Sutherland v Thomson

Obstruction of rights of way · https://scotways.com/ken/sutherland-v-thomson/

Case Report: (1876) 3 R 485

Key points: Gates for control of stock - gates as obstruction to public - Interdict to prevent destruction of gates erected on public footpath - public rights over kirk road.

The facts: Sutherland erected two small swing gates at either end of a grass field, through which ran a footpath to Tibbermuir Church. The object of the gates was to prevent stock grazing in the field from straying, whilst still allowing the parishioners to use the path on Sundays. Thomson (and others) had broken down the gates on several occasions, and Sutherland sought an Interdict and damages against Thomson. On appeal, the Court of Session held that a proprietor was entitled to put swing wicket gates across the footpath for grazing purposes, provided that the gates were not to any material degree injurious or obstructive to the public in the free use of the path. Interdict was granted against Thomson, with an order of damages to cover the cost of re-instating the gates.

Decision: In issuing the judgement, Lord Neaves posed the question as to ''whether there is any reasonable ground in the case of a public footpath for depriving the proprietor of the privilege of protecting his property from unnecessary injury by putting up gates''. He answered this question in the negative. Lord Ormidale was of the opinion that ''the general right of the owner (or the tenant farmer) to erect gates, provided they do not interfere (in a fair and reasonable sense of that expression) with the public right of passage is...beyond dispute''. Lord Gifford took the view that ''the proprietor of the servient tenement (i.e. the lands over which the footpath runs) may put up such swing gates, stiles, or turnstiles as may be necessary for fencing his property, provided they do not materially interfere with the exercise or enjoyment of the right of way which the occupants of the dominant tenement (in this case, the public; the ‘dominant tenement’ meaning the land which is benefited by the servitude in the case of private servitudes) can claim'', and he extended this principle to cover the erection of swing gates or stiles or wickets across a public footpath.

Comments: The essential principles established by this case, and followed in all subsequent cases, are that: (1) the obstruction (e.g. gate or stile) must not materially prejudice public

enjoyment and use of the public right of way; (2) the obstruction must be shown to be necessary in the interest of the land through which the public right of way passes (e.g. to prevent grazing stock from straying, protect crops, or the like); (3) the public right of way must be used in a manner which gives the owner of the land the best use of his property and causes the least possible burden or inconvenience.

Cases referred to:

(1) Wood v Robertson (1809) FC (Not in Ken). This case related to obstructions of a servitude (i.e. private) road rather than a public right of way, but the principles involved were regarded as equally applicable to obstructions of a public highway.

(2) Lord Donington v Mair (1894) 21 R 829

(3) Galbreath v Armour (1845) (HL) 4 Bell’s Appeals 374 (Not in Ken).

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

(5) Hay v Earl of Morton (1861) 24 D 116

(6) Marquis of Breadalbane v McGregor (1848) 7 Bell’s Appeals 43 (Not in Ken).