RESPONSE TO COMMENTS MADE ON DMMO APPLICATION RWO 207

On behalf of the Ramblers I make the following comments:

My comments are based on the material on the ESCC web site on 28/7/22. I have not seen any other comments. In particular I have not seen the objection by Mr Carr referred to in some of the comments but only an objection made on his behalf by ET Landnet.

I sympathise with the concern of the owners of properties in the Mill Lane area. But I am bound by the advice that I have received that where a public footpath is diverted the higher rights are not and remain on the old route. I would not object to a reasonable diversion or diversions in this area to be made simultaneously with any order. The decision maker may come to the conclusion that my advice is wrong. That is a matter of interpretation of the law rather than fact.

The material on the Quarter Sessions diversion of 1877 (absent any later legal event) is conclusive evidence of the existence of a bridleway on the route that it sets out. In my view this is the application route from point A to the old Folkington boundary. Mr Wood of ET Landnet suggests I may have the route wrong. I do not think so since the application route is the route of the currently recorded footpath and there is no trace of two routes. But if I have it wrong then it is conclusive evidence of the status of the correct route and the decision maker should decide accordingly.

My evidence shows that the bulk of the route was owned either by the Gwynne Family (Folkington) and Mr Gilbert (Wannock)

The minutes of the highway authority in 1907 show that Rupert Gwynne was the chair of the council. I also note that his brother Roland was a member of the council and was present at the first meeting where the route was discussed.

On 15/3/1907 at a meeting chaired by Rupert Gwynne, with Roland Gwynne is attendance the authority set up a special committee to meet the agent of the Gilbert Estate about a right of way dispute.

Ramblers
1 Clink Street, 3rd Floor, London SE1 9DG
[redacted] | ramblers@ramblers.org.uk | **ramblers.org.uk**

The minutes of the meeting of the authority held on 10/5/1907 and chaired by Rupert Gwynne contain the report of the special committee. Cllr Marchant described the disputed routes as all going through one field. There was one path that locals were particularly keen on, but (perhaps understandably if they were duplicates) It had a gate and a culvert that the Parish had maintained. They were not so bothered about the others. The council agreed that if Mr Gilbert would dedicate to the public one path (known as the Mission Room Path), the other two paths could be closed. The Mission Room Path ran alongside a fence between the road and Mr Thomas's House

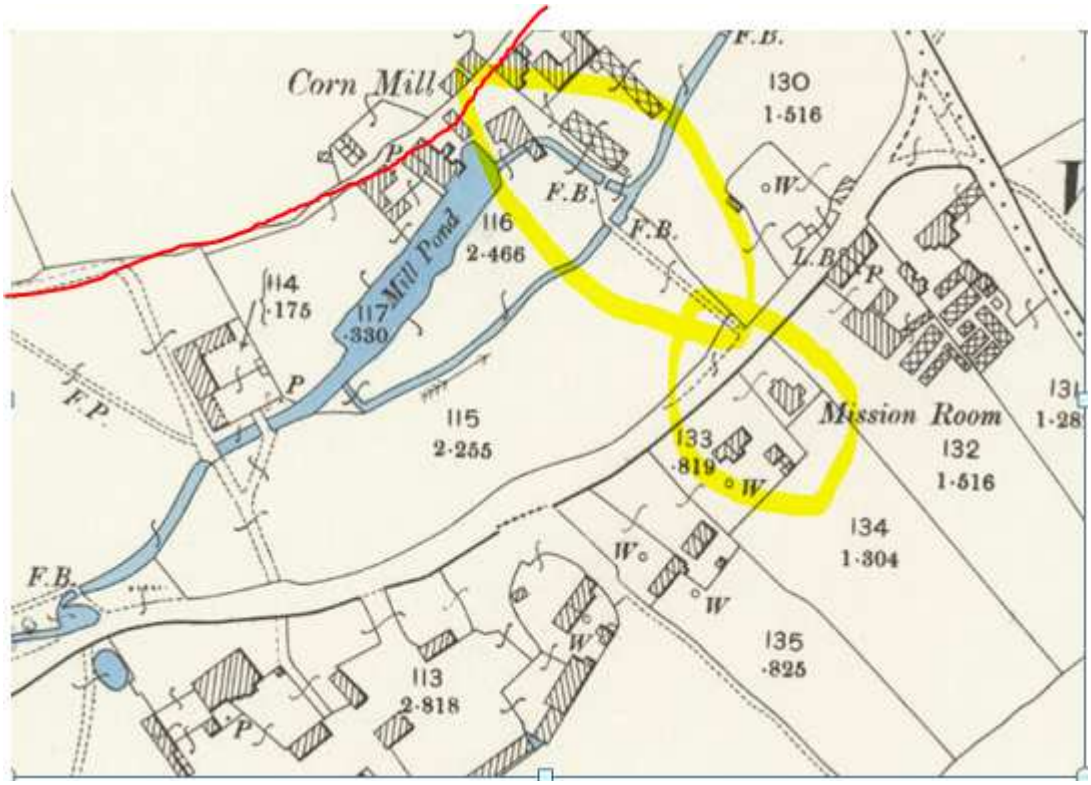
The Mission Room Path is described as a continuation (in Wannock) of the bridleway from Folkington. So there was a bridleway from Folkington to Wannock which no one was disputing.

It was reported that Mr Gilbert's agent had said that he would agree to the proposal (i.e. to dedicate the Mission Room Path) provided no one said that it was a public way already. (We all have our pride)

So far the Mission Room Path had been described as a "path", but the minutes of a meeting of the authority on 7/6/1907 (with neither of the Gwynnes attending) a letter from Mr Gilbert's agent was read. The letter said that Mr Gilbert would accept the proposed settlement and to "enclose a BRIDLE path 6ft in widtAs a continuation of the BRIDLE path from Folkington. (my emphasis).

