Mackintosh v Moir

Need for a particular line for public rights of way · https://scotways.com/ken/mackintosh-v-moir/

Case Report: (1872) 10 M 517

Key points: Indeterminate line of route - procedure for fixing line of route - use of surveyor/engineer - right of Court to decide between several possible lines.

The facts: The Pursuers raised an Action for Declarator that a public road or right of way existed between two public places in Dunoon, as indicated on a plan shown to the Court. The Action was successful, and the Court appointed an Engineer to ''report in what line the road ought to be laid down''. The Engineer’s report suggested three possible lines, each with advantages and disadvantages, and the Court confirmed that it was its duty as a Court both of Law and Equity to decide which line should be adopted as being the most suitable and convenient.

Comments: This case records the principle that the Court in a right of way case can, where the circumstances require, remit to a suitably qualified person the fixing of the actual line of a right of way (see also Rodgers v Harvie, in which the Court required a surveyor to ‘lay off’ the footpath in question); moreover, where there are several possibilities, as in this case, the Court will take upon itself the decision as to which one is most suitable. The report also includes an important statement (at p 519) by Lord Deas, ''In many instances in Scotland, where there are moors to be passed over, the public have a right of way, and yet they may have used twenty different lines for going from the one terminus to the other, taking the one they liked best or found most suitable in the state of the ground and of the weather''. In this case, however, the right of way was for a road to be constructed in a built-up area, and it was necessary that its line should be precisely fixed.