7 H & N 736 at 745-746, 158 ER 666 at 669-670.

¹⁸ See similarly *Lowery v Walker* [1910] 1 KB 173 at 189 per Buckley LJ.

¹⁹ See eg *Attorney-General v Antrobus* [1905] 2 Ch 188 at 199-200, 205-206 per Farwell J; *Behrens v Richards* [1905] 2 Ch 614 at 619-620 per Buckley J.

²⁰ *Attorney-General v Antrobus* [1905] 2 Ch 188 at 199 per Farwell J. See also *Blount v Layard* [1891] 2 Ch 681n at 691 per Bowen LJ ('Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many persons besides the owners, under the fear that their good nature may be misunderstood').

(b) Illegitimate conceptual shifts

To glide from the idea of licensed entry on land as 'lawful' towards some notion that a licensee's presence on land is 'according to law' and therefore by way of 'right' is to make a series of transitions which are utterly untenable at law. A first year law student would immediately spot the illegitimacy of these conceptual shifts. When pressed with precisely this kind of reasoning in *Bolch v Smith*,²¹ Baron Martin declared forthrightly, with the agreement of his brother judges,²² that this transmutation of ideas comprised 'a fallacious argument.' Exactly the same view would be taken today. The licensee has, in Hohfeldian terms, an 'immunity' from trespass liability whilst enjoying his/her licence, but certainly has no 'claim' (ie legal entitlement) to be present on the land.²³ The same point could just as easily be confirmed by reference to the recently enacted CROW Act 2000. Why, it might be asked, was the CROW Act necessary if existing licences to traverse open country already conferred a legal 'right' to do so?

(c) DEFRA Guidance

The essence of the preceding paragraphs is contained in the current DEFRA Guidance Note on *Countryside Legislation: De facto and de iure access to the countryside*.²⁴ This Guidance Note distinguishes between 'de iure access' (which is 'founded on legal rights'²⁵) and 'de facto access', and states quite correctly that:

'The essential elements of de facto access are the absence of any legal right to be present on the land, and the toleration or consent of the owner to the recreational user's presence. Such toleration or consent may be brought to an end, with the consequence that the owner may then ask the recreational user to leave.'²⁶

Although the terminology of 'de facto' and 'de iure' access is never wholly satisfactory, the DEFRA Guidance Note makes the point, quite properly, that access enjoyed by consent (ie by permission or licence) is not access enjoyed by *right*. Access enjoyed by mere licence falls unequivocally into the category of *de facto access* – if one really wants to use this terminology – precisely because licensed access does not rest upon any indefeasible legal entitlement to be present upon the land.²⁷ Access by licence does not come *out of any legal right* (which, after all, is the literal meaning of the Latin phrase, 'de iure'). The landowner's licence or permission merely makes the visitor's presence on the land 'lawful' for the time being. But the 'lawfulness' of the visitor's presence can be brought to an end, and the visitor's presence rendered 'unlawful', by a simple withdrawal of the licence or permission.

²¹ (1862) 7 H & N 736 at 745, 158 ER 666 at 669.

²² See (1862) 7 H & N 736 at 746-747, 158 ER 666 at 670, for the concurrence of Baron Wilde and Chief Baron Pollock, who, together with Baron Martin, formed a quite formidable trio of mid-19th century judges.

²³ See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913).

²⁴ Published 21 December 2001, updated 27 September 2002.

²⁵ Para 5.

²⁶ Para 3.

²⁷ 'De facto access' is simply a catch-all phrase which covers all access which is enjoyed otherwise than on a basis of established legal entitlement. It covers all access enjoyed as a matter of fact (as distinct from by way of right), and is therefore a compendious form of reference to the access enjoyed by the tolerated trespasser and the licensee alike.

(3) Gradations of presence on land

In England and Wales the legal standing of the recreational visitor can therefore be analysed in terms of various gradations. Two questions emerge as crucial: (i) whether the visitor is a trespasser, and (ii) whether (if the visitor is *not* a trespasser) he/she may be ordered to leave the land.

