McInroy v Duke of Athole

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

Case Report: (1891) 18 R (HL) 46

Key points: Servitude right of way - occasional use only - landowner's knowledge (or ignorance) of use - use to be open and peaceable.

The facts: A track which had been formed by deer and sheep went through a pass between two mountains and could be used as a short cut between one part of McInroy's estate and another. It ran, however, through a projecting tongue of land belonging to the Duke of Athole, proprietor of the adjoining Athole Estate. Its use by McInroy was for occasional sporting purposes when he wished to cross the mountain barrier. The evidence indicated that this use was unlikely to come to the knowledge of the Duke or of his servants; on the two (and only two) occasions when the use did come to the Duke's knowledge, it was challenged by him. On neither occasion did McInroy assert his right to use the track. The Duke sought Interdict against future use of the track by McInroy.

Legal arguments: McInroy argued that he had acquired, by prescriptive use, servitude of way for those persons who occupied his estate.

Decision: The Court held that the proved use of the track was insufficient to show that it was used in the assertion of a right. The Duke obtained the Interdict, as sought.

Comments: The Court said that, when a servitude of way is claimed, the claimant must show that his use was known, or ought to have been known, to the landowner or his staff. A high standard of vigilance on the part of thelandowner is assumed, but the use must be such as to indicate clearly, openly and peaceably that a right of passage is being asserted. In this case, the track used was in a remote area, where its use was not obvious, and, when the Duke learnt of the use, he did his best to stop it. As to tolerance, there was no argument that the use was known to and, therefore, tolerated by the Duke; since he neither knew of the use nor tolerated it, such use could not, therefore, create a servitude right of way. Indeed, the use was hardly known to the Duke at all, and he took clear steps to stop it when he learnt of it. It has been stated in 1993 in the case of Cumbernauld & Kilsyth District Council v Dollar Land (1993 SC (HL) 44) that the amount and quantity of use might prevent a landowner maintaining that it was due to his tolerance, unless he

takes measures to indicate the contrary. However, it is important to note that every case of tolerance must be considered individually in relation to its own circumstances.