

*Godwin* (2). These sums can be retained and are not repayable to the trustee.

*Tindale Davis* : There will, of course, be an appeal from the decision of this court to the Court of Appeal (*Ex p. Dawes* (3) ).

FARWELL, J. : That is of right, and you may then be able to open up questions (ii) and (iii).

Solicitors : *Solicitor to the Board of Trade* (for the Official Receiver) ; *Wallington Fabian & Co.* (for the respondents).

[Reported by CHARLES E. EDEN, ESQ., Barrister-at-Law.]

## MERSTHAM MANOR, LIMITED v. COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Hilbery, J.), May 22, 1936.]

*Highways—Dedication—Evidence—Rights of Way Act, 1932 (c. 45), s. 1—Costs—Public Authorities Protection Act, 1893 (c. 61), s. 1 (b).*

The public had for forty years used a roadway at Coulsdon and, though there was some evidence of people being stopped or turned away, it was clear that in the majority of cases it had been used as a public highway without challenge. The owner had acquiesced in its inclusion in a town planning scheme as a public highway. No notice had been placed upon the way or served upon the local authority. No fence or gate had been erected to prevent its use before the end of 1934, and it was the removal of a fence or gateway then erected that was complained of in this case as an act of trespass :—

HELD : (i) upon the evidence the roadway had been dedicated and used as a public highway.

(ii) "actually enjoyed by the public as of right" in Rights of Way Act, 1932, s. 1 (1), means actually enjoyed by the public as of right, and that the exercise of such right has been actually suffered by the owner for the period of 20 years.

(iii) "as of right" in the same subsection means in the exercise of a right vested in the public and not by permission of the owner from time to time given.

(iv) "without interruption" in the same subsection means without actual and physical stopping of the enjoyment of the right.

(v) the defendants were entitled under the Public Authorities Protection Act, 1893, s. 1 (b) to costs to be taxed between solicitor and client.

**[EDITORIAL NOTE.]** The interest in the present case lies in the fact that it is the first case decided upon the question of dedication of a public way since the passing of the Rights of Way Act, 1932. The learned judge deals in detail with the construction of sect. 1 of that Act, and compares it with the similar provisions of the Prescription Act, 1832, and considers how far the authorities decided upon that Act are applicable to the recent statute. The owner had not availed himself of the provisions for giving notice to the local authorities and depositing plans and declarations with them, so that these provisions of the Act could not be considered.

FOR THE DEDICATION OF HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 223-236, paras. 269-285 ; and FOR CASES, see DIGEST, Vol. 26, pp. 293-311, Nos. 245-430. FOR THE RIGHTS OF WAY ACT, 1932, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, p. 191. FOR THE PRESCRIPTION ACT,

1832, see HALSBURY, Hailsham Edn., Vol. 11, pp. 303-309, paras. 549-557, and DIGEST, Vol. 19, pp. 67-75, Nos. 388-449; and HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 5, p. 823.]

Cases referred to :

- (1) *Folkestone Corpn. v. Brockman*, [1914] A.C. 338; 26 Digest 284, 189.
- (2) *Mann v. Brodie* (1885), 10 App. Cas. 378; 26 Digest 281, 177.
- (3) *Poole v. Huskinson* (1843), 11 M. & W. 827; 26 Digest 286, 194.
- (4) *Macpherson v. Scottish Rights of Way & Recreation Society* (1888), 13 App. Cas. 744; 26 Digest 295, 266.
- (5) *Hollins v. Verney* (1884), 13 Q.B.D. 394; 19 Digest 69, 399.
- (6) *Smith v. Baxter*, [1900] 2 Ch. 138; 19 Digest 77, 466.
- (7) *Cooper v. Straker* (1888), 40 Ch. D. 21; 19 Digest 130, 876.
- (8) *De La Warr (Earl) v. Miles* (1881), 17 Ch. D. 535; 11 Digest 10, 78.
- (9) *Flight v. Thomas* (1840), 11 Ad. & El. 688; 19 Digest 129, 864.
- (10) *North Metropolitan Tramways Co. v. London County Council*, [1898] 2 Ch. 145; 38 Digest 131, 966.
- (11) *Bostock v. Ramsey Urban Council*, [1900] 2 Q.B. 616; 38 Digest 131, 964.

ACTION to restrain acts complained of as trespasses committed by the defendants, but intended to determine whether a certain roadway at Coulsdon, Surrey, is a public highway or a private road. The facts are fully referred to in the judgment.

*W. Marshall Freeman* and *A. W. Nicholls* for the plaintiffs.

*Sydney G. Turner, K.C.* and *Erskine Simes* for the defendants.

HILBERY, J. : In this case the plaintiffs are the owners of an estate in the parish of Coulsdon, Surrey, which comprises land originally part of a farm known as Woodplace Farm. There runs over this land a roadway beside a piece of woodland known as Three Cornered Shaw. The land over which the roadway runs is situate on the west side of a public highway known as Woodplace Lane, and is bounded on the west by the Southern Railway line from London to Brighton. The question in dispute between the parties is whether this roadway is, as the plaintiffs contend, a private roadway or is, as the defendants contend, a public highway.