The relevant gradations seem to be the following:

(a) The 'bare' or 'mere' trespasser

Here the visitor has absolutely no licence or permission (express or implied) to be present on the land and, if resistant to a request to leave, may be ejected by the use of 'reasonable' force.²⁸ 'The use of the word "trespasser" excludes any action of a lawful nature.'²⁹ The trespasser is also vulnerable to an award of civil damages or even an injunction (although the courts have tended not to favour such sanctions in respect of harmless recreational trespass in wild or scenic terrain³⁰).

(b) The 'tolerated' trespasser

Much recreational access comprises, at best, a tolerated user in respect of which the landowner by long tradition – in the generality of cases – seeks no remedy in trespass. Indeed the terminology of the 'tolerated trespasser' is beginning to infiltrate the law,³¹ although this should not be understood to imply that the tolerated trespasser has any legal *right* to be present on the land or any legal *right* to refuse to leave the land when told to do so. Ultimately the 'tolerated trespasser' has, in fact, no different status from that of the 'bare trespasser'.

(c) The implied licensee

A licence or permission to be present on land may sometimes be *implied* or *inferred* from circumstance, in which case the visitor does not, of course, rank as a trespasser. It is even possible that various categories of tolerated trespass can shade into forms of implied licence, as, for example, where a landowner, with knowledge that others are enjoying access to his land, habitually makes no objection to their presence.³² These instances involve cases of 'tacit permission'³³ in which the landowner is taken, by his/her acquiescence in the use of the land by trespassers, to have 'impliedly permitted such use, so as to raise the status of the

²⁸ See Gray and Gray, *Elements of Land Law* (3rd edn Butterworths 2001), pp 148-149.

²⁹ *Lowery v Walker* [1910] 1 KB 173 at 195 per Kennedy LJ.

³⁰ Where no injury to the private landowner is caused by a trivial trespass upon his property, the courts are generally unwilling to issue an injunction and may award nothing more than a declaration or nominal damages (see *Behrens v Richards* [1905] 2 Ch 614 at 621-623 (innocent invasion of a deserted beauty spot); *Llandudno UDC v Woods* [1899] 2 Ch 705 at 709-710 (harmless preaching on seashore)). See also *Ward v Kirkland* [1967] Ch 194 at 243C-D. In such circumstances English courts would probably incline towards the view taken in Canada that the landowner should be ordered to pay costs 'for seeking empty vindication' (see *Harrison v Carswell* (1976) 62 DLR (3d) 68 at 73 per Laskin CJC).

³¹ See also the reference to 'toleration' in the description of 'de facto access' provided by DEFRA Guidance Note on *Countryside Legislation: De facto and de iure access to the countryside* (2001), paras 3-4, 7.

³² See *Deane v Clayton* (1817) 7 Taunt 489 at 532-533, 129 ER 196 at 213 per Gibbs CJ; *Slater v Clay Cross Co Ltd* [1956] 2 QB 264 at 268-269 per Denning LJ; *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409 at 420 per Jenkins LJ.

³³ *Lowery v Walker* [1910] 1 KB 173 at 195-196 per Kennedy LJ.

persons concerned from that of trespassers to that of licensees.³⁴ The point remains, however, that such implied licensees have no 'right' – they have only a 'mere permission'.³⁵

(d) The express licensee

Some recreational visitors to land are the recipients of an expressly granted licence to be present on land (eg the climbers who specifically request and are granted permission to climb on a landowner's crag). Whilst their licence remains outstanding, such visitors cannot, of course, rank as trespassers on the land.

(e) The holder of a legal right authorising entry

Some recreational visitors hold not a mere licence to be present on land, but a *legal entitlement* which authorises their entry upon the land in question. Such legal entitlements usually derive from statute, but may in rare cases proceed from local customary or other forms of right. Most of these entitlements are referred to by the DEFRA Guidance Note (2001) under the heading of 'de iure access',³⁶ and are about to be dramatically widened by the CROW Act 2000. Those who enjoy legal rights to be present on land are not, of course, excludable or removable except in accordance with the statutory (or other terms) on which such rights have been conferred. Legal entitlement (ie de iure access) contrasts remarkably with the fragile status of the licensee.

