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

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Feb. 4, 5, 6; *April* 7, 8; *May* 22.

Highway—Dedication—" Way . . . . deemed to have been dedicated as highway "—Actual enjoyment by public as of right and without interruption for twenty years—Rights of Way Act, 1932 (22 & 23 *Geo.* 5, *c.* 45), *s.* 1, *sub-s.* 1.

By the 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."

To bring a case within this sub-section, the person asserting the right of the public to use the way must establish, on the one hand, that the public have actually had the amenity or advantage of using the way openly and not secretly or by force or with permission given from time to time and without interruption, in the sense of actual and physical stopping, of their enjoyment of the way, and, on the other hand, the actual suffering of the exercise of that right by the landowner for a full period of twenty years.

Dicta of Stirling J. in *Smith* v. *Baxter* [1900] 2 Ch. 138, 144 (quoting the words of Kay J. in *Cooper* v. *Straker* (1888) 40 Ch. D. 21, 27); of Cotton L.J. in *De La Warr (Earl)* v. *Miles* (1881) 17 Ch. D. 535, 596; of Parke B. in *Flight* v. *Thomas* (1840) 11 Ad. & El. 688, 699; and of Lindley L.J. in *Hollins* v. *Verney* (1884) 13 Q. B. D. 304, 308, applied.

ACTION tried by Hilbery J. without a jury.

The plaintiffs were the owners of an estate within the district of which the defendants were highway authority. A roadway which joined two highways ran across the plaintiffs' estate. In 1934 the plaintiffs, claiming that the roadway was their private property, erected a fence at one end of it and a gateway at the other. The defendants removed both the fence and the gateway.

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The plaintiffs thereupon brought this action against the defendants claiming damages for the wrongful entering by the defendants of the plaintiffs' land and for the defendants using the private roadway of the plaintiffs and removing the gate, gate-posts and fence of the plaintiffs. By their defence, the defendants said that the roadway in question was not a private way but a public highway, that the gateway and the fence erected by the plaintiffs obstructed that highway, and that the defendants, in removing the gateway and fence, were acting in performance of the duties imposed on them by the Local Government Act, 1894.

W. Marshall Freeman and *A. W. Nicholls* for the plaintiffs.
Turner K.C. and *Erskine Simes* for the defendants.

Cur. adv. vult.

May 22. HILBERY J. read a judgment in which he stated the facts and continued: 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 so 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, and a fence at the southern end of the roadway. 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, therefore, which has 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 on 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 on 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 Kinnear's speech in *Folkestone Corporation* v. *Brockman* (1): "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

(1) [1914] A. C. 338, 352.
(2) (1885) 10 App. Cas. 378, 386.
(3) (1843) 11 M. & W. 827, 830.

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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 that 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 (1): "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 to quote with approval this passage from the speech of Lord Halsbury L.C. in *Macpherson* v. *Scottish Rights of Way and Recreation Society, Ld.* (2): "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. (3)

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

(1) [1914] A. C. 352.
(2) (1888) 13 App. Cas. 744, 746.
(3) [1914] A. C. 353.

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 20 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 20 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 40 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, sub-s. 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 20 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, 1832, Lindley L.J., delivering the judgment of the Court of Appeal in *Hollins* v. *Verney*,

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said (1): "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." A little later on the learned Lord Justice said: "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, 1932, is dealing in s. 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* (2), "having had the amenity or advantage of using."

In the second place, what is the meaning of the qualification on 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, 1832, in *Earl De La Warr* v. *Miles* (3) Brett L.J. said: "The true interpretation of those words 'as of right' seems to me to be that he has done so

(1) (1884) 13 Q. B. D. 304, 308.
(2) [1900] 2 Ch. 138, 144.
(3) (1881) 17 Ch. D. 535, 591.

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 shows 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, 1832, 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 on Littleton (19th ed., p. 114 (*a*)) Lord Coke expresses the requirements thus: "Longus usus nec per vim, nec clam, nec precariò." There is a long line of cases which supports this view, and I take from one of them a passage which occurs in the judgment of Cotton L.J. in *Earl De La Warr* v. *Miles* (1), 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

(1) 17 Ch. D. 596.

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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, have 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, 1832. When used in that Act they are qualified by s. 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 authorizing the same to be made.

Of the words when used in the Prescription Act, 1832, Parke B. said: "Section 4 speaks of the *party* interrupted. The statute seems to contemplate interruption of the right, not of the period": *Flight* v. *Thomas*. (1) But under the Rights of Way Act, 1932, there is no section equivalent to s. 4 of the Prescription Act, 1832. The words in s. 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

(1) (1840) 11 Ad. & E. 688, 699.

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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, 1832, 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.

[His Lordship then passed to the consideration of the evidence and said that he was satisfied that there had been actual enjoyment of the way by the public for twenty, and, indeed, for forty years; that that enjoyment had been open and not by force or with permission; that for forty years it had been free from physical or actual interruption; that the evidence was consistent only with an intention by the plaintiffs to dedicate; and that the defendants, therefore, had

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established their case under s. 1 of the Rights of Way Act, 1932. He, accordingly, directed judgment to be entered for the defendants, with costs.]

Judgment for defendants.

Solicitors for the plaintiffs: *Westbury Preston & Stavridi, for Grece & Pringle, Redhill.*

Solicitors for the defendants: *Lees & Co., for E. C. King, Clerk to the Coulsdon and Purley U. D. C.*

G. F. L. B