The roadway in question is conveniently shown upon the map marked "B" traced from the Ordnance Survey map of 1868. At its southern end the roadway opens on to what is conceded to be a public way leading from the main London and Brighton road up to the Star Inn on the west side of the railway, thence across the Star Bridge over the railway, round a piece of woodland to the south called Petershole Shaw, passing by the south end of this roadway in question and continuing as a foot-path between the south end of the woodland called Three Cornered Shaw, and the north end of the woodland called Petershole Shaw, and thence as a public footway only crossing a field, No. 403, and another field, No. 414, and leading out on to Woodplace Lane at a point almost opposite Woodplace Farm.

The plaintiffs say that the defendants, who are the highway authority for the district in which this roadway is situated, wrongfully claim to use the road in question as a public highway and threaten, and intend to repeat, acts which the plaintiffs say are acts of trespass. The defendants justify those acts, asserting that they are, as they are conceded to be, the highway authority for the district charged by the Local Government Act, 1894, with the duty of protecting all public rights of way within their district and preventing as far as possible the stopping-up or obstruction of any such right of way, and that the roadway in question is a public highway.

The acts of trespass of which the plaintiffs complain are the removal by the defendants of a gate and gate-post at the northern end of the roadway in question, where it opens out on to Woodplace Lane, and a fence at the southern end of the roadway, where it opens on to the footway leading from the Star Bridge along the north side of Petershole Shaw. It is conceded that, if the roadway in question is properly to be considered to be a public highway, the removal of the gate and fence in question by the defendants was an act done by them in pursuance of their duties as the highway authority and was an act which they were required to do by law. The only issue which has therefore to be decided by me is whether the roadway in question is a public highway. In the circumstances it was agreed that the burden of proof was upon the defendants.

The defendants put their case in two ways: First, they contend that the evidence in the case should be held to establish at common law that this roadway is a public highway; secondly, they say that their evidence establishes that this should be deemed to be a roadway dedicated as a public highway under the Rights of Way Act, 1932. There is not, I think, any dispute between the parties as to what the common law requires in order that the defendants may be said to have established that this roadway has become a public highway; nor do I think there is any serious dispute between the parties (except, perhaps, with regard to one matter) about what the law requires if I am to find that this should be deemed to be a public highway under the Rights of Way Act, 1932.

The defendants accept that at common law the burden is upon them to show a long-continued user in such circumstances that an inference should be drawn from it that the owner of the land has intended to dedicate the roadway to the public for their use. From one of the several cases cited to me I take a passage which, I think, as succinctly as possible expresses what the law is. I quote from LORD KINNAR'S speech in the case of *Folkestone Corporation v. Brockman* (1), at p. 352:

The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases. and whether it will import a presumption of grant

or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by LORD BLACKBURN in *Mann v. Brodie* (2). He begins by citing the doctrine laid down by PARKE, B., in *Poole v. Huskinson* (3): "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more." And then he adds more particularly with reference to the effect of user, that "where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner, whoever he was."

As was observed by LORD KINNEAR in his speech in the case I have already cited in dealing with this question from the common law point of view :

The points to be noted are, first, that the thing to be proved is intention to dedicate, and, secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee.

And he goes on at p. 353 to quote with approval this passage from the speech of LORD HALSBURY, L.C., in *Macpherson v. Scottish Rights of Way Recreation Society* (4) :

The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public.

In considering the evidence in this case I have applied those principles and borne in mind the further observation to which LORD KINNEAR directs attention, namely, that the question is whether such user as has been proved is to be ascribed to tolerance or right.

In the second place the defendants, as I have said, base their case upon the Rights of Way Act, 1932. They contend that both under sects. 1 and 2 they have satisfied the requirements of the Act. Sect. 1 provides as follows :

(1) Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way. (2) Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.

A consideration of the evidence from the point of view of whether or not it establishes a case for the defendants under the Rights of Way Act, 1932, requires, I think, that I should first decide what it is that that Act requires should be established by evidence before the way shall be deemed to have been dedicated as a highway. Sect. 1 (1), as I have pointed out, enacts that where a way such as is therein referred to, and such as is the one in dispute in this action, has been

actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.

In the first place it is necessary to decide how the words "actually enjoyed by the public as of right" are to be construed. These words, it was pointed out to me, are reproductions of the language used in the Prescription Act, 1832. As used in that Act they have been the subject of judicial interpretation, though I cannot find that they have been the subject of judicial interpretation in their context in the Rights of Way Act, 1932. When considering these words as used in the Prescription Act, LINDLEY, L.J., delivering the judgment of the Court of Appeal in *Hollins v. Verney* (5), at pp. 308, 309, said :

Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land, over which the way is enjoyed ; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it for the same period. Moreover, as the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption. . . . The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury.

That language seems none the less applicable where, as here, the actual user which has to be considered is by members of the public generally and not by some one individual in particular. Moreover, in the Prescription Act the expression is used in connection with a topic very similar to that with which the Rights of Way Act is dealing in sect. 1. I think it is right, therefore, to interpret those words as involving that he who asserts the right must establish as a matter of fact on the one hand the actual enjoyment of the right by the public as of right, and on the other hand the actual suffering of the exercise of that right by the landowner for the full period of twenty years. I take the word "enjoyed" to mean, as STIRLING, J., said in *Smith v. Baxter* (6), at p. 144 [quoting the words of KAY, L.J. in *Cooper v. Straker* (7)], "having had the amenity or advantage of using."

