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LEWIS v. THOMAS.

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Dec. 16, 20.

Evershed M.R.,
Cohen and
Asquith L.JJ.

Rights of way—Use for upwards of 20 years—Gate across way locked from time to time by tenant—Enjoyment of way “without interruption”—Meaning—Relevance of interruptor's intention—Rights of Way Act, 1932 (22 & 23 Geo. 5, c. 45), s. 1, sub-s. 1.

Although such an act as locking a gate across a way which is used as of right by the public *prima facie* constitutes an interruption of the enjoyment of the way within the meaning of s. 1 of the Rights of Way Act, 1932, and none the less so because during the time while the gate is kept locked no one had happened to try to use the way, the absence of any intention to challenge the right of the public to use the way is material to the question whether there has in fact been any interruption within the meaning of the section.

A track over agricultural land had been used for upwards of forty years by the public as of right as a way for agricultural vehicles and cattle. A tenant of two fields through which the track ran had during that period from time to time locked a gate across it. According to the evidence he had locked the gate at night only and for the purpose of preventing cattle from damaging his corn when it was stacked in one of the fields. He had unlocked the gate each morning. In an action by the owner of land crossed by the track against the defendants for damages for trespass in driving a tractor over the track, the defendants claimed that they were exercising a public right of way. The county court judge found that when the previous tenant had locked the gate it had only been for the purpose of protecting his corn from damage by cattle, and not for the purpose of showing the public at large that there was no right of way over the track. Accordingly, he held that the locking of the gate was not an “interruption” of the exercise of the right of way which would prevent time from running under s. 1 of the Rights of Way Act, 1932.

Held, that, on the evidence as a whole, it was open to the county court judge to find that there had been no interruption in fact of the user of the way by the public, since the locking by the tenant of the gate had been done at such times and in such circumstances as not to be likely to interrupt, and not in fact to have interrupted, the use of the way.

APPEAL from Cardigan county court.

The plaintiff, Eira Marguerite Lewis, was the owner and occupier of the Old Rectory and the adjoining land and buildings at Dinas, Pembroke. The first defendant, William Joseph Thomas, was the owner of land adjoining the plaintiff's land, and George Thomas and Vincent Davies, the second and third defendants, were the tenants of the first defendant.

The plaintiff alleged that the defendants had wrongfully trespassed upon the drive of the Old Rectory with tractors and other vehicles, and had wrongfully driven cattle over it. Further, it was alleged, after the plaintiff had erected a gate at the west entrance to the drive and locked it, the defendants in March, 1949, broke the padlock on the gate and again drove a tractor along the drive. The plaintiff claimed damages and an injunction to restrain the defendants from continuing the acts of which she complained. The defendants in their defence claimed that there was a public right of way for farm vehicles and cattle over the drive and that they were entitled to use it for the purposes complained of.

It appeared from the evidence that the way in question was part of a track which started from a main road. It first passed along two fields, Nos. 142 and 148 on the ordnance survey of the parish, followed the drive of the Old Rectory, subsequently crossing further agricultural land, and ultimately joined the main road again. The track formed a short cut from Soar Hill to Brynheullan. If the track were not used, it would be necessary to make a considerable détour by the main road. It was admitted that there was a right of way for pedestrians over the track.

Originally fields Nos. 142 and 148 had been glebe land and had, with the Old Rectory and other adjoining land, vested in 1914 in the Commissioners of Church Temporalities in Wales, subsequently vesting in the Representative Body for the Church in Wales. During the material period the Old Rectory had been occupied by the rector of the parish, and the two fields had been let to one Reynolds, whose tenancy ended in 1941. In 1942 the Representative Body sold the two fields, and in 1947 the purchaser conveyed them to the first defendant. In 1945 the Old Rectory was sold by the Representative Body to the plaintiff. It appeared from the evidence that while Reynolds was tenant of the two fields he had from time to time locked a gate across the track between them at night in order to prevent cattle from damaging his corn. He had unlocked the gate in the morning. He gave the rector a key to the padlock.

The county court judge dismissed the action, holding that there had been continuous user of the way for over forty years, and that Reynolds had only locked the gate across the track to protect his corn and not to show the public that there was no right of way.

