Strathclyde (Hyndland) Housing Society Ltd v Cowie

Creation of public rights of way – use as of right by the public for the prescriptive period · https://scotways.com/ken/strathclyde-hyndland-housing-society-ltd-v-cowie/

Case Report: 1983 SLT 61 (Sheriff Court)

Key points: Urban lane - extent of possession (i.e. use) required - types of use appropriate to establishing right - need for end-to-end use.

The facts: A housing society asked the Court to declare that a public right of way existed over a mews lane in an urban area (Westbourne Gardens Lane, in Hyndland, Glasgow). The lane had, for very many years, been in public use, mainly for access to properties entering onto it, by residents and for persons visiting or providing services for them including rubbish collection, also by children at play, and occasionally by learner drivers. Relatively few people travelled the lane from end to end on a continuous journey

Decision: (1) There was no material difference between the common law test of “use as of right, continuously and without interruption" and the statutory test of ''continuous possession openly, peaceably and without judicial interruption''. (2) As the lane was in a densely populated urban area, it was necessary to demonstrate a substantial amount of possession (i.e. use) of the right of way. (3) The possession (i.e. use) proved was not of the amount, type or continuity necessary, in particular, because there was no sufficient proof of members of the public using the alleged right of way from end to end on a continuous journey for appropriate purposes.

Comments: The case contains a comprehensive review by the Sheriff Principal of the law of Public Rights of Way in Scotland. In this review, the Sheriff specifies 26 cases, most of which are contained in this publication. The case is useful for anyone attempting to evaluate the evidence in a disputed right of way case in an urban area.

Cases referred to: There were a large number of cases cited, including the following:
(1) Greg v Magistrates of Kirkcaldy (1851) 13 D 975 (Not in Ken).
(2) Cuthbertson v Young (1851) 14 D 300
(3) Hay v Earl of Morton (1861) 24 D 116
(4) Burt v Barclay (1861) 24 D 218

(5) Stewart v Greenock Harbour Trustees (1864) 2 M 1155 (Not in Ken).

(6) Macfie v Scottish Rights of Way Society (1884) 11 R 1094

(7) Macpherson v Scottish Rights of Way Society (1888) 15 R (HL) 68