McGavin v McIntyre

Relationship of public rights of way with private servitude rights of way · https://scotways.com/ken/mcgavin-v-mcintyre/

Case Report: (1874) I R 1016

Key points: Private right of way - private and public rights concurrent - right of way over the former public road - whether lost by the closure of the public road.

The facts: A conveyance of a mill was granted in 1722 "with free-ish (exit) and entry and sufficient ways and passages of twelve-foot breadth besouth the lead of the said miln". By 1872, the only road to the south of the mill lade convenient to the mill was one under the management of the local Roads Authority for the county. There was no evidence to show at what period it had become a county road. The Roads Authority, under their statutory powers, conveyed the solum of the land (the ground forming the road) to the proprietor of the adjoining ground through which it passed, receiving another road in exchange.

The proprietor of the solum of the road petitioned for an Interdict against the owner of the mill, to prevent the owner of the mill from using the former road.

Decision: It was held that a right of access in the line of the road was included in the grant of 1722, as a necessary adjunct of the mill, and that the Roads Authority had no power to interfere with it.

Comments: The case highlights the situation whereby a road may be a public highway and the subject of a private right of way at the same time, and the loss of such road’s status as a public road need not necessarily extinguish private servitude rights of way. Similarly, when a road is stopped up under a statutory procedure, the statutory authority may provide, in the stopping up order, for retention of some public rights, e.g. for a continuing pedestrian public right of passage. In suitable cases, ScotWays has made representations that have ensured such continuing public right of passage.

Cases referred to:
(1) Galbreath v Armour (1845) 4 Bell’s Appeals 374 (Not in this publication).
(2) Smith v Knowles (1825) 3 S 652 (Not in this publication).