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E. V. Falk for the plaintiff. Before a public right of way can be acquired under s. 1 of the Rights of Way Act, 1932 (1) two things are required: first, there must be user of the way as of right; secondly, that user must be without interruption: *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* (2). The plaintiff does not dispute that there was for over fifty years user of this way as of right by agricultural vehicles and for the driving of cattle. The second requirement, however, has not been fulfilled: there has been interruption. In s. 1, "without interruption" must be construed in its ordinary meaning as without any actual physical interruption. The intention of the person who interrupts the user of a way is immaterial: *Jones v. Bates* (3). Once the objective test of continuous user for the period laid down in the section is satisfied, the state of mind of the person blocking the way becomes of importance. The tenant, Reynolds, who locked the gate across the way, did it with the knowledge of the rector who was the agent of the freeholders. A right of way cannot be established by showing that, when the freeholder interrupted the way, he had no intention of defeating the public claim: *Moser v. Ambleside Urban District Council* (4). That case shows that intention is important in considering the effect of the proviso to the section. Here there is evidence that the rector knew that Reynolds had locked a gate across the way. The intention of Reynolds in locking the gate is

(1) Rights of Way Act, 1932, s. 1, sub-s. 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."

Sub-section 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."

(2) [1937] 2 K. B. 77.

(3) (1938) 158 L. T. 507.

(4) (1925) 89 J. P. 59, 118.

immaterial. That intention cannot be attributed to the rector.

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D. E. Evans for the defendants. It is clear from the judgment of Hilbery J. in *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* (1) that an intention to challenge the right of way is an essential ingredient of an interruption of a way. The interruption must have been with the intention of disputing the public right of user. Here the tenant locked the gate for his own convenience. A key was available for anyone who wanted to pass along the way when the gate was locked. This track was used very infrequently. It was only used by a few people, and not by night. There is no evidence that the locking of the gate caused any one in fact to be interrupted. There was evidence here on which the county court judge could hold that the defendants had discharged the onus which was on them. [He referred to *Attorney-General v. Dyer* (2), and *Attorney-General v. Hemingway* (3).]

Falk in reply. It is put against the plaintiff that, whereas there was interruption, there is no evidence that any person was in fact interrupted. If it is not necessary to prove continuous user of the way, it is equally not necessary to prove a continuous interruption.

Cur. adv. vult.

Dec. 20. EVERSHERD M.R. This appeal raises a question under s. 1 of the Rights of Way Act, 1932. The plaintiff, who is the owner-occupier of a property known as The Old Rectory, near to the village or town of Brynheullan, has sued three persons for alleged trespass, consisting of the user by them of a way over her property and certain other acts which they did in purported exercise of that right of way.

The answer of the defendants to the claim of trespass was that they were exercising a public right of way for agricultural vehicles and cattle. It is to be noted that, so far as foot passengers are concerned, it is conceded by the plaintiff that there is a public right of way; but the issue has been whether that public right of way extends also to its user for agricultural vehicles and cattle. I understand that other defences were raised; but, so far as this court is concerned, the sole question is whether the finding of the county court judge that there was such a public right of way can stand. The question is

(1) [1937] 2 K. B. 77.

(3) (1916) 81 J. P. 112.

(2) [1947] Ch. 67.

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So far as the former of those two conditions is concerned, "as of right," there is, I think, no question but that the witnesses as to user gave evidence that they used the way—and I borrow the well-known formula of Tomlin J., in *Hue v. Whiteley* (1)—each "believing himself to be using a public "road" to pass from one highway to another.

The real question is whether, having regard to the facts, there has been user without interruption for the requisite period. The requisite period may be forty years or twenty years, according to whether the case is founded on sub-s. 2 or sub-s. 1. For present purposes, I understand, that does not matter: either there has been interruption sufficient to defeat the claim under either sub-section or there has been no interruption at all.

Prima facie a question of that kind is one of fact for the judge. He saw all the numerous witnesses who came before him. As it is prima facie a matter of fact, therefore, the plaintiff would be out of court were it not for one matter—one sentence in the judgment of the county court judge—around which the whole argument has ranged. The note of the judgment is in two parts: first, there is a note in which the judge says that he delivered an oral *ex tempore* judgment from the notes which he made during the hearing. The notes, which are then set out, include, among others, the following: "Evidence of witnesses (a) plaintiff's witnesses. Reynolds' evidence as to locking gate is not conclusive. Not locked "as a right. Opened in morning." Then the judge made an additional note, of which the material parts are these. He said: "In this case I was satisfied from the evidence of the "witnesses, especially that given by the defendants' witnesses, "that there had been continuous use of the roadway in question "for over forty years without any attempt to question the "right to use it. . . . I came to the conclusion (and so stated "in my judgment) that, on the few occasions when Reynolds "locked the gate across the road, he did so only when his corn "was stacked near the gate of the field near the roadway in "question and when he had found that people had left his "gate open and consequently cattle wandered into the corn- "field. It was on these occasions and for this purpose only

" that he locked the gate across the road, and not because he
 " was endeavouring to show to the public at large that there
 " was no right of way through the roadway in question."

