Wills Trustees v Cairngorm Canoeing and Sailing School Ltd

Creation of public rights of way – use as of right by the public for the prescriptive period · https://scotways.com/ken/wills-trustees-v-cairngorm-canoeing-and-sailing-school-ltd/

Case Report: 1976 S.L.T. 162; 1976 SC (HL) 30

This is the leading Scottish case on navigation law. It established that there was a public right of navigation on the River Spey, a non-tidal river, and sets out the principles which apply in relation to such a right.

The facts: The Wills Trustees owned lands and held the salmon fishing rights on both banks of the River Spey, along a considerable stretch where the river was non-tidal. The Sailing School organised courses of instruction in canoeing and sailing from Loch Insh, a small loch considerably further upstream, through which the River Spey flowed. Parties of canoeists from the Sailing School traversed the Knockando stretch of the river ten to twelve times each year during the summer season. The Wills Trustees claimed that their fishings at Knockando had been adversely affected by the passage of these canoes and they sought a Declarator that they had the exclusive right of navigation on the stretch of river flowing through their lands, and also sought Interdict against the Sailing School, maintaining that the Spey was a private river.

Decision: It had been proved that from the 17th century until the end of the 19th century, there had been a practice of floating timber and other commodities down the Spey. This practice ceased after about 1885 and there was no general navigation in the Spey until the 1920s, when canoeing began, followed by a significant further increase after the Second World War. The House of Lords held: (1) that the Spey was a public navigable river; (2) that the fundamental requirement for a public right of navigation in a non-tidal river was that it must be navigable as being suitable for the passage of vessels or rafts so as to provide a means of communication and that it must be proved that there had been habitual regular use from time immemorial (at least 40 years); (3) that the right of public navigation was not a servitude and could not be lost by non-use; (4) that the theoretical basis of the public right of navigation was that the Crown had not and could not have alienated the right to use the river for navigation but had retained it in trust for the public; (5) that it was not strictly analogous to a right of way on land and did not require to run between two

public places; (6) that in relation to a public right of navigation on a non-tidal river, the question of public interest or benefit was irrelevant; and (7) that the public right of navigation in the River Spey which was established in 1783 and was still in existence, extended to permit any operation by a vessel which could be reasonably described as a boat, including a canoe.

Comments: This is the leading case on the subject of the public right of navigation in a non-tidal river. The report extends over 140 pages of the law report, and it is not possible here to give any more than a brief outline of the case; for anyone with an interest in the subject, the whole report is required reading, as it contains a lengthy review of the facts and the law, with copious reference to legal authority.

Public Rights of Way and Private Servitude Rights of Way

This is a House of Lords decision is also of interest to those interested in rights of way on land through the statements by Lord Fraser (a Scottish judge sitting in the House of Lords) on the differences between Scots and English Law on the subject of implied grant - a right of way in Scots Law being constituted by use and not by implied grant.

See also:

Lauder v MacColl.

Midlothian Council v Crolla.