So where was this Mission Room Path, which was a continuation of the bridleway from Folkington and which had a culvert and a gate and which ran along a fence between a house and a road ?

I suggest that the map extract below taken from the second edition of the Ordnance Survey 1-2500 map below shows it. It goes from the Mission Room, across a culvert and to what I suggest is the bridleway from Folkington (shown in red) It runs from point E to point F on my application route. I can find no other paths in the vicinity of the Mission Room which would justify the title this path has. This view is supported by the Finance Act evidence.



The significance of this evidence is that no one was disputing the existence of a bridleway from Folkington which went up to, or past the end of the mission room path, even though the sons of the owner of the western part of the route were on the council and the other major owner was heavily involved in the discussions.

The evidence also shows that the Mission Room Path itself was dedicated as a bridleway.

LOCATION OF THE MIDDLE OF THE ROUTE

Having established that there is a bridleway from A to N and that there is a bridleway leading to Folkington passing point F, I now turn to the section N-F

I say that the route of the Bridleway between these points is the recorded footpath on the first definitive map. This is because:

a) It is unlikely that there was both a footpath and a bridleway covering the same route, in the absence of any evidence that the bridleway might become unusable for pedestrians.
b) Whilst Ordnance Survey surveyors were instructed not to investigate public status the Instructions to Ordnance Survey Field Examiners 1905 is clear in its direction that: "*Mere convenience footpaths for the use of a household, cottage or farm; or for the temporary use of workmen, should not be shown; but paths leading to any well-defined object of use or interest, as to a public well, should be shown. N.B. – A clearly marked track on the ground is not in itself sufficient to justify showing a path,* ***unless it is in obvious use by the public"*** so it is likely that any route used by the public would be shown on such maps. There is no other route which goes all the way from point N to point F.
c) No alternative right of way between Folkington and Wannock was identified in the first definitive map process.
d) The only alternative route shown on some maps would require the route to turn sharply south west at point N and then turn 90 degrees south east to rejoin the application route which appears illogical. It is labelled as a footpath on some maps, but even where part of it is shown the section from point N going south west is not always shown. On the balance of probabilities this is not, in my view, the route of the bridleway.

If the decision maker remains in any doubt about this section they should follow the decision in Eyre v New Forest Highway Board (attached) where it was ruled that where the route of a section of a way was uncertain, but the route on either side was confirmed, then the most likely route should be taken as the right of way.

SECTION B-J

This section is included because it is the only alternative candidate route that could feasibly fit the description of the mission room path.

SECTION F-D

This section is today recorded as a publicly maintainable road but it is included because it was recorded as a public footpath on the first definitive map, suggesting that it did not have the status of a public road at the time.

In the issue recorded in the minutes of Eastbourne Rural District Council above the landowner did not suggest that the bridleway to Folkington was not existence, only that the mission room path was not a right of way. His stance makes no sense if the bridleway did not continue further east since he would be arguing for a dead end bridleway. No one on the council seems to have raised this point. I suggest this is evidence that the bridleway continued past point F to meet the road.

COMMENTS MADE BY ET LANDNET

I address the comments according to their numbered paragraphs in the ET Landnet .

4) No evidence has been produced in support of the statements made here. By contrast Planning Inspectorate consistency guidelines comment on these maps as follows: under "Other post-1800 maps" (page 11) 12.43 "Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. However, combined with evidence from other sources, they can tip the balance of probability in favour".

5) The first edition of the Ordnance Survey one inch map does not contain the caveat referred to 3.1.3 Copies of the instructions given about the portrayal of private roads are given in correspondence held at the national archive under reference OS 3/260. The instruction given is "as these plans are intended for military purposes no existing roads should be omitted; but to distinguish those roads which are entirely on trespass the line of the main road from which they branch is not to be broken for them" So routes that the public had the right to use were distinguished. The ends are broken.

6) There was no obligation to show bridleways on tithe maps, but the portrayal of most of the route shows it was of sufficient importance to be featured.

7 and 8) Athough estate maps are based on the OS mapping they have been extensively altered and if the route was not in existence I suggest it would have been deleted. This map is evidence of existence of the route, not its rights.

12) Only the Mission Hall Path was disputed.

13) These maps carried the disclaimer that they were not testimony to rights over the way.

14) I am not sure what is being suggested here. I have not seen the annotation “Bridleway bridge” on an OS map, which is what seems to be suggested.

16) I don’t think that is comment is valid given that this section was shown as a footpath on the first definitive map. There may be many reasons why a path or bridleway may not be clear on the ground at particular times.

Chris Smith for the Ramblers 1/8/22

(1892) 56 JP 517.

Reports.

[1935] 1 K.B. 320 —— (1947) Ch. 83

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

June 18.

EYRE *v.* NEW FOREST HIGHWAY BOARD.

Highway—How created—Dedication—Tenant for life—Remainderman—Practice—New trial—Point not taken at the trial.

A tenant for life cannot dedicate a way as a highway as against the remainderman.

It is by the continual passage of people who wish to go along a particular way, that evidence of there being a highway is established.

A new trial will not be granted on a point not taken at the trial until after the case on both sides was closed.

