Ellice’s Trustees v Commissioners for the Caledonian Canal

Rights of way – land owned by statutory undertakers or the Crown · https://scotways.com/ken/ellices-trustees-v-commissioners-for-the-caledonian-canal/

Case Report: (1904) 6 F 325

Key points: Public passage over ground owned by statutory body - acquisition of right of way by prescription - acquisition of right of way by express grant - powers of statutory body.

The facts: By Acts of Parliament in 1803 and 1804, powers were given for the construction and maintenance of the Caledonian Canal. The canal, which passes through the Estate of Invergarry, was opened in 1822 and, in its passage through the Estate, it separated a certain strip of land from the rest of the estate and from the public road. In 1814, the Estate was paid a sum of money as compensation for the land taken, and the Commissioners undertook to provide four bridges ‘conveniently situated’. In the conveyance of the land, dated 1815, to the Commissioners, the Estate proprietor accepted that he was satisfied with the accommodation provided. In the event, only two of the bridges were built and a further sum was therefore paid to the estate in respect of the two not built. In exchange, the Estate discharged the Commissioners of all claims which they might have under the law. In 1893, the Commissioners constructed a weir in the bank of the canal to permit the escape of floodwater and to prevent injury to the bank. The weir intersected the towpath which had been used since the construction of the canal by the Estate and by their tenants as an access to several lands. Although the Act of 1804 gave powers to the owners of lands affected by the canal to erect additional bridges at their own expense, the Estate asked the Commissioners to erect a new bridge, at their (the Commissioners’) expense, at the point where the towpath was cut.

Decision: In an Action of Declarator by the Estate against the Commissioners, it was held that: (1) looking at the terms of the conveyance and subsequent discharge, the Commissioners were under no statutory obligation to execute any further works to provide more convenient communication between different parts of the estate; (2) no servitude right of way or access had been implicitly reserved by the Estate in the conveyance to the canal authorities; (3) any use that the Estate had made of the towpath could be described as a tolerance on the part of the canal authorities and

could not form a foundation for prescription; (4) as it would have been ultra vires (i.e. beyond the legal powers) of the Commissioners to make an express grant of servitude right of way along the towpath, an effective grant could not be inferred from any such use as had been made; and (5) even if a limited right of use of the towpath had been acquired by prescription, such a right could not prevail against the statutory rights of the canal authorities. The construction of the weir in question was, therefore, within their rights and duties.

Comments: This case is dependent upon the terms of the particular Acts relating to the canal but contains important comments upon the position of statutory authorities in respect of the acquisition or grant of rights of way.

Cases referred to:

(1) Grierson v School Board of Sandsting (1882) 9 R 437 (Not in Ken).

(2) Rome v Hope-Johnston (1884) 11 R 653

(3) Mann v Brodie (1885) 12 R (HL) 52

(4) Thomson v Murdoch (1862) 24 D 975

(5) Ayr Harbour Trustees v Oswald (1883) 10 R (HL) 85