Anderson v Earl of Morton

Obstruction of rights of way · https://scotways.com/ken/anderson-v-earl-of-morton/

Case Report: (1846) 8 D 1085

Key points: Attempt to exclude public from claimed right of way - gates on footpath - consequent change in character of route - changed character prejudicial to case for right of way.

The facts: Lord Morton challenged the public's right to use certain footpaths running through his estate at Aberdour. Certain residents of Aberdour raised an Action for Declarator to establish that the public had a right to the use of these footpaths. Lord Morton planned to erect gateways at certain points with a view to excluding members of the public. An Interdict was sought against Lord Morton to prevent any action being taken to change the character of the roads in issue pending a decision in the Action of Declarator. The residents' concern was that the erection of the proposed gates would have the effect of seriously prejudicing their case by depriving them of evidence in favour of a public right of way which would be afforded by the existing appearance of the paths (i.e. open and without gates). Lord Morton argued that the mere fact of an application for Declarator should not have the effect of preventing him from exercising his proprietorial rights.

Decision: The Court of Session refused the Interdict against Lord Morton, but agreed to make an Order to have an inspection of the ground take place and a judicial plan drawn up, representing the existing appearance of the roads, to avoid the danger that evidence of their present state might be lost.

Comments: This case clearly demonstrates that the Court will provide a remedy in cases where the proprietor intends to carry out operations altering the whole aspect of the ground along which an alleged right of way runs (for instance by blowing up or digging up the road, flooding it or otherwise changing its character). According to Lord Cockburn, even removal of a plank or breaking off the projecting stones of a stile can be barred.