This was a motion for a new trial on the ground of misdirection. The point raised was as to the right of a highway board to "metal or gravel" ways across common or waste lands, so as to make them into hard roads or highways. The plaintiff was the owner of lands in Hampshire, in the district of the New Forest, including a portion of the waste lands of the manor of Tadenham, over which there was a public right of way, but the way being a track or pathway, no repairs had been done on the *locus in quo*, which was green, before 1866. The highway board proposed to "metal" it so as to make it into a hard road, and for that purpose had put gravel upon it, to test their right. The plaintiff thereupon brought his action. The way was across the common and had been long used, but had never been metalled or made a road. The case was tried before *Wills*, J., and a jury, at the Winchester assizes. Upon the question whether there was a right of way, at the close of the case on both sides, the point was taken that there was only a limited dedication to the public—limited by the actual user—a user of the way as it had been used before. Under the learned judge's direction the jury found for the defendant board. The summing-up of the learned judge was on this motion characterised by the Court of Appeal as "copious and clear and a complete exposition of the law on the subject" (*infra*), and was in the following terms:—

WILLS, J.—The principal question which arises in this case is one pre-eminently for you; and I am very glad that you had an advantage which it was impossible to give to me, so as to put me upon an equal footing with yourselves in dealing with the evidence, namely, that of having seen the place in question, which is an enormous advantage in any question of this kind. I, on the other hand, have at present an advantage over you which I will attempt to explain as much as possible, namely, I think I have from long experience a thorough familiarity with the principles and maxims and propositions of law which are applicable to the case, and which are not always perfectly easy to grasp, but without an accurate knowledge of which no one can possibly deal properly with a case of this description. Now, the action is brought for the act of the defendant highway board, in depositing gravel where you saw it, and the spot on which it is deposited undoubtedly belongs to the plaintiff, and, therefore, unless there is a justification for their doing so he is entitled to your verdict, because they have committed a trespass in that case. Therefore, the question for you is whether that justification which is alleged exists, and the justification which they allege is this: they say "this is a highway which we had a right, and which we had the duty, of repairing." "Right" and "duty" are correlative and co-extensive terms in this matter, and they say "it was in the exercise of that right and that duty, that we put this gravel for the purpose of repairing this road." All highways, all rights of passage over the property of individuals, have their actual or presumed origin, although it is not often the origin in point of fact, in a dedication by the owner of the soil, that is to say, he either says in so many words, or he so conducts himself as to lead the public to infer that he meant to say: "I am willing that the public should have this right of passage." If a man has actually conceded that right of passage to the public it is irrevocable, and that is expressed by the maxim with which we are all familiar, I suppose, "once a highway, always a highway." Up till the year 1835, when the Highway Act, which is the foundation of our present system, was passed, if there was a dedication of a road to the public by the owner either expressed by deed, as occasionally happens, or inferred from public user for such a time as to any tribunal who judges the case will appear sufficient to found that inference, if the proper inference was that he had said or so conducted himself as to imply that he had granted that right of passage to the public; and the public had on their part accepted it and used the road, from that moment there was not only the right of passage on the part of the public, but there was the liability to repair on the part of the parish; and antecedent to the act of 1835, wherever you found the right of passage by the public so that you were satisfied it was a highway, it was absolutely immaterial for the purpose of settling whether it was a highway or not, whether it ever had been repaired or not. Repairs by the parish were always an important piece of evidence when the question of highway or no highway came under consideration; but once establish that there was the right of passage given to the public, accepted by the public and used by the public, it followed as a matter of course, that, although no gravel or no work had been done, from that moment the liability on the part of the parish existed. A great many old highways in country places are highways, which from the time they were first used, have never had a spadeful of gravel thrown upon them, or a shilling's worth of repairs done to them at any spot. Therefore, down to the year 1835, if you establish there was the right of way on the part of the public, the liability to repair follows; and it attached, and it attaches, for all time; and it was immaterial, it is immaterial, if the public way antecedent to 1835 is made out to your satisfaction, whether repairs were ever done upon the road or not. The question whether repairs were or were not done to it is a piece of evidence which would help you in arriving at a just conclusion as to whether there was or was not a highway. But it is no more than that, and if there was a right of way on the part of the public over the place in question antecedent to 1835, then the liability to repair and the right to repair have attached to the present defendants. If there was not such a right of way prior to 1835 no such right and no such duty has attached because it having been found in many parts of the country that this liability pressed heavily upon parishes in respect to roads which were not of great public importance, and that the population was increasing and people were laying out building land and laying out streets in great numbers, threatening to throw additional burthens upon the public, or upon the parish as it was then, it was thought wise to put some limitation upon that; and now since 1835 you may have a way which is an undoubted public way, because the owner has dedicated it to the public, and they have used it, and it has become in that way a public highway, which people have a right to go backwards and forwards along, and yet there may be no right to repair it, and no duty to repair it upon anybody. Inasmuch as, in this case, the defendants cannot justify what they have done merely by reason of the existence of a right of passage on the part of the public, which has been the shape which nine out of ten actions of this kind take; inasmuch as they cannot justify it simply because there is a right since 1835 on the part of the public to pass, but they want the additional element in their defence that the public are bound to repair, and, therefore, have a right to repair, and inasmuch as the formalities which were required by the act of 1835, namely, the consent of the vestry, and an application to quarter sessions, and the satisfying of the magistrates that the road had been put into complete and satisfactory repair before the parish were asked to take it over, nothing of that sort having been done, the defendants cannot succeed here unless they make out that, antecedent to 1835, there was a public right of passage over this spot in question. If they do make that out, then the right to repair attaches. If they do not make it out, the right of repair does not attach, and, therefore, whether they get or lose the verdict must depend upon whether you are of opinion that the public had a right of way and passage over the spot in question before the year 1835. Let me now point out to you before I go on to the evidence itself, a consideration of great importance, as it seems to me, in this case, which really has scarcely been touched upon by the learned counsel on either side. It is quite true that a tenant for life cannot dedicate as against the remainderman. You understand, the man who has only a limited interest cannot dedicate in perpetuity so as to impose a burden upon the man who comes in after him, and who, during the life tenancy, can do nothing whatever to interfere with what he may choose to do. A dedication, if there be one, if there be that which as against the life tenant if he were owner in fee would constitute an effectual dedication of the road to the public for ever, if it is only done by the life tenant, cannot operate as against the remainderman. Therefore, in a certain sense, the evidence of what took place during the period that the life tenant has been owner of the property, has been the person entitled to interfere with persons who trespassed over the property if he were so disposed, in a certain sense that cannot establish a dedication of itself as against the owner in fee; yet it is a great mistake to suppose that it can be altogether rejected, and that it has not very often an extremely important bearing upon the question of whether there was a right of way before that limited owner, the tenant for life, came into the possession of the estate. After the tenant for life comes into possession of his portion of the inheritance or his life estate, if all that is done after that can be reasonably referred to permission on the part of the life tenant, it is justly excluded in considering whether there has been a dedication by the owner in fee. If, however, you find that the life tenant instead of wishing to allow other people to pass over is minded if he can to stop it, and if you find that he has not been able to stop it, of course, it puts a totally different complexion on the case, and raises a new set of considerations; because the user, during the possession of the tenant for life, cannot be reasonably referred to a mere wish on his part or a willingness on his part that the public should enjoy a right which did not exist when he came into his title. Under these circumstances it is very naturally and very reasonably tacked on to antecedent evidence, and goes undoubtedly to strengthen the evidence of what was done both before and after his time. Now, in this case, if Mr. *Bucknill* were right in saying that you might altogether obliterate, as it were, from the case this period

