Mann v Brodie

Creation of rights of way – interruption of the prescriptive period · https://scotways.com/ken/mann-v-brodie/

Case Reports: (1884) 11 R (SC) 925 and (1885) 12 R (HL) 52

Key points: Exclusion of public from right of way - interruption of prescriptive period - effect of earlier period of use - failure of public to assert right.

The facts: In a previous Action brought by Brodie in 1883 for Declarator of Public Right of Way over a road leading from one public road to another, over land belonging to Mann, it was proved that, during the 37 years from 1846 to 1883, the public had been excluded from use of the road, but that, during the 26 years from 1820 to 1846, the public had used the road as of right. The evidence as to the remainder of the forty years prior to 1846 was insufficient in itself to prove that the public had used the road as of right.

Decision: It was held that the legal presumption arising from the exclusion of the public from the road without challenge for 37 years (i.e. the presumption that the road was not a public right of way) overcame the presumption that the use prior to 1820 had been of the same character as that between 1820 and 1846 (when the road had been used by the public as of right), and that, therefore, in the absence of any distinct evidence as to that earlier use, Brodie had failed to prove a prescriptive right to the road. Lord Blackburn observed as follows: "Though exclusion for less than forty years will not extinguish a public right which is proved to have been created, the fact of no right having been asserted during an exclusion of so long a period as 37 years affords some reason for requiring more evidence to establish that such a right really existed. There must have been many alive in the period between 1846 and, say, 1856 and now dead, who must have known much more as to what really was the state of user of the road between 1805 and 1820 than those now alive, and if they did not assert a right, it affords some ground for surmising that they did not think that the right existed, and, therefore, some ground for looking more critically at the evidence produced to prove that it did."

Comments: This case contains a useful exposition of the law relating to the acquisition of and loss of rights of way, and includes a review of the authorities at that time. In particular, Lord Blackburn (an English judge sitting in the House of Lords) indicated that the concept of an implied grant of a right of way was not one of Scots Law, which rested rather upon use by the public for

the prescriptive time.

Cases referred to:

(1) Harvie v Rodgers (1827) 3 W & S 251

(2) Cuthbertson v Young (1851) 1 MacQ 455

See also:

Lauder v MacColl.