In the second place, what is the meaning of the qualification upon the actual enjoyment by the public expressed in the Act by the words "as of right"? Speaking of the same qualification in the Prescription Act, in *Earl De La Warr v. Miles* (8), at p. 591, BRETT, L.J., said :

The true interpretation of those words "as of right" seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission. If he shews that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing that he had a right to do, whether the lord said "You may do it" or not; he has proved all that it is necessary for him to prove.

It is the requisite quality of the act, not merely the act itself, which is here defined. It is easier for me to appreciate the presence of those words in the Prescription Act, dealing as it does with whether rights have been acquired in respect of one tenement and against another because of acts done over a period by owners of the one tenement, than their presence in the Rights of Way Act, 1932, dealing with the acts of members of the public, no matter how or whence they come, or why they go along the way, and who may individually use the way but once, and that by chance. However, I think it is plain that the words "as of right" require that the quality of the acts, as well as the acts, must be established.

The essential quality of the acts, that is as acts done as of right, has from early days in our law been established by showing that the acts were done openly, not secretly, not by force and not by permission from time to time given. In COKE UPON LITTLETON, p. 113 (b), LORD COKE expresses the requirements thus: "*Longus usus nec per vim, nec clam, nec precario*"; and there is a long line of cases which supports this view. I take from one of them, as I have already cited the case (*Earl De La Warr v. Miles* (8)) a passage which occurs in the judgment of COTTON, L.J., at p. 596, where he says :

You must see whether the acts have been done as of right, that is to say not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done.

I think it right, therefore, to hold that, where the words "as of right" are used in the Rights of Way Act, 1932, in connection with the actual enjoyment, they are satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given.

Finally, there are the words "without interruption" to be interpreted. In the first place, do they refer to the enjoyment of the right or to the period of that enjoyment? Is it sufficient to amount to interruption if acts have from time to time been done which, while not stopping the user from going on, yet challenged the right; or must the interruption,

to come within the meaning of the Act, be actual and physical stoppage of the user for a time or from time to time ?

These words again occur in the Prescription Act. When used in that Act they are qualified by sect. 4 of the Act, which enacts that no act or other matter shall be deemed to be an interruption within the meaning of the statute unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorising the same to be made.

Of the words when used in the Prescription Act, PARKE, B., said in *Flight v. Thomas* (9), at p. 699.

Sect. 4 speaks of the party interrupted. The statute seems to contemplate interruption of the right, not of the period.

But under the Rights of Way Act there is no section equivalent to the Prescription Act, s. 4. The words in sect. 1 are :

has been actually enjoyed by the public as of right and without interruption for a full period of twenty years.

In their context they occur, however, as qualifications of the actual enjoyment of the way by the public, rather than as qualifications of the period. The scheme of the section appears to be that the actual enjoyment of the way must in character be two things, that is, of right and without interruption, and, when an enjoyment of a nature satisfying those two requirements has been proved, the duration of that enjoyment must be shown to have been for a full period of twenty years. Moreover, public user is essentially to some extent intermittent, occurring as it does only when individual members of the public make use of the way. It is, therefore, in my view, as it was in the view of PARKE, B., of the words when used in the Prescription Act, to the interruption of the enjoyment of the way and not to the period of time that the words are attached by way of qualification.

But what must be the nature of the interruption which the enjoyment of the way must be without ? Is it sufficient, as I have said, to amount to an interruption if acts have from time to time been done which, while suffering the actual user to go on, yet challenged the right ; or must the interruption be some physical and actual interruption which prevents the enjoyment of the way ? With regard to this, I can find no help in the rest of the Act, but the words themselves are used in connection with what the Act calls "actual enjoyment" for a period of years. As it is actual enjoyment which must be without interruption, one would suppose that the interruption contemplated must be actual. One can scarcely interrupt acts except by some physical act which stops them. I therefore think that the word "interruption" in the expression in

the Act "without interruption" is properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment. In practice this construction of the words will lead to no difficulty and cause no surprise. Many bodies, such as the four Inns of Court, over and through whose property run roads used by the public, take the precaution to close and actually to stop the public enjoyment of those roads for one day at least in every year.

I pass, therefore, to the consideration of the evidence in order to see whether the requirements of the common law and of the Rights of Way Act have been satisfied. The defendants contend that they have established that this roadway has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, and, indeed, for a full period of forty years, and that there is no sufficient evidence adduced by the plaintiffs that there was no intention during that period to dedicate such way or that during that period of twenty years there was not at any time any person in possession of such land capable of dedicating such way. The defendants proved before me, by the mouth of Mr. Durrant, that this road had been used as early as 1870 and ever since by the public. It is true that he spoke of particular acts of user by persons who were tenants of the farms on the estate, or tenants of houses on the estate, and his evidence was criticised from this point of view; but he made it plain that in his experience the user which he had observed had, during the whole time he had known it (and that is since 1870), been user by persons other than those who were merely tenants and had been by what he called "the public." When he was challenged in cross-examination as to what he meant by the expression "the public," he said: "Me or you or anyone else; I mean anyone," and that he reckoned himself as one of the public, and had regularly used the way as such, openly, not by any particular permission but as a matter of right. He said, and I think he was telling the truth, that he had seen bakers, butchers and grocers all go down that way from Woodplace Farm. Mr. James Mason, whose age was seventy-six, had lived for fifty-three years in the parish of Coulsdon and had used this way himself many times. He said that during the past fifty years not only had he used it himself, but he had seen hundreds using it, especially on Sundays, for walking; and he said that on Sundays in the summer it is a regular walk. He said, like Mr. Durrant, that he had never been stopped by anyone. In cross-examination he mentioned that on one occasion he had seen the road used by a circus proprietor who took his elephants that way.