from 1832 to 1887 his case would stand, of course, a great deal better than it does. But then you have this important piece of evidence that the plaintiff's grandfather tried to stop the people coming down the lane. You have the evidence of the gamekeeper Bushell, that his instructions were to try and turn people back, and you have the evidence of Wright, that the present plaintiff gave him the same instructions. During the whole of the period, therefore, during which the life tenant was either the plaintiff's grandfather, or his father, or himself, you have a person in ownership for the time being of Tinker's Lane, who did not wish the public to pass, and who would have stopped, and wished to stop, their passage if he could. If so, and if the impression left upon your mind by the bulk of the evidence that you have heard, is that notwithstanding his objection to it, he was not able to stop it, and that the thing went on, surely it is a strong ground for supposing that there really was a right acquired by the public before that time which he could not interfere with. It is right, gentlemen, in a case of this kind which has lasted over a considerable period, that the judge should take his part in the joint responsibility, and should present before the jury shortly what seem to him the salient points upon the evidence. Now I have pointed out to you that the evidence fron 1832 down to 1887, the period of the tenancy, is necessarily of less value than if there had been a person competent to dedicate during the whole of that time. I have also pointed out to you, that it cannot be disregarded, and if you find that during the whole of that time there were persons who were very willing to put a stop to it if they could have done so, any tribunal I think would be justified, if they thought it was a proper thing to do, in acting upon slighter evidence in respect to the evidence antecedent to 1832, when the life tenancy began, than if that antecedent slight evidence were not fortified by the fact of the continuous user since that date, notwithstanding the opposition and the reluctance of the persons who had to submit to it. It is entirely for you to say, but, to my mind, I cannot help saying it, that, with regard to there having been a continuous user of this road as such, a road would be used if it were a public road by the limited portion of the public passing along and wanting to use a road of that kind. With the exception of one witness, who gave his evidence upon commission, the evidence seems to point to user by people who did not belong to the estate, and whose user cannot be explained away in that way, because, of course, people who belong to an estate where there are rights of this kind, are sure to have rights of even if there is no public way, and, therefore, in all such cases it happens constantly that the evidence of user, if it can be watered down to user only by tenants and persons who might be presumed to have permission upon other grounds than that of legal right, does not come to much. But in this case is there one witness, who has been called either for the plaintiff or for the defendants, who does not either attempt to prove, or admit according to which side he is called upon, that more or less user by people who wanted to go along this road was exercised? It seems to me that nearly everybody who has been called for the plaintiff has been obliged to admit this in cross-examination; but is there one or are there more than a very few, from beginning to end, who do not say that during the periods of which they speak, some of which, no doubt, are covered by the period from 1832 to 1887, when the life tenancy existed, such sort of people as were likely to want to use a bye-road of this kind in a country place, and in a sparsely populated district did not use it? To what extent that is likely to have been, you are better judges than I am. It seems that there is a turnpike road, or a high road, on one side of Cadnam Common; on the other side, there is that road that leads to the disputed portion, and beyond that if you pass over that disputed portion, you come to Tinker's Lane which leads apparently to a number of places. It seems to connect itself with the high road to Salisbury, and with other more important centres, and I should rather gather from what I have heard that there are more important centres of population in the opposite direction. You have heard what Mr. *Bucknill* says about there being that better and shorter road by which to go. All that appears to me on the evidence is that, for some reason or other, whether it was that they liked the picturesque (which is not very likely), or whether it is that it is really shorter; there were a certain portion of the people from first to last who wished to go that way. It is by the continual passage of people who wish to go along a particular spot that evidence of there being a high road is created; and taking the high roads in the country, a great deal more than half of them have no better origin and rest upon no more definite foundation than that. It is perfectly true that it is a necessary element in the legal definition of a highway that it must lead from one definite place to some other definite place, and that you cannot have a public right to indefinitely stray over a common for instance. It is a very common notion that such a right can be acquired. When an owner of property in the exercise of his undoubted proprietary rights wishes to put an end to a kind of unlimited straying over his property which in times past has been harmless, but which, from increase of population or one thing or another, has become very detrimental—when he puts up fences and so on, you have a party of people who assemble in great numbers with swords and axes, and cut down what he has done, and assert