Burt v Barclay

Creation of public rights of way – use as of right by the public for the prescriptive period · https://scotways.com/ken/burt-v-barclay/

Case Report: (1861) 24 D 218

Key points: Use of route by right or by tolerance of proprietor - right of proprietor to enclose land - route having no public places at termini - destruction of fences regarded as trespass.

The facts: In 1856 Barclay owned a field which he enclosed with fences. Burt, the owner of the adjoining land, claimed that these fences crossed a public road or path leading from part of his ground to a mill, owned by Barclay. Burt made openings in the fences, which were in turn closed up again by Barclay. Barclay sought Interdict against Burt in order to stop Burt trespassing on his (Barclay's) property.

Decision: The evidence did not establish ''any public road, or any servitude road, or indeed any road at all'', on the basis that the alleged road had no public termini (it is to be assumed, therefore, that Barclay's mill was not a 'public place' in the sense of being a mill to which local farmers were thirled). Burt's allegations were consistent with the tolerance of Barclay, the proprietor of the ground. Latterly, Burt had been using the alleged road and persuading others to do likewise, but persons doing so had been stopped by Barclay.
The evidence of use was consistent with the owner's tolerance; if a landowner chose to allow straggling over unenclosed land, that did not constitute the creation of a right of way nor did it prevent his enclosing his land. The Interdict sought by Barclay was granted.

Comments: This case illustrates: (1) that a public right of way, under common law, has to run from one public place to another public place; and (2) that use of a 'servitude road' to establish a 'servitude of way' (i.e. a private right of way) must be such as to exclude any suggestion that its use was due to tolerance by the landowner; (3) that it is relevant to apply the term 'trespass' in instances in which damage is done while on the land of another; compare the situation in Geils v Thomson in which Thomson was held to be trespassing on Geils' land even though Geils had first committed a wrong.