

An inquiry into shifting conceptions of landownership in Scotland, and their presence in law

Quotation from Bell's *Principles*

At paragraph 940 in his *Principles of the Law of Scotland*, Professor Bell writes:

“The right to the exclusive occupation and use of land leads, in its exercise, to many difficult cases of interference between coterminous proprietors, and between landowners and the public. The proprietor of land has the exclusive right to the use and occupation, not merely of the surface, but of what is below, and what is above the surface, a coelo usque ad centrum.”

Later, at paragraph 944, he continues:

“Individual benefit or convenience will not justify the invasion of this exclusive right of property, nor does the absence of actual damage prevent the person whose property is invaded from vindicating his right to exclusive use. The right must be purchased if the party be desirous of using it.”

While Bell's view does appear to represent a rather absolutist view of landownership, it is notable that he recognises the difficulties that may be caused by that view. This is true of solely private disputes (“interference between coterminous proprietors”), where a regime of exclusive rights over plots of land may be troublesome where neighbouring plots of heritage are naturally interdependent. But it is also true of public disputes, where a tension arises between the freedom of the landowner, with his/her “exclusive right to the use and occupation”, and the public at large, with their interests in both (i) using privately-owned land for their own purposes, and (ii) the landowner refraining from using their land for purposes detrimental to that public.

The last 30 years, and in particular the period following the establishment of the Scottish Parliament in 1999, has seen considerable developments in this respect, and Bell's view, correct as it might have been when written in the nineteenth century, can now be seen as out of place. Such developments have been primarily (albeit not entirely) statutory, with notable examples including: the extensive public access rights introduced by the Land Reform (Scotland) Act 2003; and the rights of pre-emption or forced transfer provided for under the 2003 Act, and the Land Reform (Scotland) Act 2016, respectively.

Further developments may yet be on the horizon. The 2016 Act established the Scottish Land Commission, and made provision for the publication of a Land Rights and Responsibilities Statement. Proposals put forward by the Commission have led to the introduction by the Scottish Government of a new land reform Bill, undertaking to introduce, among other things, compulsory management plans for large-scale landholdings and lotting by the Scottish Ministers of such holdings upon transfer, and facilitate the exercise of previously-introduced community land rights through requiring notice of transfer.

As Bell notes, the relationship between landowners and the public (or public-minded governments) is not always an easy one, and it is foreseeable that, just as prior reforms

have been cause for consternation among some landowners, reforms brought forward by the new Bill may face similar, and perhaps more vigorous, opposition.

It is clear that the concept of landownership has developed significantly since Bell's time, and remains on the move. For this reason, I consider it ripe for examination and, as such, in my research I would seek to:

- Detail the nature of landownership in Scotland during the eighteenth and nineteenth century, with reference to Bell and other writers, and to contemporaneous case law, and explore seeds of future development
- With reference to legislation, and parliamentary materials detailing the development of and consultation on such legislation, explore how recent reforms have been influenced by developing conceptions of landownership, and have themselves developed the concept
- In particular, inquire into the nature of landownership in Bell's time and in modern-day Scotland as regards the rival private interests of landowners ("coterminous proprietors", in Bell's terms) and the interests of the public against landowners
- Consider whether and to what extent such concepts have made a practical difference to the nature of landownership in Scotland, and whether any lessons can be learned from previous reforms as regards recent proposals

An approximate timeline of my research is included in the table below, and followed by a list of proposed reading:

Week no. and date	Research focus
1 (w.b. 3 Jun)	Overview of the modern law of landownership: with a view to putting subsequent research in context
2 (w.b. 10 Jun)	Landownership in Bell's time: inquiry into Bell and his contemporaries incl. Hume and Erskine, and contemporaneous case law and commentary
3 (w.b. 17 Jun)	Legal elements of modern land reforms: the 2003 and 2016 Acts, application in case law, and practical success
4 (w.b. 22 Jul)	Policy elements of modern land reforms: parliamentary development and consultation
5 (w.b. 29 Jul)	The future of land reform: the 2024 Bill, policy materials and consultations
6 (w.b. 5 Aug)	Write-up

Reading:

- M M Combe, J Glass, A Tindley, *Land reform in Scotland: history, law and policy* (EUP 2020)
- W M Gordon, S Wortley, *Scottish Land Law, vol II* (3rd edn, W Green 2020), ch 17 ('Public access rights') and Part IV ('Social control of land use')
- Articles including:
 - J Robbie, 'Babes in the wood', 2021 Edin LR 347
 - M M Combe, '...another answer to the Scottish land question', 2016 Jur Rev 291; 'Get off that land', 2014 Jur Rev 287; 'Land reform revisited', 2014 Edin LR 410; 'Access to land and to landownership', 2010 Edin LR 110; '...a definitive answer to the Scottish land question?', 2006 Jur Rev 195
 - J Fordyce, '...pushing the boundaries', 2010 Jur Rev 263

- D McKenzie Skene, A Slater, 'Liability and access to the countryside', 2004 Jur Rev 353
- Parliamentary records from the time of the passage of legislation including the 2003 and 2016 Acts
- Additional materials held by National Records of Scotland relating to the passage of those Acts
- Details of and responses to 'Land reform in a net-zero nation' consultation in 2022 by Scottish Government
- [Consultation analysis report](#) prepared in respect of the above
- Policy memorandum and explanatory notes to the Land Reform (Scotland) Bill 2024