their rights in that way, and it very often happens that they imagine that they can set up and establish a right of indefinitely straying over a place to walk upon. There is no such right as that known to the law. Therefore, there must be a definite terminus, and a more or less definite direction; indeed, there must be a definite direction, subject to this which makes me say what I do. Where the right of passage exists on the part of the public, and where the road over a common or an unenclosed space or anything of that kind which would naturally be taken, is foundrous or is allowed to become foundrous, the public have a right, and it is a principle which is to be found in all our law books, and it is one which has been exercised from the earliest times down to the latest of doing that which would be otherwise trespassing beyond the bounds of what I may call the legitimate highway, the straight direction across in which they ought to go, if things were all right for them; and they have a right to deviate right or left in order to get along upon those parts that are less foundrous, as the old law books say, parts which are less muddy and dilapidated. If there is a right of passing from Kew Lake Lane, which is a public highway, through the gate into Tinker's Lane, it is absolutely certain I should think, with a greensward such as that appears to have been in the earlier times and practically down to the present time, that there will be a quantity of deviation. We hear that it is a very boggy and wet sort of place, a place very apt to get out of order, and, therefore, there is perfectly certain to be something of that kind. It is true that nobody can establish a right to have a sort of fan as Mr. *Bucknill* put it, but it may be that the fanlike expansion of the tracts is really, under such circumstances as that, only a legitimate exercise of the right of getting out of the foundrous part of the road, and going upon sound ground which may not be in the proper line. At the gate, and if there be a highway up to that gate there is no possibility of deviating because everybody has got to pass through that gate. On the other side there is a physical possibility of deviating. It does not seem to me, although this is entirely for you, a thing that is in itself of necessity fatal to the contention that there is a right of way in the direct line, because it may be that it is a way which is practicable under the circumstances, in the condition in which it has been, to get across. The case of the defendants would have been better if it had been nothing but one defined track, and Mr. *Bucknill* is fairly entitled to all he said about this deviation on one side and the other, as being an element of apparent uncertainty which has to be explained, though it is not wholly inconsistent with the defendant's case. I do not think it comes to more than that, and it is for you to say what value is to be attributed under the circumstances to the evidence. A good deal also has been said of this assumed track by the side of one hedge or the other. It is certain that if anybody were going north he would go alongside the hedge which forms the eastern boundary of the plaintiff's property on the far side; and it may be it is possible that the public might acquire a right, if the evidence were strong enough, that those of them who wanted to go up there might acquire a right to do it by continually going across there, although it was a trespass in the first instance. So along the hedge which runs east and west, and which forms the southern boundary of the green. But as to that there is the smallest possible evidence as it seems to me of their ever having been used in anything like a systematic way. Now there comes what is, in my mind, a very important general consideration here. There is a considerable body of evidence that Tinker's Lane is at all events now a public highway. Mr. *Bucknill* is right in saying that will not do for the defendants; they must have a highway before 1835, and what the evidence upon that point is, I will just shortly give you presently. But supposing you think Tinker's Lane is a public highway, what would be the meaning in a country place like that of a highway which ends in a *cul de sac*, and ends at a gate on to a common? Such things exist in large towns. In Leeds, which is a place where I have done a good deal of my hardest forensic work, there were scores of streets which ended with dead walls and which were repaired by the public. These are all gone now, but I recollect it perfectly well; but who ever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? I have known it successfully established in a beautiful walk leading to a cliff end or a place off the seashore. I tried a case at Haverfordwest a short time ago, where such a thing as that was established to the satisfaction of everybody except the people who lost. But what do you find such a thing for in this part of the world? I cannot conceive it. It is a just observation that if you think Tinker's Lane was a public highway, an old and ancient public highway, why should it be so unless it leads across that common to some of these places beyond? I cannot conceive myself how that could be a public highway, or to what purpose it could be dedicated or in what way it could be used so as to become a public highway, unless it was to pass over from that side of the country to this side of the country. Therefore, it seems to me, after all said and done, that the evidence with regard to this little piece across the green cannot be severed from the other; and it is comparatively of little importance, because if I were a juror, and were satisfied in my own mind that Tinker's Lane was really a public highway up to that gate, I do not know, but I think, it would take a great deal to persuade me that