(4) Removability of the licensee

The legal status of a bare licence to be present on land (whether granted expressly or impliedly) is indeed fragile.³⁷ In the inevitable absence of any 'right' vested in the licensee, the licence is vulnerable to arbitrary termination or revocation at any time.³⁸ The conventional view of the common law is that bare licences are terminable without any requirement of objectively reasonable cause and without any obligation to proffer a rationally communicable explanation, either before or after, for any particular act of exclusion. The landowner's control over selective access to his/her land is unfettered by any necessity to comply with rules of fairness or natural justice. The landowner simply enjoys an unchallengeable discretion to withhold or withdraw permission to enter. The draconian nature of the landowner's right to exclude or eject is beginning to be mitigated, in the urban context, by the intrusion of a rule of 'reasonable access' in respect of certain kinds of

³⁴ Law Reform Committee, *Third Report: Occupiers' Liability to Invitees, Licensees and Trespassers* (Cmd 9305, November 1954), para 29. A prime example of such acquiescence is found in *Canadian Pacific Railway Co v The King* [1931] AC 414 at 424, 428 per Lord Russell of Killowen ('original trespass, which, by dint of toleration over a period of time, became an occupation by leave and licence').

³⁵ *Hounsell v Smyth* (1860) 7 CB (NS) 731 at 743-744, 141 ER 1003 at 1008 per Williams J; *Binks v South Yorkshire Railway and River Dun Co* (1862) 3 B & S 244 at 252, 122 ER 92 at 96 per Wightman J; *Lowery v Walker* [1910] 1 KB 173 at 199 per Kennedy LJ.

³⁶ *Countryside Legislation: De facto and de iure access to the countryside* (2001), para 5.

³⁷ The terminology of 'bare' licence is traditionally used by way of contradistinction to the 'contractual' licence which arises where (as, say, in the case of the visit to the cinema or football ground) the visitor's permission to enter upon land is purchased for money or other valuable consideration.

³⁸ See *Wood v Leadbitter* (1845) 13 M & W 838 at 844-845, 851-854, 153 ER 351 at 354, 357-358 per Alderson B (referring to the inherent revocability of the 'mere' licence as one of 'the ancient landmarks of the common law'). See also *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 193-195 per Lord Porter, 198 per Lord Uthwatt.

'quasi-public' location or facility.³⁹ However, the traditional vigour of the landowner's common law exclusory privilege remains fairly unabated in the context of recreational access to open country.

(a) How may a licence be terminated?

A bare licence may be revoked and terminated by any words or conduct which sufficiently indicate that the permission to be present on land has been withdrawn. Where A grants B a gratuitous licence to cross A's field, the licence is 'plainly revocable by notice given by A to B'.⁴⁰ In the absence of any contractual element in the licence, it cannot be argued that the landowner impliedly promised, on the initial grant of the licence, that, provided the licensee behaved properly, he/she would be left, undisturbed by any premature revocation, to complete the purpose contemplated by the licence.⁴¹

(b) Is there any requirement of advance notice of termination of a licence?

The law is not entirely clear as to the nature of the notice which must be given to a licensee to the effect that his/her licence has been terminated or withdrawn.⁴² However, as appears below, this element of legal uncertainty does not impinge on the position of the average hillwalker or climber, for whom the rules are, in fact, pretty clear.⁴³

(i) Reasonable advance notice

There is some legal dispute whether a landowner may indeed terminate a licence with *immediate effect* or is obliged, instead, to allow or specify a period of time which must elapse before the licence (ie the permission to be present on land) is deemed to have come to an end. The more generally accepted view is that all licences (whether 'bare' or 'contractual') are terminable only by the giving of 'reasonable' advance notice.⁴⁴ In other words, 'a licensee whose licence is revocable is entitled to reasonable notice of revocation'⁴⁵ and that the licence itself does not terminate until the expiration of a 'reasonable' period of time following the announcement of the revocation.⁴⁶

³⁹ See Gray and Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, [1999] EHRLR 46.

