Dorset decision

House of Lords rules in Ramblers' favour

After an eight-year battle, the Ramblers' Association has won its first-ever case in the House of Lords. The result in our favour will have long-lasting meaning in the ongoing fight to save our footpaths. Footpaths campaigner Alexis Badger reports.

The Ramblers' footpath team celebrates the House of Lords' judgement.

The walking public had great cause for celebration in July when the Law Lords, in a case brought by the Ramblers' Association, unanimously brought to a halt a damaging trend of adverse legal precedents which had been causing the loss of valuable, well-used footpaths across the nation.

The law (section 31 of the Highways Act 1980 if you want to get technical!) always used to be – and should have stayed – that where the public had used a path for more than 20 years, and where the landowner did not challenge users by saying that it wasn't a right of way, public rights were deemed to have come into existence.

But in 1999, Mr Justice Dyson "put the boot in", as our counsel, George Laurence QC, termed it in his opening speech before the Lords, when he ruled in the Dorset Case that a landowner could defeat a claim that a path had become a right of way even when he had never challenged public use. All the landowner had to do was retrospectively assert that he had never intended to dedicate the way to the public after all. This was despite a path's history of being used, unchallenged, in the past.

We didn't accept that parliament intended the law to be so loaded against the public – in particular because the law was initially made primarily to make public rights of way easier to establish, not harder. Also, the law already provides a number of alternative ways for landowners to prevent a right of way from coming into existence if they feel such a blockage is legitimate. Surely, we said, if parliament has prescribed methods of challenge, then shouldn't they be used by landowners rather than subverting a law that exists in fact to protect paths?

Avid followers of all things judicial will know that cases costing hundreds of thousands of pounds often hang on the interpretation of a single word within a sentence, and our case was no different. In the end the matter seemed to turn on the meaning of the word 'intention', and the way in which the intention of a landowner is weighed up against evidence of public use of a path in coming to a decision about whether public rights should be recorded. Shouldn't they be used by landowners rather than subverting a law that exists in fact to protect paths?

The Law Lords agreed with us that the proper meaning of 'intention' had been misinterpreted in recent judgements, and that it should have been clear all along that the word was included to allow the operation of a necessary legal fiction: that in order for the public to gain something, the mechanics of the law require someone to have agreed to give it away.

Lord Scott called intention "often a purely imaginary thing" and Baroness Hale made the point nicely when she said: "If the public enjoy the way as of right and without interruption for 20 years, the statute tells us what an objective outsider is to assume – that the landowner intends to dedicate it as a highway."

Because of our unprecedented victory in the highest court in the land, made entirely possible by the generous donations of Ramblers members, future claims for the recording of paths will be decided on user evidence balanced against what the landowner actually did, not on what they say they meant to do, and this will protect countless paths from being lost for ever.

WHAT NOW?

If there is a path in your locality which is not shown on the definitive map and which has been used by the public, as of right, for a period of at least 20 years (or shorter in some circumstances) then consider making an application to have it recognised. For full advice on how to go about this visit www.ramblers.org.uk/footpaths/action/claimindex.html or telephone ☎ 020 7339 8500 and ask for Rights of Way Advice Note 5, How to claim a public right of way.

CASES IN POINT

Godmanchester, Cambridgeshire: Godmanchester Town Council made an application to add a path to the definitive map. The path ran around three sides of a former gravel pit, now a small lake. The map already showed a footpath along one of its sides and the application sought to complete the circuit. The inspector found that there had been 20 years' use before the right had been called into question, but the landowners produced a letter to the local planning authority in which they complained of pedestrian trespass. Although the letter wouldn't have come to the attention of path users, or satisfied any of the other methods of showing no intention to dedicate, the inspector felt it was sufficient evidence in the light of the Dorset judgement. She refused to confirm the order. The Court of Appeal upheld her decision.

Aldworth and Streatley, West Berkshire: 60-odd members of the public walked this strategic path unhindered for 75 years. In 1992, a 'No footpath' sign challenged their right. Leslie Drain, RA local representative, made a statutory claim. The landowners objected; it came before an inquiry inspector who found that the 'deemed dedication' tests were satisfied, but for one thing: for part of the time, a tenancy agreement existed containing a (standard) clause telling the tenant 'not to allow any footpaths to be created'. Users knew nothing of it, and use continued; but it ousted the claim.

In both cases the Law Lords have now ruled that this kind of evidence should never have counted. The matter must be redetermined.

TIMELINE

Pre-1932
No fixed period is laid down for which a path must be used before it's recognised as public; consequently many claims fail. Campaigning to define 'sufficient period'. Private Members' Bills introduced into Commons to bring this about, 1906 and every year 1927-1931. All defeated by landowning lobby.

1932
Rights of Way Act 1932 establishes 20 years as period of use after which a path is deemed a public right of way, unless sufficient evidence of no intention by landowner to dedicate. Until 1999, it is understood that 'sufficient evidence' of no intention means evidence directed at users of the way.

1956
Fairey v Southampton County Council case seemed to confirm view of evidence having to be directed at users of the way.

1988
Judge in Regina v Secretary of State ex parte Billson rules otherwise. All a landowner need do is something 'overt and contemporaneous' – path users needn't know. A new doctrine.

1999
Regina v Secretary of State ex parte Dorset County Council. Mr Justice Dyson decision confirms that evidence of no intention to dedicate need not be aimed at the path users. Applications for recognition of rights of way begin to fail.

2003
Applications for public rights of way to be added to definitive map at Godmanchester, Cambridgeshire, and Aldworth and Streatley, in West Berkshire, founder on this point alone. RA takes on both as joint test cases.

2004
Cases heard in Divisional Court. We lose: the statute does not say anything about direct challenges to the public. RA seeks leave to go to the Court of Appeal.

2005
Court of Appeal against us too, and refuses leave to appeal to House of Lords.

2006
RA applies for leave to appeal to Judicial Office of House of Lords. Appeal Committee agrees we have identified an arguable point of law of general public importance. (Most applications for leave to appeal are refused.)

May 2007
Appeal heard by the Law Lords.

June 2007
Law Lords unanimously allow RA's appeal.