Magistrates of Elgin v Robertson

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

Case Report: (1862) 24 D 301

Key points: Establishment of right of way - duration of period of use requiring to be proved - proof of use for less than the prescriptive period - presumption re nature of prior use.

The facts: Elgin Town Council ('The Council') raised an Action for Declarator to establish a right of way over certain plots of land. The Council required to prove, amongst other things, that there had been public use of the proposed way for the prescriptive period which, at that time, was 40 years. The Council proved that the way had been used in the necessary manner to establish it as public from 1798 to 1835 (i.e. for 37 years). They argued that this uninterrupted use could be presumed to be 'carried back' for at least another three years prior to 1798 in order to show 40 years' use. Robertson, however, produced evidence that for several years prior to 1798 there had been no public passage over the ground.

Decision: The Court decided that no right of way had been established and observed: (1) That where uninterrupted use has been proved for less than the full prescriptive period, there may be 'cases of delicacy' where the use proved might warrant an inference that similar use had existed in the preceding years. In this case, there could be no such inference, because Robertson produced positive evidence that, prior to 1798, there had been no public access over the ground in question; and (2) that, in proving use, the prescriptive period to which the use relates need not finish on any particular date, e.g. the date of raising the Action; if the required use can be proved for the necessary period, terminating at any time, that is sufficient, providing that between the end of the period of proved use and the raising of the Action the right of way has not been extinguished.

Comments: This case illustrates (a) that, in certain circumstances where proof of a full 40 (or now 20) years' use is unavailable, the Court may be prepared to presume that similar use existed in preceding years, though every case will depend on its own circumstances; and (b) that the start and finish dates of the prescriptive period are not important, providing that the necessary use between given dates can be proved, and also that between the finish date and the raising of the Action the right of way has not been extinguished. Given that the prescriptive period is now only

20 years, as opposed to the 40 required at the time of this case, the foregoing comments are based upon the assumption that a present-day Court would apply the principles of this case in regard to the interpretation of the current Act, i.e. the Prescription & Limitation (Scotland) Act of 1973, which introduced the 20-year period. There is, however, no legal precedent on this point.

Cases referred to:

(1) Harvie v Rodgers (1827) 4 Murr 29 (Not in Ken).

(2) Cuthbertson v Young (1851) 14 D 304 and (1853) 1 MacQ 455 and 1854 17 R (HL) 2