Lauder v MacColl

Creation of public rights of way – need for public place end points · https://scotways.com/ken/lauder-v-maccoll/

Case Report: 1993 SCLR 753 (OH)

Key points: Creation of right of way - track leading from public road to foreshore - evidence required to establish use for the prescriptive period - effect of occasional closing of access by locked gate.

The facts: Lauder raised an Action for Declarator of Right of Way over a track leading from a public road to the foreshore, crossing land owned by MacColl. The law in the case was straightforward and not in dispute, and, in considering whether the part of the foreshore in question was a ‘public place’ for right of way purposes, the judge quoted at length from the judgement of Lord President Normand in Marquis of Bute v McKirdy (above).

Decision: The question was whether Lauder could prove use of the track by the public for the prescriptive period. The evidence available towards the start of that period in the 1930s was not plentiful: part of it consisted of an affidavit (i.e. a sworn statement) from a 93-year old witness, who died before the case was heard, but this affidavit evidence was of limited value because it was inconsistent with the other evidence and also because the witness was not available to be cross-examined for explanations. Lauder’s most important witness then became a local lady, born in 1927, whose visits to the foreshore had started in the early 1930s on Sunday School picnics and had continued from time to time since then. The Court held that, despite the limited evidence, Lauder had proved use of the track for the prescriptive period and he was granted the Declarator sought.

Comments: This case is of interest for two reasons: (1) It indicates the weakness of relying on affidavit evidence from a deceased witness, and (2) The effect of locking a gate across a track for one day in each year was referred to, although not considered in-depth; in England, the question turns on the whether it can be inferred - under the presumptions applicable in English Law - that the owner intends to dedicate the way to the use of the public. Thus, in England, locking a gate, even if only once a year indicates that the owner has no intention of such dedication. In Scotland, however, the constitution of a right of way does not depend on any legal fiction (i.e. presumption) but on the fact of use by the public as a matter of right, continuously and without interruption.

From the observations of the Court in the above case, it would seem that the practice of locking a gate for one day in the year would be ineffective in a Scottish context, provided that the established criteria for the creation of a right of way were otherwise met.

Cases referred to:

(1) Macpherson v Scottish Rights of Way & Recreation Society Ltd (1887) 14 R 875 and (1888) 15 R (HL) 68

(2) Mann v Brodie (1885) 12 R (HL) 52