A most important piece of evidence, in my view, was given by Mr. Wright, who lives at Coulsdon and is an ex-member of the Metropolitan Police. He had been a constable in the force for thirty years, being

posted to Coulsdon on July 6, 1896. From 1896 until 1920 he was the local constable patrolling that part of the Coulsdon district which included this roadway. It was, he told me, part of his duty to patrol all the public highways in his particular area. He told me that he did not go upon private property unless called there or unless he had some reason to suspect that something was going on on that private property which required the interference of a police constable, and he swore that practically every day or night, once during the twenty-four hours, he could guarantee that he had patrolled this road as one of the public highways which it was his duty to patrol. In cross-examination his evidence was challenged because the list of the highways which he was given to patrol was a list set out in a book which gave to the constable the details of each of his beats, and this disputed road had been included in that book, and the constable was unable to produce that book. He was in fact unable to produce it because, as a piece of Government property, it had been rendered up by him to the authorities when he retired. That criticism of his evidence did not detract, in my opinion, from the importance of what he had sworn before me, because he gave his evidence in a way which convinced me that he could have been under no sort of misapprehension as to what he was telling me and that he had no doubt at all in his own mind that this road had been a road which had formed part of his beat as a public highway. He, at any rate once in every twenty-four hours, as a member of the public—true, holding an official position but, none the less, a member of the public—had used this roadway plainly as of right as a public highway during the period between 1896 and 1920, for twenty-four years.

Mr. Rowland, an official of the Surrey County Council employed at the Netherne Hospital, Coulsdon, since March, 1911, told me that, during the twenty-five years he had been in the vicinity of Netherne Hospital, which is, of course, close to this road, he had himself frequently used the road and had seen it used by all classes of persons, pedestrians, local inhabitants, visitors to the countryside, farm carts, tradesmen's vehicles and wheeled traffic of all kinds, such as visiting motor cars and motor cycles. He it was, it is true, as was elicited in cross-examination, who reported to the defendants the erecting of the first fence or gateway across this road, either at the end of 1934 or the beginning of 1935; but I think that that reporting by him of the incident is easily to be understood if the rest of his evidence is true. If it be true, as I think it is, that he had seen that road used in the way in which he says it had been used for all the years he had been in the immediate neighbourhood, it would be natural that he should perhaps be shocked into action when he saw for the first time, after so many years, something in the nature of a barricade against any further user of the sort to which he had been accustomed being put across the road.

Mr. White, who now resides at Coulsdon, said he knew this road before he resided there twenty-five years ago ; he had walked upon it and, with his wife, gathered bluebells from beside the road, that he had used it continuously and had used it openly, never being stopped in any way when so doing. He had used it when going to church at Chipstead from his home in order to avoid going along the Brighton Road and because it was pleasanter that way. That evidence, in my view, forms a strong body of evidence that the public has actually enjoyed this way as of right certainly for twenty, and, I think, for forty years.

The plaintiffs called a Mr. Jackson, who, at the age of fifty-nine, said that he remembered the road for the last fifty years. He said he had used the way, but he said he knew he had no right of way because he himself had been turned off and had heard of other people being turned off. More particularly, he remembered that, during the time of Mr. Henton's tenancy of Woodplace Farm and Mr. Baine's occupation of the fields, including those where this road runs, he had known of people being turned off. It turned out that one of the occasions when he spoke of being turned off was when he was nine years of age, and that on that occasion, in fulfilment of a promise which he had received when caught there before, Mr. Henton had given him what he described in his evidence as a "damned good hiding" for trespassing. But it became apparent that he had not on that occasion been keeping to the road but had got through the wood, and, when he was asked in cross-examination what he was doing in the wood, he said : "Trespassing." Listening to his evidence and considering it again since, I do not think it fairly comes to more than this : that, when a boy, he had gone up that road and thereby gained access to the woods and had been turned away by the farmer, and indeed thrashed, for his trespass in the woods. Significantly enough, he admitted that, if he was going from the Star Inn to Woodplace Farm to-morrow, he would go along this road, but he added that he might get stopped for trespassing. Mr. Jackson did not satisfy me that he had been prevented from using this road merely as a road.

