Leith-Buchanan v Hogg

Creation of public rights of way – need for public place end points · https://scotways.com/ken/leith-buchanan-v-hogg/

Case Report: 1931 SC 204

Key points: Public rights on banks of non-tidal navigable river - public rights on shore of loch - commercial rights on shore of loch - public rights on tidal foreshore.

The facts: This case related to a claim by Hogg that he was entitled to use a part of the shore of Loch Lomond, which belonged to Leith-Buchanan, for his (Hogg's) boat-hiring business; as such, it is not strictly a right of way case, but its relevance is commented on below.

Decision: The banks of a navigable non-tidal river or loch are the property of the riparian owners. A navigable non-tidal river or loch has no foreshore, and the public has none of the rights it enjoys on the foreshore of the sea. Any public rights on a navigable river or loch are therefore only those that are incidental to navigation of the river or loch itself.

Comments: The foreshore (i. e. part of the shore of the sea which is, of course, both navigable and tidal) is, generally speaking, a 'public place', but it is only a 'public place' as a right of way terminus if the public resort to it ''for some definite and intelligible purpose'' (see Duncan v Lees, re Kinkell, on the Fife coast). The River Leven, which is navigable but non-tidal, flows from Loch Lomond to the sea. In this case, both parties assumed that Loch Lomond was an extension of the navigable but non-tidal River Leven. The Court, however, while accepting that assumption for the purposes of this case only, seriously doubted whether it was legally correct. According to early legal authorities, the position of 'public rivers' was to be distinguished from that of 'private lochs'. The Court was not satisfied that the same considerations applied to both merely because a navigable river issued from a loch. A navigable non-tidal river, such as the River Leven, has no foreshore, nor has Loch Lomond; it followed from the above assumption that on the banks of the River Leven and of Loch Lomond the public has none of the rights it enjoys on the foreshore at the sea. In a navigable non-tidal river such as the Leven, the public's rights are those incidental to navigation, and in this case, with reference to Loch Lomond, again on the above assumption, the public's rights were similarly limited. The banks of a navigable non-tidal river are the property of the riparian owners; likewise, again on the same assumption, Loch Lomond's shores and banks are private too. It follows from the above that, for rights of way purposes, the positions in law of

the sea’s foreshore and the banks of a freshwater loch are very different. It may be difficult to establish that a place on the shore of an inland loch is a ‘public place’, whereas, to establish the same on the foreshore, where a ‘public place’ may be established by recreational use, could be much easier.

Although the court expressed doubt about whether navigation rights could apply on inland lochs, the Wills Trustees case, above, appears to accept that navigation rights may apply in respect of inland lochs.

Cases referred to: A number of cases were referred to, of which only the following is in Ken: Duncan v Lees (1871) 9 M 855.