It is on that particular part of the judge's finding and judgment that the plaintiff founds her argument ; for she says that the judge in that passage misdirected himself by holding, in effect, that interruption in fact does not matter if there was no intention by the interrupter to challenge the right. The plaintiff says, first, that that direction is wrong in law and is inconsistent with Hilbery J.'s view in *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* (1), approved by this court in *Jones v. Bates* (2), and particularly with Scott L.J.'s judgment in the latter case.

Secondly, the plaintiff argues that in any case Reynolds was only a tenant of these two fields east of the Old Rectory property. What he did was in fact done with the full knowledge of the rector who was living at the Old Rectory and was at that time the agent of the owners of the property. It cannot, the plaintiff argues, be assumed that whatever was in the mind of Reynolds the same thoughts were also in the mind of the rector ; and the court could not on any view, it is said, assume that there was no intention on the rector's part to challenge the right of way. [His Lordship recited the facts, and continued :] During the period while Reynolds was a tenant, however, it is clear that on occasions—the judge finds at night only—he did lock a gate which was across the way, not on the Old Rectory property, but on his own property between the two fields. It is that locking, that alleged interruption, which forms the main burden of the argument before us.

As to the second point, namely, that, whatever was in Reynolds' mind, the rector cannot be assumed to have intended no challenge, there is in point of fact no evidence at all that the rector did intend any challenge. In so far as there is any evidence, I should have thought that it was the other way. But, in any case, the gate in question was not on the rector's property. It was not the rector's gate, and therefore this alleged interruption cannot, in my judgment, be laid at the door of the rector at all. He was, in fact, given a key. His interest in the matter was really as a member of the public if he desired himself to pass eastward along this lane from his property to the main road. I do not therefore think that

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The real question is the first indicated above. If his judgment means what the plaintiff says, it may well be doubted whether the statement of the judge could be regarded as correct. *Prima facie*, to my mind "interruption" in these two sub-sections means interruption in fact.

I have already mentioned Scott L.J.'s judgment in *Jones v. Bates* (1). I quote this short passage: "The next requirement of the statute, 'without interruption,' means that the enjoyment of the right must not have been interrupted. If for the statutory period members of the public have used the way as of right, and their exercise of that right has in fact been interrupted, then the statutory consequences follow." I take that as meaning that, in the mind of the Lord Justice, "interruption" means what it says: it means interruption in fact.

On the other hand, in my judgment the presence or absence of a challenge may well be a relevant circumstance in determining whether in truth there has been interruption in fact. The illustration was given during the course of the argument of a road which was interrupted and entirely blocked by some broken-down vehicle so that nobody could pass along it at all. It is obvious that in such a case no court would hold that there was such an interruption as was intended by the section. In the forming of that conclusion, the circumstances in which the barring of the way took place and the complete absence of any intention to stop anybody from going along it would, I think, be a relevant circumstance.

Reading the evidence and the judge's judgment, I come to the conclusion that he really did no more, in the passage read, than to refer to Reynolds' state of mind as one of the relevant circumstances to be considered, like the occasions and the times when the gate was locked, in arriving at his decision whether there had in fact been interruption.

I agree that a barring, and particularly a deliberate barring, of a way for an appreciable period would not necessarily lose its effect merely because no one happened to try to use the way during that period. But here the only user in controversy is use by farm vehicles and cattle (the use by foot being conceded); and such use is very improbable at night. The

evidence seems to be that Reynolds, in fact, only locked the gate at certain periods of the year when his corn was stacked, and always saw to it that it was unlocked in the morning.

In all the circumstances, including the considerable evidence of use which the judge heard, I think that it was open to him to find, as he did, "no interruption," and that the locking was done at such times only as would not be likely to interrupt and did not in fact interrupt (as it was not intended to interrupt) the user of the track for farm vehicles and cattle.