⁴⁰ *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 188 per Viscount Simon.

⁴¹ See *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 189 per Viscount Simon; *White v Blackmore* [1972] 2 QB 651 at 675F-676A per Roskill LJ.

⁴² See DEFRA Guidance Note on *Countryside Legislation: De facto and de iure access to the countryside* (2001), para 7.

⁴³ Such legal uncertainty as exists is more directly relevant to the termination of contractual licences (ie those licences granted for a fee), where issues of notice of termination tend to intersect more obviously with commercial obligations towards third parties.

⁴⁴ For an isolated voice to the contrary, see *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 196 per Lord Porter (who was, nevertheless, prepared to allow a 'reasonable' time following the termination of the licence for the licensee to vacate the premises).

⁴⁵ *Canadian Pacific Railway Co v The King* [1931] AC 414 at 432 per Lord Russell of Killowen. See similarly *Mellor v Watkins* (1874) LR 9 QB 400 at 405-406 per Blackburn J; *Minister of Health v Bellotti* [1944] KB 298 at 308-309 per Goddard LJ.

⁴⁶ See *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 199-201 per Lord Uthwatt.

(ii) An extra 'period of grace'

Even when this period of 'reasonable' notice of termination has elapsed, the better view is that the former licensee 'will not be considered a trespasser before he has had a reasonable time in which to vacate the premises.'⁴⁷ In other words, the visitor whose licence has just come to an end is allowed, as 'a rule of law', a 'period of grace' or 'packing-up period' before he technically reverts to the status of a trespasser.⁴⁸ This extra period of time 'supervenes after the licence has terminated' and is intended to 'enable the former licensee to adjust himself to the new situation by vacating the premises.'⁴⁹

(iii) The legal objective

The objective of the law in providing for 'reasonable' notice of termination (and even an extra period of 'reasonable' packing up time) is, quite clearly, to allow the licensee a 'breathing space',⁵⁰ usually in the light of any commercial commitments already undertaken by him/her,⁵¹ to make alternative arrangements in the aftermath of the withdrawal of the licence.

The provision of 'reasonable' time is therefore primarily relevant to long term licences whose cancellation involves 'interests of public concern' or the 'disruption of [some] public service'.⁵² In *Canadian Pacific Railway Co v The King* (1931)⁵³ a licensee who had installed telegraph poles beside hundreds of miles of railway track was allowed a reasonable time to organise the relocation of the poles and wires elsewhere than on the crown land on which they were no longer welcome. As Lord Russell of Killowen said in the Privy Council, the licensee had incurred 'obligations in other directions, which the determination of the licence would disable him from fulfilling, unless the licence were determined after a notice sufficient, in point of time, for the making of substituted arrangements.'⁵⁴ In such cases a failure to give reasonable notice of termination of a licence may possibly even invalidate the act of termination itself,⁵⁵ although the courts are more likely to hold that any deficiency in the matter of notice can be cured if, in fact, the licensee was allowed more time than was actually specified in the notice to vacate the premises.⁵⁶

⁴⁷ *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 204 per Lord MacDermott. See similarly *Cornish v Stubbs* (1870) LR 5 CP 334 at 339 per Willes J (Under a parol (ie verbally granted) licence, the licensee 'has a right to a reasonable time to go off the land after it has been withdrawn before he can be forcibly thrust off it').

⁴⁸ *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 204-208 per Lord MacDermott (Viscount Simon and Lord Simonds concurring at 191, 208).

⁴⁹ *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 204 per Lord MacDermott.

⁵⁰ *Canadian Pacific Railway Co v The King* [1931] AC 414 at 432 per Lord Russell of Killowen.

⁵¹ *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 199-200 per Lord Uthwatt.

⁵² See *Governing Body of Henrietta Barnett School v Hampstead Garden Suburb Institute* (1995) 93 LGR 470 at 509-511 per Carnwath J (conduct of voluntary aided school). See similarly *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 205 per Lord MacDermott (referring to 'specialised user involving obligations to third parties or the public' and involving 'considerable expenditure and a host of contractual relationships').