Mr. Hallett, who was ninety-two years of age, proved and satisfied me that the repairs to the road had been done by tenants : indeed, the defendants do not assert that they have ever done any repairs to this road in their capacity of highway authority. But Mr. Hallett was also called before me as a witness to prove that he had stopped people from using the road. He had lived at Dean Farm for five and a half years and managed the farm in 1896 ; that is a farm which adjoins Woodplace Farm. If one looks at the form which the questions and answers took when this witness was being asked about this road being a farm road, it will be seen that they cannot be said to be free from confusion. He spoke about the proper way for the public being to cross Woodplace

Farm, and he said the proper way was "up to Dean Lane for the public, and up by Coulsdon by the main road." He said he repaired this occupation road two or three times and that it belonged to the estate "down to Hooley Farm"; and the rest of the answer which he then went on to give was unintelligible to the shorthand writer and to myself. In the next question he was asked: "What did you say that the occupation road was used for?" and his answer was: "What do you mean by the occupation road?" He was then asked what was this road about which we were talking used for, and he answered, as a question, "Woodplace Road?"; and it became, I think, a matter of great uncertainty as to whether the witness and his questioner at any time were certainly directing their minds and their questions and answers to the same subject-matter. I myself endeavoured to get this matter into the region of certainty by asking him whether he knew the road that runs down from opposite Woodplace Farm by Three Cornered Shaw, and he then answered: "Down to Coulsdon?" in the form of a question. I then said to him: "The one which goes down to Star Bridge," and he replied: "That is the road I am talking about," and that it was that road that he used to repair. I can only say that the witness, who was ninety-two years of age and in many respects a very capable old man, left me with an uncomfortable feeling that perhaps we had not been understanding one another with regard to the subject-matter to which his evidence was intended to be directed. He said he had attempted to stop three people using the road. The question asked him was: "Have you ever attempted to stop people using that road?" and he answered: "Only three people; then they made a mistake; they took the wrong turning and I sent them back; that is all I had to do; they were very pleased to go back." There, again, I received the impression that he was intending to relate an incident when he had sent people back another way because they had taken the wrong turning rather than because they were committing an act of trespass in going that way at all. I can only say that I was unable to derive any assistance from Mr. Hallett's evidence.

The plaintiffs also called a Mr. Osborne, the foreman in charge of the Merstham Estates at the present day, who had discharged the duties of that office for nearly ten years. He said that he had endeavoured to prevent people using this road, and he it was who proved that he erected the fence at the south end of the road on Oct. 12, 1934. In cross-examination this witness admitted that when he was appointed he received no special instructions with regard to this road as distinguished from any other road on the estate, that is to say, no special instructions to prevent trespass or to keep people off this road. His only instructions had been general instructions to keep people off all private roads on the estate and until 1934, when he had orders to erect the fence at the

south end, he had had no particular instructions with regard to this road. He said that it was in pursuance of those general instructions that he had asked people not to use this lane. He said he had never succeeded in stopping anybody whom he had spoken to; that when spoken to they would not stop, they would continue their journey.

That body of evidence satisfies me that there has been an actual enjoyment of this way by the public for twenty years, and indeed for forty years; it satisfies me as well that it has been an enjoyment as of right in the sense in which I have said those words ought to be interpreted. The enjoyment has been open; it is not suggested by the plaintiffs that it has ever been by permission given from time to time. It is true that the plaintiffs do say that all early user is to be attributed to tolerance by the landowner because it was entirely confined to local persons or employees or tenants of the farms, but I am not satisfied that the user was confined to those classes of persons. Certainly during the last twenty years it is clear that the user has been by large numbers of persons, members of the public, not tenants or employees of the estate, and often not even local residents. Certainly none of the evidence on either side suggests that any of the user has been by force. If substantive evidence were required to show that the public believed that in making use of the road it was only exercising a right, it is afforded by the plaintiffs' own witness, Mr. Osborne, as it seems to me, when he makes the admissions to which I have called attention, namely, that, though he told the members of the public when he found them walking upon the road that they must not use the way and that it was considered private, they did not stop, they would not stop, they would continue their journey.

It was shown, as I have said, that the fence at the southern end of the roadway and the gateway at its northern end were erected in or about Oct., 1934, and thereafter removed by the defendants. Until that time no obstruction of the way at any time had been put up either at the southern or northern end of this road by the plaintiffs. If I am right in interpreting the Act as I have done and in thinking, as I do, that the interruption from which the enjoyment of the way must be free is physical and actual interruption, then there can be no doubt upon the evidence before me that this way as from the earliest times and throughout the period of the last forty years has been free from any physical or actual interruption. The plaintiffs certainly failed to prove before me that, during the period of twenty years, there was not at any time any person in possession of the land capable of dedicating or that during the last forty years the title of the land in question had ever been in such a state that the occupier had no power to dedicate; the utmost they showed was that it had been leased again and again to various tenants; on the expiration of one tenancy a fresh lease had

been granted to another tenant, but no evidence was put before me to show for what period there was, on the expiration of any one of the tenancies, occupation by the plaintiffs or their predecessors in title who were at the time the owners of the land. It certainly was never proved before me that the state of the title during the last forty years was ever such that it was impossible that dedication could have taken place.

