Richardson v Cromarty Petroleum Co Ltd

Creation of public rights of way – use as of right by the public for the prescriptive period ·
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Case Report: 1982 SLT 237

Key points: Prescriptive period - interpretation of 20-year rule - constitution of right of way - quality of use required.

The facts: Richardson raised an Action for Declarator that a public right of way existed over a path on land owned by Cromarty Petroleum Co Ltd ('Cromarty'). In order to succeed, Richardson needed to prove that the path had existed for twenty years.

Legal arguments: Cromarty argued that section 3 (3) of the Prescription and Limitation (Scotland) Act, 1973, which reduces the prescriptive period of use required to establish a right of way from 40 to 20 years, did not do so, and that the period remained at 40 years. Cromarty argued, therefore, that Richardson must prove use for that period in order to succeed.

Decision: The Court conceded that section 3 (3) of the Act, was not ''happily worded'', but nevertheless its intention and effect must be to reduce the prescriptive period to 20 years. Cromarty's argument was, therefore, refuted. As regards the points which Richardson required to prove, the Court held that: (1) the path had existed for 20 years, from 1956 to 1976; (2) it did link two public places, one of these being the foreshore at a place to which the public regularly resorted for recreation and which accordingly fell within the category of a 'public place' (see Darrie v Drummond and Duncan v Lees; (3) the question of the amount and type of public use caused difficulty, because there were various ways of getting to the foreshore, and Richardson required to show that the path in question was used sufficiently to constitute a public right of way; the use to be by pedestrians, and to be for the purpose of recreation, not for other purposes, the rule being that the type of use to be taken into account when assessing the quantity of that use must be limited to the purpose of that use; this use of the path, for going to the foreshore for the purpose of recreation, was allowable, but use for other purposes must be disregarded (see Jenkins v Murray; (4) evidence of sufficient use of the type required had not been proved; a right had not, therefore, been established, and the case failed.

Comments: (a) For practical purposes, Cromarty's argument regarding the length of the prescriptive period, though of technical legal interest, maybe ignored; the length of the prescriptive period required to establish a right of way is 20 years; (b) much more importantly, the case indicates that mere 'use' by the public of a path may not be sufficient in all cases; the quality and the purpose of the use may be the critical point – in this instance, Richardson failed to satisfy the Court that the public's use of the path for recreational purposes was sufficient to establish a right; (c) it also illustrates the point that, when it comes to assessing type and quality of use, each case has to be decided on the basis of its own particular circumstances.

Cases referred to:

(1) Mann v Brodie (1885) 12 R 52

(2) Darrie v Drummond (1865) 3 M 496

(3) Duncan v Lees (1871) 9 M 855

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

(5) Jenkins v Murray (1886) 4 M 1046