Lord Donington v Mair

Obstruction of rights of way · https://scotways.com/ken/lord-donington-v-mair/

Case Report: (1894) 21 R 829

Key points: Pedestrian right of way over private carriage road - right of proprietor to erect gates to prevent carriage traffic - provision of pedestrian gates and vehicular gates - whether gates an obstruction of pedestrian right of way.

The facts: Lord Donington erected locked gates at either end of a public right of way through his estate, these gates being designed to prevent the passage of carriages and other vehicles, but he also placed two unlocked swing gates alongside. These swing gates presented no obstacle to pedestrians. The locked gates were broken down, and Lord Donington sought an order for re-erection of the gates and an Interdict against Mair from interfering with the gates.

Decision: The Court held, by a majority, that the proprietor of a road, which was suited for carriage traffic, and over the whole of which the public had been entitled to free use for foot passengers only, was entitled to erect, and to keep locked, gates at each end of the road, across the carriageway, for the purpose of preventing any public traffic along the road other than that of foot passengers, swing gates having been left unlocked at either end, sufficient to permit entry and egress of foot passengers.

Opinion: In the leading opinion, the Lord Justice Clerk stated that ''The presence of swing gates, giving an opening of three feet when swung back, could not be held to be an illegal obstruction'', and that ''Anything which covers up and prevents the unobstructed use of the ground, subject to the right for its exercise, must be justified by the owner. He may do so by shewing that what he is doing is required for the proper working of his estate, as by dividing the fields or the like, and that it is an immaterial interference with the rights of.....the public. The case of stiles and a footway is an illustration of this. They are obstructions, but may be put up as not interfering materially with the right, and as being requisite for the reasonable working of the owner’s estate.'' He held it as established law ''...that a right to pass from one place to another, over private property, is one which does not imply the power to prevent the proprietor from beneficial use and protection of his own property. The proprietor is not to be held to obstruct the right by the course he has taken, which practically leaves the whole road available to the foot passenger, and only requires him at

the moment of entering and leaving the private property of the Pursuer (i.e. the owner, Donington, in this case) to do so in such a manner as does not injure him, but enables the Pursuer to protect his property from illegal trespass by other classes of road traffic.''

Comments: This is another leading case defining what can be categorised as an obstruction of a public right of way. It illustrates the Court’s desire to balance the right of the public to free use and enjoyment of a right of way with the landowner’s right to make legitimate use of his land and to prevent unauthorised access.

Cases referred to:

(1) Wood v Robertson (1809) FC (Not in Ken).

(2) Rodgers v Harvie (1829) 7 S 287

(3) Kirkpatrick v Murray (1856) 19 D 91

(4) Hay v Earl of Morton's Trustees (1861) 24 D 116

(5) Home Drummond (petition) (1848) 6 M 896

(6) Sutherland v Thomson (1876) 3 R 485