It was much pressed upon me by the plaintiffs that there had been a complete change in character of the neighbourhood during the last thirty-four or thirty-five years—indeed, since about the beginning of this century—and that I can well understand and, indeed, I think it is proved to be the fact; but I think, in the circumstances of this case, that it tells against the plaintiffs and in favour of the defendants' contention. The estate came to Lord Hilton's family between 1817 and 1821. The earliest estate plan produced, a tracing of which is with the maps produced by the plaintiffs and is marked with the letter "A," already shows the railway and the Star Bridge over it, with the roadway leading across the north end of Petershole Shaw, and then this roadway going up in a northerly direction and coming out on the highway almost opposite Woodplace Farm. That map also shows a footpath leading from the end of Star Bridge across the fields, through Three Cornered Shaw and coming out on the roadway opposite Woodplace Farm. The ordnance map of 1868, reproduced conveniently on the plaintiffs' map "B," shows that that public footpath no longer runs across the meadows from the end of Star Bridge to the footway up through Three Cornered Shaw and then through Three Cornered Shaw; the public footpath by 1868 has apparently come from the end of Star Bridge, round the north end of Petershole Shaw and onwards to the field No. 403 by way of the road between Petershole Shaw and the south end of Three Cornered Shaw, and thence across fields Nos. 403 and 414 on the south side of Three Cornered Shaw and so out to the roadway opposite Woodplace Farm.

The very presence, it was said, of that public footpath, which it is conceded is a public right of way, running as it does from the roadway which comes over Star Bridge on to the roadway opposite Woodplace Farm, makes it most unlikely that there would be a public right of way on the other side of Three Cornered Shaw in the situation of the roadway in dispute, leading also from the roadway on the north side of Petershole Shaw from Star Bridge and coming out also on the roadway opposite Woodplace Farm.

For my own part I think that, as a matter of probabilities, it is probable that, as soon as the footpath ceased to be used across the field actually from Star Bridge to the middle of Three Cornered Shaw and the public were allowed to use as of right, at any rate so much of the roadway from Star Bridge as led to the south end and past the south end of the

roadway now in dispute, they began to use the roadway now in dispute instead of the footpath way over the meadows Nos. 403 and 414. Although the roadway in question was only repaired by the tenants of Woodplace Farm from time to time, it was none the less metalled, and I have no doubt that it was drier to go upon and gave more accommodation than the footpath way over the fields. I am satisfied by the evidence, whether that be the reason for their doing so or not, that the public has for the last forty years actually and continuously used the roadway in question in order to get from Star Bridge or to Star Bridge from Woodplace Lane. The change in character of the neighbourhood has resulted in ever-increasing numbers of the public using this road, when they come to the south end of Three Cornered Shaw, instead of the wetter way over the fields.

I have referred in some detail to the evidence which was given by the plaintiffs, but, when that evidence is read in conjunction with the other evidence which they called, namely, that of Mr. Willoughby and Mr. Stone, I think it is clear that the officials acting for the estate knew that the public was using the road in question.

Is there, then, in the words of sect. 1 (1), sufficient evidence that there was no intention during the last twenty years to dedicate such way?

If the estate had no intention of allowing the way to be dedicated to the public use, it is a very remarkable thing that, with an ever-increasing user by the public, which is admitted, no obstruction was attempted to be put across the way until the end of 1934.

Mr. Stone, a member of the firm of Messrs. Cluttons, and secretary of the plaintiff company, whose firm had been agents for this estate ever since 1878, except for the years between 1896 and 1916, until the plaintiff company was formed, when Mr. Stone, as a member of that firm, had become the secretary of the company and continued to manage it, told me that he had stopped people walking up that road, and had seen people walking down that road and had told them that there was no public right of way in that piece of road. He said his own personal recollection included most of the time since 1916, and that since 1916 there had been building development and crowds of buses coming and so on, and the matter had been much worse. He had, therefore, as a responsible official managing the estate, ample notice of the user which the public were making of the roadway, and I suppose he would have me to understand from his evidence that he had spoken to people who were walking there and told them it was private, that the estate did not desire that the public should use the road; but he, too, added that, while it had been the desire of the owners to stop the public from using it, they had never succeeded in doing so. With his experience he must have appreciated that this was strong evidence that the public were using it apparently as of right, yet he did not have any gate or obstruc-

tion put there nor did he have any notice posted at either end of the road. When he was asked why the estate had never, until Oct., 1934, attempted to shut up the way or stop it by gate or fence, he could only say that he did not see any definite reason why they should shut it up, that to shut it up always meant another gate and fence to keep up.

It must be borne in mind, when considering evidence such as that, that Mr. Stone is a gentleman who is thoroughly well acquainted with matters like rights of way and the acquisition of rights of way over estates; he must have known, of course, that there were such things as notices that could be put up, and it does not satisfy me, when a witness is asked about that, that he should say: "But notices get disfigured and may be altered so that the terms of them, through the destruction of a negative, become a positive and make the matter worse." He must have known, since 1932 at any rate, that, under the Rights of Way Act, 1932, s. 1 (3), a notice by the owner of the land over which such a way passes inconsistent with the dedication of the way as a highway placed before or after and maintained after the commencement of that Act in such a manner as to be visible to those using the way was expressly allowed by the Act, in the absence of proof of a contrary intention, to be sufficient evidence to negative the intention to dedicate such a way as a highway. Also, he must have known that that subsection went on to make provision for the case of such a notice being torn down or defaced, and gave him the right, if the notice suffered in that way, to give notice in writing to the council (in this case the defendants) that the way was not dedicated to the public and that such a notice in such circumstances, in the absence of proof of a contrary intention, was, by the Act, allowed as sufficient evidence to negative the intention of the owner of the land to dedicate such way as a public highway. None the less, no such notice was put up. At some date, which has not been fixed in the evidence before me, a finger-post was erected and stood at the south end of this road, one arm of which pointed up this disputed road with the words upon it: "To Farthing Downs." It is clear, I think, from Mr. Willoughby's evidence, that at some time he had seen this finger-post prior to August, 1934, but made no complaint about it and did not mention the matter until Aug. 10, 1934. Mr. Willoughby said that the question of erecting a gate across the Woodplace Lane end of this road was considered with a view to preventing trespass and damage, but at the time the resources of the estate were nearly exhausted by providing gates and fences, and he decided to erect gates in place of existing defective ones before putting up new ones. He went on to tell me that, after the purchase by the Surrey County Council of Netherne Farm in 1899 and of Woodplace Farm in 1902, the Surrey County Council for many years went on building different blocks of buildings and always