⁵³ [1931] AC 414.

⁵⁴ [1931] AC 414 at 432.

⁵⁵ See *Canadian Pacific Railway Co v The King* [1931] AC 414 at 432-433; *Governing Body of Henrietta Barnett School v Hampstead Garden Suburb Institute* (1995) 93 LGR 470 at 508-511.

⁵⁶ See *Minister of Health v Bellotti* [1944] KB 298 at 307.

(c) Application to climbers and hillwalkers

How do the foregoing provisions of the common law affect climbers and hillwalkers who enjoy access to recreational land by licence or permission? In reality, few of the doubts adverted to above have any impact on the termination of such licences. The legal position of the climber or hillwalker is, sadly, pretty clear under the limited 'traditional' or 'customary' freedoms allowed by the common law. The common law draws an important distinction between those forms of licensed user which are 'an entirely personal matter' and other forms of licensed user which involve 'interests of public concern',⁵⁷ with the result that, in the former kinds of case (eg in the case of the recreational visitor), requirements of due notice are fairly nugatory. Take, as working examples, the cases of:

- the climber who has already started up a rock climb when the landowner appears and purports to terminate any licence the climber may have to be present on the land;
- the hillwalker who is already one third way up his chosen hill when, similarly, his licence (if he has one) is supposedly withdrawn by the landowner.

(i) Is the recreational visitor entitled to advance notice of termination of his licence?

On the basis of the common law principles discussed above, the recreational visitor is entitled to 'reasonable' advance notice that his licence is being terminated. But where, as in the case of pure recreational access, the exercise of the licence 'involves nothing beyond' (ie no commercial implications or matters of 'public concern' as traditionally understood), the licence is terminable 'brevi manu at the will of the licensor' (ie with immediate effect).⁵⁸ In other words, the period of notice regarded by the common law as 'reasonable' in this context is, in fact, minimal to the point of non-existence. The licence can, as a matter of law, be terminated summarily and immediately.⁵⁹ The licence to use the crag or hill (if there be any licence) can be withdrawn by summary communication on the spot to the recreational visitor.

(ii) Is the recreational visitor still entitled to 'reasonable' packing up time?

The common law rules indicate that, following the summary withdrawal of a visitor's licence, the visitor must still be allowed a 'reasonable time' to get off the premises⁶⁰ 'by the most appropriate route for doing so ... [and] with reasonable expedition'.⁶¹ For the duration of this 'period of grace' or 'packing-up period' the recreational visitor is not regarded by the common law as a trespasser. As Viscount Simon declared in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* (1948),⁶² A's licence to cross B's field 'would plainly be revocable by notice given by A to B', although even here

'notice of revocation conveyed to B when he was in the act of crossing A's field could not turn him into a trespasser until he was off the premises, but his future right of crossing would thereupon cease.'

⁵⁷ *Governing Body of Henrietta Barnett School v Hampstead Garden Suburb Institute* (1995) 93 LGR 470 at 509-511 per Carnwath J.

⁵⁸ *Canadian Pacific Railway Co v The King* [1931] AC 414 at 432 per Lord Russell of Killowen.

⁵⁹ See *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 205, where Lord MacDermott provided more than a hint that a 'bare and unqualified licence' can be 'withdrawn instantaneously'.

⁶⁰ *Robson v Hallett* [1967] 2 QB 939 at 952-953 per Lord Parker CJ, 954 per Diplock LJ.

⁶¹ *Robson v Hallett* [1967] 2 QB 939 at 954 per Diplock LJ.

⁶² [1948] AC 173 at 188-189.

