Scottish Rights of Way & Recreation Society Ltd v Macpherson

Creation of public rights of way – use as of right by the public for the prescriptive period ·
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Case Report: (1887) 14 R 875 and (1888) 15 R (HL) 68

Key points: Creation of right of way - evidence of public use - nature and quantity of evidence required in remote mountain area - irregular and seasonal use only.

The facts: This was an Action for Declarator of Right of Way from Auchallater, (on the A93 Braemar / Blairgowrie road), via Glen Callater, Jock's Road and Glen Doll to the terminus of the public road at Glen Clova. From the northern terminus at Auchallater to the flanks of Tolmount, the landowner, Farquharson of Invercauld, conceded a right of way; at Tolmount, however, the route entered Macpherson's estate, passing to the west side of Craig Lunkard and descending by Jock's Road (described as ''a steep and very rocky place'') to enter Glen Doll and reach Braedownie in Glen Clova.

Legal arguments: The dispute was whether the way claimed had been used as of right or by the tolerance of the landowner. The SRWRS evidence showed that the route: (1) had been a drovers' road for taking sheep, unsold at the Braemar market, south to the market at Cullow at Kirriemuir; (2) had been used by farmers going south to Clova or north to Braemar, and also occasionally by tourists; (3) was reputed in the district to be a public right of way.

Decision: The decision turned wholly on the evidence, i.e. the law was not in dispute. The Court attached much importance to (1) above, and held that, taking the whole evidence together, a right of way had been established. Decree of Declarator was therefore granted, as sought.

Comments: The case is of interest in that the Court remarked that the evidence was ''by no means extensive'': the route was probably unused in winter, and at other periods it may have been unused for weeks at a time and the driving of sheep took place at most twice a year, but the extent of the use required depended on the nature of the country and the inhabitants' requirements, and must be such as might be expected if the way were public and were admitted to be so by the proprietors. The use which was proved in the Action was ''just what

might have been expected in such a district''.

Cases referred to:

(1) Napier’s Trustees v Morrison (1851) 13 D 1404; 23 Sc Jur 656 (Not in Ken).

(2) Mackintosh v Moir (1871) 9 M 574

(3) Torrie v Duke of Atholl (1852) 1 MacQ 61