had a large number of men at work there, and added very much to the population.

The trespassing became steadily worse. The locality turned into a more suburban area, with continual trespass. The spread of London into and over this area increased the trespass. He was asked: "What did you do to counteract it?" and he answered: "We erected barbed wire, I think a good deal, and kept up the fences upon the roads as much as possible and endeavoured to keep people to the track wherever we could."

If there was no intention to dedicate this way, it is remarkable that, with the matter so much in mind as this would indicate and with steps being taken against the public elsewhere, no gate or bar was put across this way and not even a notice was put up. It is even more remarkable when one remembers that the estate did take steps, by means of barbed wire and boards, to prevent the public from establishing fresh ways. Mr. Stone said: "First of all, I wish to say that I have not at any time put any wire or obstructions up in any of these recognised-by-us footpaths." I pause to observe that this, though only, it is said, incidentally a footpath, was being much used as such and never had any obstruction or wire put upon it at these times of which Mr. Stone is more particularly speaking. Then Mr. Stone added: "Coming from the point 'A' to point 'B,' during the last five or six years people have endeavoured to make a track down from 'B' to 'J' and one across in the direction of Netherne and one up to 'C,' as I say, coming from the occupation road; and we consequently had barbed-wire fencing put up. People used to come deliberately, evidently armed with cutters. We found it nipped right through. We put boards up to say that it was private, and pointing in the direction of the footpath. I put some wire at one time on the south side of the road at point 'C.' Not until recently did we attempt to put anything across 'C.'" The boards and fences put up did not, he added, relate to the road in question. The estate authorities were therefore actually taking steps to prevent unauthorised user of tracks from the roadway at the south end of the road in question, which the plaintiffs refer to as an occupation road, and yet, while actually taking steps within a few feet of the end of this roadway, where, according to the evidence, there was, as there was elsewhere, increasing trespass, they erected no fence, wire, board or gate across this road but left it in the same condition as the tracks authorised by them for use by the public.

Lastly, in 1923 the defendant prepared a preliminary statement of proposals under the Housing and Town Planning Acts, in which this road appears amongst other roads, streets or ways which it was proposed to stop up or divert as against the provision of the proposed new 40-foot road along the line of the admitted public footpath over the

meadows. On the public inquiry the plaintiffs were heard in evidence but took no point upon this part of the proposal.

In the final town planning scheme of 1928, which was approved by the Minister and given full legal force and effect under the Coulsdon and Purley Town Planning Scheme Order, 1930, this roadway appears in the third schedule under the description of a highway to be diverted or stopped up and is there called "Footpath from Star Bridge to Woodplace Lane." No objection was taken at any stage of these town planning proceedings to the way in which this roadway was being treated, and, while it is of course possible that it might not have been noticed, it is difficult to conceive such an oversight when objections were being made and evidence was being offered on behalf of the estate in connection with the details of the scheme in so far as they affected the estate interests. Moreover, on Feb. 23, 1927, in reference to the proposed scheme, Messrs. Clutton write, on page 1 of the correspondence, to the defendants, saying that they had inspected the maps and found that the estate was affected in two places. They go on to say: "We would also raise no objection to the proposed diversion of the lane to Star Bridge along the line of the public footpath." If the plaintiffs' present contention is right, there could be no question of a "diversion" of the lane to Star Bridge, by which is admittedly meant this roadway now in question. Mr. Stone admitted in cross-examination that the word "diversion" used by a surveyor imported, first, the closing of an old road and, secondly, the substitution of something else for it. If this road was, as the plaintiffs say, a private occupation road, there was no question of the proposed new road being in substitution for it, nor could there be any question of or necessity for closing it. Indeed, unless this road was already a public highway, the language was inapt to express what the parties were then talking about.

In the circumstances I am satisfied that there is not sufficient evidence of an intention not to dedicate; indeed, rather do I think that there has been a long course of conduct by the plaintiffs consistent only with an intention to dedicate.

I am therefore of opinion that the defendants have established their case under the Rights of Way Act, 1932, s. 1 (1), (2).