Applying this approach to the two working examples suggested above, the common law position seems to be as follows:

– The rock climber who is accosted mid-climb has a ‘reasonable’ time to vacate the land by the most appropriate route. Here safety factors would appear to be uppermost in determining ‘reasonableness’ of time and ‘appropriateness’ of route. It is inconceivable that a climber leading up a rock route would reasonably be expected to reverse his route once he is more than a few feet off the ground (unless there were, for instance, an easy, obvious and immediate escape off the crag on to open hillside). Considerations of safety would appear to dictate that ‘reasonable’ packing up time involves the completion of the climb under way (for both the leader and any climber who follows to retrieve gear). Thereafter, of course, the visitor or visitors must vacate the land with all expedition.

– The hillwalker who is stopped one third way up his hill is allowed a ‘reasonable’ period of grace or packing up time *only* in the limited sense that he must retreat from the hill with reasonable expedition and by the most appropriate route (taking into account, say, terrain, weather conditions and any other factor bearing on safety). He is not entitled, on a sunny day and on clear terrain, to insist on completing his planned route to the top and down. The ‘period of grace’ which he enjoys before he is relegated to the status of trespasser is intended merely to enable him to get off the hill with reasonable safety and speed. It is not intended, as Lord MacDermott pointed out in the *Winter Garden* case,⁶³ ‘to prolong the user sanctioned by the licence merely for the benefit and convenience of the licensee.’

(d) Possible counter-arguments?

Such is the bleakness of the traditional common law ‘freedoms’ of access outlined above that it is tempting to wonder whether the courts have ever countenanced any means of mitigating the severity of these rules. Two possible means spring to mind – but both have been closed off by the courts themselves.

(i) Licence coupled with an interest

English law has long acknowledged that, in some circumstances, a licence which is ‘coupled with an interest’ (ie coupled with some purpose for which the exercise of the licence is essential) may not be terminated by the landowner before the completion of the purpose envisaged.⁶⁴ The standard example is that of the cinema-goer who purchases his ticket of admission. Provided that he behaves himself properly, such a licensee may not be ejected prematurely from the cinema before the completion of the performance which he has paid to see.⁶⁵ Can this doctrine help to alleviate the parlous legal position of the recreational visitor whose licence to traverse land has been purportedly terminated?

The answer is, regrettably, both *clear* and *negative*. A number of problems arise. The obligation of the landowner to avoid premature termination of a ‘licence coupled with an interest’ applies, if at all, rather more obviously where the licence is based on a contract and the obligation can be readily implied as a term of that

⁶³ *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 205 per Lord MacDermott.

⁶⁴ See eg *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 665 at 686 per Lord Denning MR ([‘T]he owner cannot revoke the licence at his will. He cannot revoke the licence so as to defeat the period or purpose for which it was granted. A court of equity will restrain him from so doing’). The doctrine that a licence, once acted upon, is irrevocable, goes back a long way (see eg *Webb v Patemoster* (1619) 2 Rolle 143, 81 ER 713; *Palm* 71 at 72-73, 81 ER 983 at 984; *Popham* 151, 79 ER 1250).

⁶⁵ *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 at 7 (regarded as ‘rightly decided’ in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 189 per Viscount Simon).

contract.⁶⁶ It is likely that the licensee, in order to take advantage of the doctrine, would also have to show that, 'on the faith of' the licence granted, he has in some way altered his position 'to his detriment'.⁶⁷ Moreover, even if the doctrine is capable of applying to a bare (ie non-contractual) licence, the courts have already denied forthrightly that it can help the recreational visitor. In *White v Blackmore* (1972),⁶⁸ a young man was killed whilst spectating at a jalopy car racing competition in which he was also intermittently taking part as a driver. Liability turned, in some degree, on his precise status as a bare or gratuitous licensee. By a majority the Court of Appeal rejected the argument that the young man's recreational access to the competition area had been a 'licence coupled with an interest' and had therefore been irrevocable before the completion of its purpose (ie before the end of the day's racing).⁶⁹ The Court took the view that his licence was 'revocable at will'⁷⁰ and could always have been withdrawn 'summarily' at any time subject only to his right to collect and remove his jalopy after the termination of his licence.⁷¹