Enoch (892) 56 JP 517

it was possible that that state of things should co-exist with no public way across the little piece of green. Therefore, it seems to me, it is a very important question whether this Tinker's Lane up to the gate is a public way, and with regard to that I have to tell you, speaking in general, what the evidence is, but there are just one or two specific things to which I should like to call your attention. There is evidence that repairs were done which the tendency of the evidence is to connect with the parish, and which it is sought to connect with the parish through a portion of the road which lies between the now Home Farm and the gate; that is at the very end of this road this way. If these repairs were really done, one cannot quite understand for what purpose they were done except for the use of the public. There is evidence which carries back these repairs to before 1835 and before 1832. However, the evidence of repairs is not touched by the date in 1832—nothing to do with it. Repair by the parish is always, if it is made out, a strong indication of the public right. It is a burden accepted by the parish which would not be accepted unless there was a public way. Now, one witness seems to carry his evidence back to something like the year 1828, certainly beyond the critical period of 1835. Then there is further additional evidence which goes to substantiate the same point. On the other hand there is evidence, which the plaintiff necessarily and legitimately relies upon, that Tinker's Lane was twice altered by the landowner. Of course, especially since 1835 (and this was since 1835), he had no right to obliterate the old road although he substituted a new one for it without an order of sessions, and the strict legal result would be, that the old obliterated way would still remain if you could find out where it lay. No one would want to be bothered with any such question as that; but it is a thing which is more likely to have been done without objection. On the other hand, so long as the plaintiff and his predecessors cared to relieve the parish from the burthen of repairing these roads, you may depend upon it that the parish were not likely to be discontented with that state of things; and it is admitted, and it is rather made a part of his case, that from the time when he did effect that diversion he did more to the road, and it may very well be, that the people were very glad to let sleeping dogs lie. So long as the thing was in better order than it had formerly been nobody would say anything about it. This is about all the plaintiff has offered to rebut what seems to me a very considerable body of evidence, although it is worthy of your consideration the other way. Now, one word as to what has been done on the green. There is no evidence that I think anybody would think worthy of any consideration of any repairs being done to that from which anything could be gathered before 1866 or 1867 or thereabouts, which is very late in the day; but late as it is it was after Brewer, the tenant, had done it that the surveyor of that day clearly wanted to get them mended again, because he applied to the tenant who succeeded Brewer to do it; when that man refused to do it the surveyor did it himself, and the surveyor seems to have done it on more than one occasion since. He cannot give himself a right to do it by assuming it if he had not got it before 1835. On the other hand his conduct in doing it, and acquiescence in it, is a piece of evidence tending to indicate that he felt there was a right to do it. If so, that means that there was an ancient way before 1835. I am not laying this down as law; but I cannot understand how there could be a public way up to the gate—practically, I mean; I do not mean theoretically,—but how in a locality like this there could be a public highway up to the gate without there being a highway beyond it. If there were a public highway up Tinker's Lane before 1835, it does not seem to me at all a wrong step to take, or an unreasonable step to take, to say there must have been one across that green, and most of the witnesses who have been called for the plaintiff say that, if anything, there was more of a track formerly than there is now, and we can understand why that was. The plaintiff—I do not mention this as a topic of prejudice at all—said three or four years ago: "That road is too good. As it is people come along it. Let us have all the gravel and stuff taken up and make it foundrous." I doubt whether he would have a right to do more than let it get foundrous and leave it alone. I doubt very much whether he would have a right to do what he did, to pick up the gravel and make it worse; but never mind whether he had or not, assume that he had, the result must be, of course, that it looks a good deal less like a road than it was likely to look before the operation was completed. Gentlemen, you will be kind enough to consider your verdict. The question for you is; Do you think that the track across that bit of green was an ancient highway? I mean not necessarily from time immemorial, but a real old highway, an existing highway at the time when the act of 1835 came into operation? If you do think so, your verdict ought to be for the defendants; if you think there was no existing highway before 1835, you must find for the plaintiff. In that case it is not a question for damages. It will be quite sufficient if you say whether you find for the plaintiff or for the defendants.

Foote (with him *Bucknill*, Q.C.), for the plaintiff.—I am sure your lordship does not suspect me of wanting to criticise the summing up; but my learned friend, Mr. *Bucknill*, asked me to submit to your lordship that it might be desirable to ask specific questions—viz., first, whether there is a public highway now, and, if so, whether it became so before 1835, or afterwards, and, secondly, whether, if before 1835, it was more than a right of passage not involving a right to repair?

WILLS, J.—There is no such thing as a right of passage not involving a right to repair before 1835.

Foote.—That is a point we desire to reserve to ourselves,—that across a common there may be a right to go without a right to repair or metal a road. There may be a dedication *sub modo*, that is a dedication of a highway so far as the right of passage is concerned without the right to put gravel. I do not want to argue it at all.

WILLS, J.—In my opinion, the duty to repair an ancient highway was always co-extensive with the right of passage by the public. The liability of the parish attached, though there were thousands of instances in which it was never exercised.

Foote.—I do not desire to argue it. I only want to make the point clear.

WILLS, J.—I think if you want to raise that point you had better go for a new trial, because that goes to the root of my summing-up.

Foote.—It does, my lord. In the case of a footway it is common to have such a dedication. I mean, take the case of a footpath across a cornfield where the farmer ploughs it up every year and sows it with corn. No one could say that the public can gravel that, yet it is a highway, and I submit that there may be a right of passage not carrying with it the right of repairing and gravelling. We ask your lordship to put that to the jury.

WILLS, J.—Inasmuch as there has been no evidence whatever directed to any such distinction as that, I had better put it generally.

The jury found for the defendant board. This was an application on the part of the plaintiff to set aside the verdict on the ground that the evidence of mere user did not show a dedication to the public as a highway, nor any right beyond the user.

Hopkinson, Q.C. (with him *Foote*), now moved for a new trial for the plaintiff.—It is one thing to have tracks or mere paths, and a very different thing to have hard roads. The change would seriously affect the amenities of the property, and prejudicially affect its value. The mere user of a way across such lands was not enough to show a dedication to the public as a road or highway, or a right to repair it and metal it as such. The *locus in quo* was green, and there had been no repairs on it before the year 1866. The mere user by the public of a right of way over open or waste land only showed a right to go over such land, not to have it made into a hard road. That depended upon whether there had been a dedication to the public as a road or highway. The mere user as a way only showed the right to continue such user.

Lord ESHER, M.R.—Then you say the public must in wet weather walk in the mud?

Hopkinson—They must use the way as they have done before.

Lord ESHER, M.R.—Surely it depends on the act?