In the view of the evidence which I have taken, it is not necessary, I think, to discuss the ancient maps, the ordnance maps, the tithe maps and the estate maps, save to say this. The road is shown as a road on the earliest maps put in evidence before me. Rocque's map of 1762, produced from the custody of the British Museum, claims that in it "is expressed all the roads, lanes, churches," etc., and was the earliest in date. It showed the road in question and the shaw alongside which it runs. The road is again shown on the map of 1802 by Faden and again in Greenwood's map of 1822 and 1823; but, of course, these maps

only show it as a road. There is nothing in the maps to show whether or not the topographer-author was intending to represent the roads on his map as public highways. All the ordnance survey maps show the road ; but it was admitted by Mr. Godley, a witness from the Ordnance Survey Department, that they show any road which is there on the surface whether it is a public highway or not. The tithe maps make no distinction between a public and a private road ; their object is to show what is titheable, and the roadways are marked upon them as untitheable parts of the land whether they are public or private. The earliest estate map put in by the plaintiffs shows the road with its northern end opening on to Woodplace Lane opposite the opening of the driftway on to Farthing Down on the east of Woodplace Lane, which is admittedly a public way and bridle track. If this road was a continuation of that public way, it is strange that it was public from Farthing Down to Woodplace Lane and private from the opposite side of Woodplace Lane to Star Bridge. In the map attached to the particulars of sale of this portion of the estate in July, 1929, the plaintiffs printed the name " Woodplace Lane " as though this road was the continuation of that lane leading down to Star Bridge.

I make those comments upon the maps more particularly to call attention to certain details which appear and certain matters which seem to me to be useful to observe ; but, for my part, I do not find that they give me any assistance in arriving at the conclusions to which I have come.

For the reasons given by me, there must be judgment for the defendants, with costs.

*Simes* : My Lord, my learned friend and I have both looked into the matter, and I think there is no doubt that, if an order is made in our favour as to costs, that naturally carries solicitor and client costs. Strictly, we should get them without its being mentioned in the order. In the case of *North Metropolitan Tramways Company v. London County Council* (10), ROMER, J., said, at p. 148 :

No doubt *prima facie* an order to tax costs means taxation between party and party, and it would be better in cases of the kind now before me to insert expressly in the judgment that the costs are to be taxed as between solicitor and client. But the omission would not deprive the defendant entitled to the benefit of the statute of solicitor and client costs.

HILBERY, J. : Then the court has no discretion in the matter once it is clear that, in substance, judgment has been obtained ?

*Simes* : That was the view at that time. In *Bostock v. Ramsey Urban District Council* (11), it was held :

The Public Authorities Protection Act, 1893, s. 1 (b), which provides that, wherever in an action within the Act a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client, does not take away

the discretion given to the judge at the trial by R.S.C. Ord. 65, r. 1, to deprive the successful defendant of costs for good cause.

*Freeman* : My Lord, it is really a penal statute. It is intended to prevent people from inadvisedly bringing an action against local authorities, and the word "shall" deprives your Lordship of all discretion except where good cause can be shown for depriving the defendants of their costs. There is nothing in this case to which I can point which could raise that issue.

*HILBERY, J.* : Then the order will be for costs as between solicitor and client.

Solicitors : *Westbury Preston & Stavridi* (for the plaintiffs); *Lees & Co.*, agents for *E. C. King*, Purley (for the defendants).

*Reported by* LESLIE CARNEGIE, Esq., and GERALD ABRAHAMS, Esq.,  
Barristers-at-Law.]

### DODWORTH v. DALE.

[KING'S BENCH DIVISION (Lawrence, J.), **May 13, 1936.**]

*Income Tax—Personal allowance—Married man—Marriage annulled—Additional assessments—Income Tax Act, 1918 (c. 40), s. 125 (1).*

A taxpayer went through the form of marriage with a lady in 1921 and lived with her until 1933. During those years he received in respect of the income tax payable by him the usual personal allowance of a married man. In 1933 he obtained a decree of nullity and the revenue authorities made additional assessments upon him in respect of the years 1928 to 1933 upon the ground that the marriage having been declared null and void he was not entitled to such allowances :—

**HELD** : the taxpayer having been rightly granted an allowance at the time, it was incompetent for the revenue authorities to make an additional assessment upon him by reason of facts which arose after the year of assessment.

**[EDITORIAL NOTE.** The question here is quite shortly stated, although its solution required a long and careful consideration of authority. It is simply this : has a decree of nullity of marriage such retrospective effect as to enable the revenue authorities to make these additional assessments upon the male party to the void marriage ? Following a line of authorities, the learned judge has held that it has no such effect and does not afford anyone an opportunity of re-opening concluded matters.

AS TO THE EFFECT OF A NULLITY DECREE, see HALSBURY, Hailsham Edn., Vol. 10, p. 641, para. 937 ; and FOR CASES, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326-2345 and p. 554, No. 6079. AS TO PERSONAL ALLOWANCES, see HALSBURY, Hailsham Edn., Vol. 17, p. 14, para. 19 ; and FOR CASES, see DIGEST, Vol. 28, pp. 90, 91, Nos. 536-541.]

Cases referred to :

- (1) *Lewis (falsely called Hayward) v. Hayward* (1866), 35 L. J. P. & M. 105 ; 27 Digest 270, 2382.
- (2) *Norton v. Seton (falsely called Norton)* (1819), 3 Phillim. 147 ; 27 Digest 266, 2340.