Rhins District Committee of the County Council of Wigtownshire v Cunninghame

Creation of public rights of way – use as of right by the public for the prescriptive period · https://scotways.com/ken/rhins-district-committee-of-the-county-council-of-wigtownshire-v-cunninghame/

Case Report: 19l7 2 SLT 169 (Court of Session).

Key points: Establishment of terminus as public place - partial use - end-to-end use - use as of right or by tolerance

The facts: The local authority asked the Court to declare that a public right of way for pedestrians existed along a track leading from the Glenluce to Stranraer public road to the River Luce and to the seashore and then back to the said public road at another point. The evidence showed that in the past there had been much cart traffic on parts of the route, but the evidence of end-to-end use in recent times related exclusively to pedestrians out for recreation.

Decision: It was held, on the basis of the evidence of end-to-end use, that there was a public right of way for pedestrians only.

Comments: The importance of this case lies in the long-established general principles set out by Lord Sands: the law first ascertains whether a place is public or private before determining whether the public has a right of access to it. The issue is not whether a right of way has been acquired by use for the prescriptive period, but whether evidence of use and the nature of that use, have proved (in terms of the established criteria relating to rights of way) the existence of a right of way. Use by persons not going the whole length of a route cannot establish a right of way for the whole length, or indeed for any right of way if there is no intervening public place; however, if a right of way is once established, anyone may use it, even if he does not go the whole distance. Lord Sands used the Lairig Pass between Aviemore and Braemar as an illustration. As this is perhaps the most famous long-distance right of way in Scotland, his remarks are quoted in full: "If a question of right of way arose, it would be necessary to show traffic from the public road near Aviemore to the public road near Braemar. No amount of traffic from Aviemore to the Pools of Dee and back, or from Braemar to the Pools of Dee and back (these pools not being a public place) would establish a right of way from Aviemore to Braemar. But, if enough through traffic were proved to establish a right of way, provided this were exercised as of right, then the fact that large

numbers of people travel parts of the way without challenge would be a relevant consideration. A proprietor might have tolerated the relatively few athletic persons who carried their packs and made the whole journey, but he might not have tolerated the invasion of the privacy of his sporting domains by the large number who used part of the path unless it were a public one which he could not close."

Cases referred to:

(1) Moncrieffe v Lord Provost of Perth (1842) 5 D 298 (Not in Ken).

(2) Scott v Drummond (1866) 4 M 819

(3) Duncan v Lees (1870) 9 M 274

(4) Jenkins v Murray (1866) 4 M 1046

(5) Keiller v Magistrates of Dunbar (1886) 14 R 191 (Not in Ken).

(6) McRobert v Reid 1914 SC 633