(ii) *Equitable licence*

It is similarly tempting to explore the possibility that recreational visitors may claim to have some sort of 'equitable licence' which protects their presence on land from arbitrary termination. English law certainly recognises that licensees may acquire a status of irremovability if they have acted to their detriment in reliance on some representation from the relevant landowner that they would acquire some proprietary interest in the land in question.⁷² The man who, at his own expense, builds himself a bungalow on his parents' land in reliance on their assurance that the land would be his, acquires an equitable licence or licence based on 'equitable estoppel' which cannot be summarily revoked.⁷³

In the present context, however, the difficulties in appealing to this legal doctrine are numerous. It would be extremely problematical to suggest that any recreational visitor to open country has received anything in the form of an assurance of proprietary entitlement in that land – not least since, as will be remembered, a *ius spatiandi* does not comprise a proprietary interest known to the common law. Still less easy would be the suggestion that the climber or hillwalker has altered his/her position to his/her detriment in reliance on some past offer of open access. The recreational visitor derives *benefit* rather than *detriment* from the licence. And, in any event, the Court of Appeal has ruled in *CIN Properties Ltd v Rawlins* (1995)⁷⁴ that there are 'the gravest doubts' whether the principle of equitable or estoppel-based licence 'could ever apply so as to create rights in favour of the public at large, since it is difficult to see how the acts or omissions of those individuals who rely on a representation could create rights in favour of the public.'

It is conceivable that, in rather extraordinary circumstances, a specific individual who had been promised access to a crag or hill could claim that he/she had incurred recognisable detriment in reliance on the representation of assured access (eg through organising transport and accommodation for a group of novice climbers on a week-long course of instruction). But at this point, we divert into the remote and the fanciful. The

⁶⁶ See eg *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 189 per Viscount Simon. Moreover, equity will not normally assist a volunteer (ie one who gives no consideration or money value).

⁶⁷ *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 665 at 686 per Lord Denning MR.

⁶⁸ [1972] 2 QB 651.

⁶⁹ The facts 'could not create a licence coupled with an interest in the sense in which that phrase has come to be used down the years in the reported cases so as to make the licence irrevocable' ([1972] 2 QB 651 at 675G per Roskill LJ). See also Buckley LJ at 669H.

⁷⁰ [1972] 2 QB 651 at 676G per Roskill LJ.

⁷¹ [1972] 2 QB 651 at 669G-670B per Buckley LJ, 676G per Roskill LJ.

⁷² See Gray and Gray, *Elements of Land Law* (3rd edn Butterworths 2001), pp 753-763.

⁷³ See eg *Inwards v Baker* [1965] 2 QB 29.

⁷⁴ [1995] 2 EGLR 130 at 134B.

doctrine of equitable licence offers, in reality, no escape from the dilemma faced by the recreational visitor whose licence is peremptorily withdrawn.

4. Conclusions and challenges

The foregoing demonstrates, in a way in which I take no pleasure at all, the extreme limitations which surround the conventional understanding of the *common law* status of the hillwalker or climber in England and Wales today. (It should be stressed again that this note does not purport to deal with the law of recreational access in Scotland.) I believe, however, that the above description of the traditional or customary 'freedoms' of public access to recreational land would be regarded as entirely unexceptional by the overwhelming generality of the legal community in this jurisdiction. Indeed, it might even be thought that, in minor respects, the account in this note (particularly in dealing with the allowance of 'reasonable' time to vacate land) strays towards a view unduly favourable to the recreational visitor.

Several conclusions inevitably follow – and they are so stark that it is difficult to articulate them in suitably moderate terms.⁷⁵

(1) Importance of the Countryside and Rights of Way Act 2000

It should by now be obvious that the rights of recreational user of access land conferred by the CROW Act 2000 dramatically transcend any of the 'common law freedoms' supposedly enjoyed hitherto by the public. The common law position of the recreational visitor is precarious in the extreme. His/her presence on land, even if initially validated by some licence, can usually be countermanded peremptorily without generating the slightest cause for legal complaint by the former licensee. In contrast, the CROW Act 2000, whatever its limitations, supplements the fragile common law liberties of the hillwalker and climber by the conferment of a generally indefeasible statutory entitlement of recreational access in respect of 'access land'. This is a quantum step of historic proportions and its significance can scarcely be overstated.