Hopkinson—The learned judge did not put it on the act. There was only a limited dedication. There may be a right of way across common lands without an absolute dedication to the public. Here there was only a right to go over the common as people go over most of the commons of England. There was thus misdirection.

Murphy, Q.C., *Bullen*, and *Austin*, for the defendant board, were not called upon.

The Court (Lord ESHER, BOWEN, L.J., and A. L. SMITH, L.J.)—The point now urged was not taken at the trial until the case on both sides was closed, and, therefore, it cannot be taken now. The question at the trial was whether there was a right of way at all, not as to a limited right of way or a limited dedication. The summing up was copious and clear, and a complete exposition of the law on the subject; it was a clear and correct direction to the jury on all the points raised. At the close of the case, the point as to a limited dedication was taken; and now this court is asked to grant a new trial upon it. That ought not to be done.

Motion refused.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

December 9, 1891. (1945) K.B. 43

DENT, APPELLANT, *v.* OVERSEERS OF COMMONDALE, RESPONDENT.

Poor rate—Liquidator assessed—No appeal—Distress warrant.

D., the liquidator of a company was inserted in the rate book as owner and occupier, and did not appeal against the rate, and did not pay.

Held, *that as the rate was good on the face of it, the justices were right in issuing a distress warrant against him.*

This is a case stated by us, the undersigned, four of Her Majesty's justices of the peace in and for the North Riding of the county of York, on the application of the above-named appellant under section 33 of the Summary Jurisdiction Act, 1879:—

1. At a court of summary jurisdiction holden by us at Guisborough within the said riding, on the 21st day of July, 1891, the overseers of the poor of the township of Commondale within the said riding, and within the jurisdiction of the said court by John Robinson, one of the said overseers, duly preferred a complaint against the appellant for that he being a person duly rated and assessed to the relief of the

FURTHER SUBMISSION ON APPLICATION RWO RWO 207 FOLLOWING A QUESTION BY THE LOCAL AUTHORITY.

You have asked me what part of the case of Eyre v New Forest Highway Board reflects my contention that the middle of a right of way need not be certain but that the most likely route should be taken.

I refer to the interpretation of the case in the PINS consistency guidelines which says

2.37 In *Eyre v New Forest Highway Board* 1892 Wills J also covers the situation in which two apparent culs-de-sac are created by reason of uncertainty over the status of a short, linking section (in that case a track over a common). He held that, where a short section of uncertain status exists it can be presumed that its status is that of the two highways linked by it.

I also refer to the decision of Inspector Beckett on an appeal, which can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/912423/fps_p2745_14a_6_od.pdf At paragraph 11 the inspector says

Under the provisions of section 53 (3) (c) (ii) there is no "reasonably alleged to subsist" test as is found in subsection (i). However, given that the appeal route forms part of a through link between existing public carriageways, I intend to give consideration to the appeal route as a whole and not to its separate constituent parts. If a conclusion is reached that it is reasonable for the Appellant to allege the existence of a public vehicular right of way over the appeal route as a whole, it would follow that it would also be reasonable to allege the existence of higher rights over A – B and C – D as otherwise B – C would be a vehicular cul-de-sac at either end. Such a route could not subsist at common law.

This decision is not binding on a decision maker, but I suggest it is an accurate statement of the legislation.

I think that much of the decision in Eyre V New Forest Highway Board is relevant, and I note in particular that the route over the common appears to have changed over time and that reference is made to people taking different routes. On the following pages I have highlighted the bits of the decision that I think particularly relevant.

[1935] 1 K.B. 320 —— (1947) Ch. 83

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

June 18.

EYRE v. NEW FOREST HIGHWAY BOARD.

Highway—How created—Dedication—Tenant for life—Remainderman—Practice—New trial—Point not taken at the trial.

A tenant for life cannot dedicate a way as a highway as against the remainderman.

It is by the continual passage of people who wish to go along a particular way, that evidence of there being a highway is established.

A new trial will not be granted on a point not taken at the trial until after the case on both sides was closed.

This was a motion for a new trial on the ground of misdirection. The point raised was as to the right of a highway board to "metal or gravel" ways across common or waste lands, so as to make them into hard roads or highways. The plaintiff was the owner of lands in Hampshire, in the district of the New Forest, including a portion of the waste lands of the manor of Tadenham, over which there was a public right of way, but the way being a track or pathway, no repairs had been done on the *locus in quo*, which was green, before 1866. The highway board proposed to "metal" it so as to make it into a hard road, and for that purpose had put gravel upon it, to test their right. The plaintiff thereupon brought his action. The way was across the common and had been long used, but had never been metalled or made a road. The case was tried before *Wills*, J., and a jury, at the Winchester assizes. Upon the question whether there was a right of way, at the close of the case on both sides, the point was taken that there was only a limited dedication to the public—limited by the actual user—a user of the way as it had been used before. Under the learned judge's direction the jury found for the defendant board. The summing-up of the learned judge was on this motion characterised by the Court of Appeal as "copious and clear and a complete exposition of the law on the subject" (*infra*), and was in the following terms:—