I would therefore dismiss the appeal. I would also follow the judge in not attempting to define more precisely the nature and extent of the right and in not making any declaration. It is sufficient that the plaintiff's action fails. The matter would, as between the plaintiff and these defendants and persons deriving title through them, of course, be *res judicata*; but the plaintiff might hereafter, if she wished, litigate the matter afresh with other persons, or the Attorney-General; and raise more precisely the exact nature of the public right. That does not call for any decision in this case. I think that the proper course is to affirm the decision of the county court judge in dismissing the plaintiff's action.

COHEN L.J. : I am of the same opinion, and only desire to add a few words on the main issue. To succeed in the defence that there is a public highway, the defendants have to establish, first, enjoyment as of right for the prescribed period and, secondly, no interruption. So far as the first point is concerned, the judge found in their favour. There was ample evidence on which he could so find, and I do not think that his finding as to enjoyment as of right was challenged by Mr. Falk for the plaintiff. The dispute is whether that enjoyment was or was not interrupted. On this point Mr. Falk relied on the evidence of Reynolds, which has already been summarized by the Master of the Rolls. There was no other evidence of interruption, but I should mention that given for the plaintiff by one Harries, who farmed some of the fields in question. He said that he obtained the rector's permission before he drove his cattle along the track. The county court judge held that that evidence did not constitute an interruption. It is with this finding that Mr. Falk quarrels. He says, first, that the evidence of Reynolds, who was not the owner of the land subject to the alleged right of way, cannot be relevant.

There is no direct authority on the point of interruption so

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far as the Act of 1932 is concerned ; but in *Moser v. Ambleside Urban District Council* (1), MacKinnon J. had to consider the question of intention under the law as it was before that Act. The question then was whether the evidence justified an inference of dedication. MacKinnon J. said (2) : " The other principle that I think it is as well to bear in mind is this : it was said, very truly, in the passage of Parke B. in *Poole v. Huskinson* (3), that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner—I mean by the owner himself—and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge. The fact that the owner, as is so constantly done, locks the gates once a year, and that sort of thing, is, or may be, a periodical intimation by the owner that he is not intending to dedicate a highway, but it must be an effective act of interruption ; it must be by the owner himself, because if you have evidence of an attempted interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or, again, if it is an attempted interruption by a tenant without the assent or authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me, such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication." The dedication in that case was affirmed by the Court of Appeal (4). There is no further reference to the matter of intention in the judgment of this court.

It is plain that, where the question is whether or not there was evidence of dedication, first, intention must be relevant and, secondly, the relevant intention must be that of the person presumed to dedicate. But Mr. Falk says that the Act of

(1) 89 J. P. 59.

(2) *Ibid.* 61.

(3) (1843) 11 M. & W. 827.

(4) 89 J. P. 118.

1932 has made the fact of interruption, if proved, conclusive, unless, to quote the relevant words from sub-ss. 1 and 2 of s. 1 of the Act, "there is sufficient evidence that there was no intention during that period to dedicate such way." To some extent I agree with Mr. Falk. It seems to me that the reference to interruption in the sub-section is to the fact of an interruption, and that the question of intention is primarily relevant if, and only if, the owner, against whom the right of way is asserted, seeks to prove no intention to dedicate. None the less, intention may be involved in the question whether a particular act is or is not interruption. Thus, padlocking a gate is prima facie an act of interruption; but I doubt whether it could be held to be so if the interrupter fixed on the gate a notice that the key would be found hanging on the gatepost. The question is whether, having regard to the circumstances, the locking of the gate by Reynolds to the extent indicated by his evidence constitutes interruption. The fact that the gate was locked is clearly proved; and it is not proved that any one person while it was locked would find on the gate any information where the key could be obtained. On the other hand, although the rector must be taken to have approved of the affixing of the lock of which he had a key, Reynolds states that the driver of a coal lorry would get a key, presumably from the rectory, and that the gate was normally unlocked. Moreover, there was no evidence of any actual case in which any person seeking to use the way had been interfered with by the erection and locking of the gate. The alleged right of way was in a place where user of it was only likely by farmers and the like in the vicinity, who would know where the key would be. I agree with the Master of the Rolls in reading the evidence as meaning that the gate was only locked at night. In those circumstances, I am not prepared to differ from the view of the county court judge that there was, in the circumstances of this case, no actual interruption of the right of way. That being so, it seems to me to follow that the appeal fails.

ASQUITH L.J. I agree.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co. for Walter L. Williams & Sons, Fishguard.*

Holt, Beevor & Kinsey for W. J. Williams & Davies, Cardigan.

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