(2) Dangers of over-reliance on 'traditional' or 'customary' freedoms of access

The CROW Act 2000 does not, of course, displace or abrogate the traditional or customary freedoms enjoyed by the outdoors community. These freedoms – measured principally in the form of defeasible licences of recreational access – remain alongside the new CROW Act entitlement. But, whatever one's view of the merits or demerits of the CROW Act 2000, it would be an act of astonishing imprudence to scorn the rights conferred by this Act or to suggest that the objectives of the Act are already better achieved by reliance on the existing common law. Such a view would not merely be untenable as a matter of law; it would work severely to the discredit of anyone rash enough to propagate such a controversion of the patent legal reality. To imagine that the common law of licensed access in any way secures a body of binding or enforceable *entitlement* on behalf of the climbing community is gravely to misconceive the nature of the so-called 'traditional' or 'customary' privileges of access permitted by the common law. The first question which would be asked by any judge or counsel, if pressed with the supposed efficacy of the pre-existing common law position, would be why Parliament wasted its time in 1999/2000 legislating for duplicate (or even allegedly inferior) rights of recreational access. This would, indeed, be a 'killer question'. It would be an inevitable inference in any court of law that Parliament legislated precisely in order to remedy the infirmity of the pre-existing common law position.

The climbing and hillwalking community is understandably and justifiably anxious that the totality of recreational access to open and uncultivated land should be placed on an even more secure footing than that offered by the CROW Act 2000. For anyone consumed by a love of the hills or by a craving for rock, the limitations of both the CROW Act 2000 and the pre-existing common law are an utter anathema. Change in

⁷⁵ As Diplock LJ pointed out in *Robson v Hallett* [1967] 2 QB 939 at 953G, the points of the law in this area are 'so simple that the combined researches of counsel have not revealed any authority upon them. There is no authority because no one has thought it plausible up till now to question them.'

the law tends, however, to be incremental; it requires careful argumentation. And advocacy of a progressive direction for the law of the future requires to be solidly based on a clear understanding of the law as it currently stands. The best platform for movement and change is not an over-enthusiastic or aspirational perception (however well intentioned) of the present state of play, but rather a balanced assessment of the strengths and the weakness of the legal position regarding access under the pre-existing common law. The community of climbers and hillwalkers is not best served by the almost incomprehensible assertion that the CROW Act 2000 was a needless irrelevance or that recreational visitors would do well to throw themselves back upon the richness of 'traditional' or 'customary' freedoms long enjoyed at common law.

(3) Challenges

Climbers and hillwalkers should be – and usually are – deeply committed to the egalitarian ideal of optimal public access to privately owned open country. However, the current task is not aided by misconceptions of the rather bleak content of the common law of recreational access or by the suggestion that we have strayed away from some 'golden age' of universal rights of access. The challenges of today involve a drawing together of new or modified ways of looking at things, in the sure knowledge that, with the passage of time, courts and lawyers and parliamentarians react more receptively to carefully reasoned advocacy of particular lines of thought or social philosophy. This work pays long-term dividends – perhaps 5, 10 or 20 years down the line – in influencing or transforming social and political (and ultimately legal) attitudes. There are several bright paths to be followed in this direction, not the least of which is the new emphasis placed upon supra-national or fundamental human rights of self-realisation. But these are not particularly the subject of this note, the principal purpose of which has been to expose the grievous deficiencies of the common law of England and Wales with regard to privileges of recreational access.

Recognition of the limitations of the common law does not, however, mark an end, but merely a beginning. We are, all of us, looking for a secure foundation for a principle of true 'pedestrian democracy' in wild or open country. The real challenge facing the climbing community of today is therefore to marshal a range of powerful arguments, drawn in part from analogous legal doctrines of the past and also from modern overseas developments, which are aimed at refashioning a workable law of trespass which does not preclude – but instead greatly facilitates – reasonable public access to privately held recreational space.

21 March 2003