Norrie v Magistrates of Kirriemuir

Creation of public rights of way – use as of right by the public for the prescriptive period ·
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Case Report: 1945 SC 302

Key points: Action for Declarator that ground was free of any public right of way - use by persons having privilege of access as opposed to use by the public - sufficiency of evidence - use as of right.

The facts: This Action was raised by Norrie for a Declarator that his ground was free of any public right of way; it related to a single pathway in Kirriemuir, created at first as an access to a number of allotments; privileges of access to these allotments had been originally granted to certain persons; later, however, the pathway became a link between two public places along which a substantial stream of through traffic developed. Considerable traffic had used the path for the prescriptive period, and the question was whether the traffic should be ascribed to public or private use.

Legal arguments: Norrie argued that: (1) use of the path was due to his tolerance; (2) there was a difference between: (a) use by members of the public as such, and (b) use by persons having a privileged right of use - e.g. allotment holders. He maintained that the evidence had proved that only nine named persons had been shown to use the route without a right of privilege to do so; these nine persons might possibly have exercised a public right, but passage by the many un-named users had not been proved to be in exercise of such a right; (3) use by persons who had a privileged right of access could not set up a right of way, and (4) because the path crossed the land of other proprietors who were not parties to the Action, the case could not proceed if these parties were not present. The Magistrates argued that Norrie’s suggestion that the use had been due to his tolerance was negatived by the volume of traffic on the path, many of the public using it never having been granted any right to use it; they maintained that the evidence was inconsistent with tolerance and consistent only with the assertion of a public right.

Decision: The Court rejected all four arguments above. (1) The Court referred to the summary of the law in the 1937 case of Marquis of Bute v McKirdy & McMillan viz: whether the use had been such as might have been expected if the road had been an undisputed right of way; if so, the inactivity of the proprietor in failing to assert his right to exclude the public was not to be ascribed

to his tolerance, but rather to the fact that he acquiesced in, or could not have disputed, the public right. (2) In rejecting this point, the Court said that various classes of members of the public had been identified as users, e.g. factory workers, schoolboys, men going to work, women shopping and so on. If Norrie maintained that these classes had used the route other than as members of the public, he must prove this; the volume of the traffic was held to have been sufficient to set up a public right of way. (3) The Court held that evidence by such persons of use of the continuous passage of the footpath from end to end was valid evidence for this purpose; this followed the decision in the case of Scottish Rights of Way & Recreation Society Ltd v Macpherson (above) in 1887. (4) If the Magistrates could prove end-to-end use of the path, that would establish a right of way; this followed the decision in the case of Nairn v Speedie in 1899 (see below, Part 2.10). The Declarator sought by Norrie was therefore refused.

Comments: This was a long and complicated case, in which much evidence was produced; it is illustrative of the several points shown above but, as a whole, it is a good example of what is required of a proprietor who seeks a Declarator that his land is free of any right of way.

Cases referred to:

(1) Marquis of Bute v McKirdy & McMillan 1937 SC 93

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

(3) Crawford v Menzies (1849) 11 D 1127 (Not in Ken).

(4) Blair v MacFie (1884) 11 R 515 (Not in Ken).

(5) Fraser Tytler’s Trustees v Milton (1890) 17 R 670 (Not in Ken).

(6) Nairn v Speedie (1899) 1 F 635

(7) McGregor v Crieff Co-operative Society 1915 SC (HL 93)

(8) McInroy v Duke of Athole (1891) 18 R (HL) 46

(9) Napier’s Trustees v Morrison (1851) 13 D 1404 (Not in Ken)

(10) Edinburgh Corporation v North British Railway Co. 1904 6 F 620

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