Thomson v Murdoch

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

Case Report: (1862) 24 D 975

Key points: Private servitude right of way - public servitude right of way - definitions - distinction.

The facts: This was an appeal at the instance of Thomson against a previous Sheriff Court decision. Murdoch and others were the Trustees for the Roman Catholic congregation of Dumbarton, as proprietors in trust of certain lands within the burgh on which a chapel and other buildings had been erected. Thomson had erected certain buildings on a road lying adjacent to the church property. The Church Trustees contended that the land on which the road was situated was subject to a servitude right in their favour which they had enjoyed ‘from time immemorial’, and they petitioned the Court to require that Thomson should remove “all buildings, walls, fences and other erections'' therefrom. The decision in the Sheriff Court had been that the road in question was a public road and that the Trustees were entitled to possession.

Decision: On appeal to the Court of Session, it was held, on the interpretation of the legal written case as put forward by Thomson, that the case related purely to a private servitude right and that the Sheriff's judgement had been unsound. In his judgement, Lord Deas said "The question dealt upon in argument - whether the right of public road is of the nature of a personal servitude or a right of property in the Crown for the behoof of the public - has in my opinion nothing to do with the question now before us, because, even assuming the right to be of the nature of a personal servitude, there can be no doubt that, when we speak of a servitude road and of a public road in judicial proceedings we usually mean two distinct things and the distinction is in practice perfectly well understood. In applications for Interdict, for Actions of Declarator and so on, we do not call a public road a servitude road, and a party who speaks of the one runs no risk of being supposed to mean the other. The right of servitude of road is different from a public road in many respects. In one case, the title is in every member of the public, whereas, in the other case, the title is only in the owner of the dominant tenement (i e only the person entitled to exercise the servitude right). Secondly, Lord Deas said that the effect of the action is different, in that a judgement in the case of a servitude road affected only the parties to the actual legal proceedings and each of their successors as the owners of the property benefited by and the property burdened with the access, whereas a judgement in an action at the instance of any member of the public for the vindication

of a public road affected the whole public. He stated that the very nature of the two rights was essentially different - a right of servitude road excluded the public, whilst a right of public road admitted the public.

Comments: This case deals with technical points of legal procedure, relating to the terms in which Thomson’s case was stated, but nonetheless contains relevant statements by the Appeal Court judge on the difference between private and public rights of way. The final decision on the point at issue between the parties is not disclosed.

Case referred to: Galbreath v Armour (1845) 4 Bell’s Appeals 374 (Not in this publication).