Kinross County Council v Archibald

Rights of way – land owned by statutory undertakers or the Crown · https://scotways.com/ken/kinross-county-council-v-archibald/

Case Report: 1900 VII SLT 305

Key points: Public passage over ground owned by statutory body - power of statutory body to grant rights of way over ground used in their undertaking - use by tolerance - use as of right.

The facts: Kinross County Council raised an Action for Declarator of a public right of way over land of the Leven Trust (represented by Archibald), a statutory body formed to deal with the drainage of land at Loch Leven. A new cut (drainage channel) had been formed in 1830, in replacement of an older channel, and a pre-existing track had been severed as a result of the necessary works. There was a cart road alongside the line of the new channel, and this had been used by the public. It was argued for the Trust, on the authority of preceding cases, that the Trust could not competently grant a servitude right of way over land required for their undertaking. The Lord Ordinary held that it was not established law that it was ultra vires (i.e. beyond the legal powers) of a statutory body to grant a right of way over land required for statutory purposes if such a grant was not inconsistent with the terms of the Statute and did not prevent the due fulfilment of its purposes. Evidence was then led, and the Court held, that the County Council had not proved that the track had been used as of right, but merely by tolerance of the Trustees; thus no public right of way had been proved.

Comments: Although the claim for declarator of a right of way failed, it could have succeeded if other conditions had been met, and this case is in line with Lord Keith's comments in British Transport v Westmoreland County Council.

Cases referred to:

(1) Magistrates of Oban v Callander & Oban Railway (1892) 19 R 912

(2) Ayr Harbour Trustees v Oswald (1883) 10 R 472 and 10 R (HL) 850

(3) Caledonian Railway v Turcan (1898) 25 R (HL) 1 (Not in Ken).

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

(5) Napier's Trustees v Morrison (1851) 13 D 1404 (Not in Ken).