WILLS, J.—The principal question which arises in this case is one pre-eminently for you; and I am very glad that you had an advantage which it was impossible to give to me, so as to put me upon an equal footing with yourselves in dealing with the evidence, namely, that of having seen the place in question, which is an enormous advantage in any question of this kind. I, on the other hand, have at present an advantage over you which I will attempt to explain as much as possible, namely, I think I have from long experience a thorough familiarity with the principles and maxims and propositions of law which are applicable to the case, and which are not always perfectly easy to grasp, but without an accurate knowledge of which no one can possibly deal properly with a case of this description. Now, the action is brought for the act of the defendant highway board, in depositing gravel where you saw it, and the spot on which it is deposited undoubtedly belongs to the plaintiff, and, therefore, unless there is a justification for their doing so he is entitled to your verdict, because they have committed a trespass in that case. Therefore, the question for you is whether that justification which is alleged exists, and the justification which they allege is this: they say "this is a highway which we had a right, and which we had the duty, of repairing." "Right" and "duty" are correlative and co-extensive terms in this matter, and they say "it was in the exercise of that right and that duty, that we put this gravel for the purpose of repairing this road." All highways, all rights of passage over the property of individuals, have their actual or presumed origin, although it is not often the origin in point of fact, in a dedication by the owner of the soil, that is to say, he either says in so many words, or he so conducts himself as to lead the public to infer that he meant to say: "I am willing that the public should have this right of passage." If a man has actually conceded that right of passage to the public it is irrevocable, and that is expressed by the maxim with which we are all familiar, I suppose, "once a highway, always a highway." Up till the year 1835, when the Highway Act, which is the foundation of our present system, was passed, if there was a dedication of a road to the public by the owner either expressed by deed, as occasionally happens, or inferred from public user for such a time as to any tribunal who judges the case will appear sufficient to found that inference, if the proper inference was that he had said or so conducted himself as to imply that he had granted that right of passage to the public; and the public had on their part accepted it and used the road, from that moment there was not only the right of passage on the part of the public, but there was the liability to repair on the part of the parish; and antecedent to the act of 1835, wherever you found the right of passage by the public so that you were satisfied it was a highway, it was absolutely immaterial for the purpose of settling whether it was a highway or not, whether it ever had been repaired or not. Repairs by the parish were always an important piece of evidence when the question of highway or no highway came under consideration; but once establish that there was the right of passage given to the public, accepted by the public and used by the public, it followed as a matter of course, that, although no gravel or no work had been done, from that moment the liability on the part of the parish existed. A great many old highways in country places are highways, which from the time they were first used, have never had a spadeful of gravel thrown upon them, or a shilling's worth of repairs done to them at any spot. Therefore, down to the year 1835, if you establish there was the right of way on the part of the public, the liability to repair follows; and it attached, and it attaches, for all time; and it was immaterial, it is immaterial, if the public way antecedent to 1835 is made out to your satisfaction, whether repairs were ever done upon the road or not. The question whether repairs were or were not done to it is a piece of evidence which would help you in arriving at a just conclusion as to whether there was or was not a highway. But it is no more than that, and if there was a right of way on the part of the public over the place in question antecedent to 1835, then the liability to repair and the right to repair have attached to the present defendants. If there was not such a right of way prior to 1835 no such right and no such duty has attached because it having been found in many parts of the country that this liability pressed heavily upon parishes in respect to roads which were not of great public importance, and that the population was increasing and people were laying out building land and laying out streets in great numbers, threatening to throw additional burthens upon the public, or upon the parish as it was then, it was thought wise to put some limitation upon that; and now since 1835 you may have a way which is an undoubted public way, because the owner has dedicated it to the public, and they have used it, and it has become in that way a public highway, which people have a right to go backwards and forwards along, and yet there may be no right to repair it, and no duty to repair it upon anybody. Inasmuch as, in this case, the defendants cannot justify what they have done merely by reason of the existence of a right of passage on the part of the public, which has been the shape which nine out of ten actions of this kind take; inasmuch as they cannot justify it simply because there is a right since 1835 on the part of the public to pass, but they want the additional element in their defence that the public are bound to repair, and, therefore, have a right to repair, and inasmuch as the formalities which were required by the act of 1835, namely, the consent of the vestry, and an application to quarter sessions, and the satisfying of the magistrates that the road had been put into complete and satisfactory repair before the parish were asked to take it over, nothing of that sort having been done, the defendants cannot succeed here unless they make out that, antecedent to 1835, there was a public right of passage over this spot in question. If they do make that out, then the right to repair attaches. If they do not make it out, the right of repair does not attach, and, therefore, whether they get or lose the verdict must depend upon whether you are of opinion that the public had a right of way and passage over the spot in question before the year 1835. Let me now point out to you before I go on to the evidence itself, a consideration of great importance, as it seems to me, in this case, which really has scarcely been touched upon by the learned counsel on either side. It is quite true that a tenant for life cannot dedicate as against the remainderman. You understand, the man who has only a limited interest cannot dedicate in perpetuity so as to impose a burden upon the man who comes in after him, and who, during the life tenancy, can do nothing whatever to interfere with what he may choose to do. A dedication, if there be one, if there be that which as against the life tenant if he were owner in fee would constitute an effectual dedication of the road to the public for ever, if it is only done by the life tenant, cannot operate as against the remainderman. Therefore, in a certain sense, the evidence of what took place during the period that the life tenant has been owner of the property, has been the person entitled to interfere with persons who trespassed over the property if he were so disposed, in a certain sense that cannot establish a dedication of itself as against the owner in fee; yet it is a great mistake to suppose that it can be altogether rejected, and that it has not very often an extremely important bearing upon the question of whether there was a right of way before that limited owner, the tenant for life, came into the possession of the estate. After the tenant for life comes into possession of his portion of the inheritance or his life estate, if all that is done after that can be reasonably referred to permission on the part of the life tenant, it is justly excluded in considering whether there has been a dedication by the owner in fee. If, however, you find that the life tenant instead of wishing to allow other people to pass over is minded if he can to stop it, and if you find that he has not been able to stop it, of course, it puts a totally different complexion on the case, and raises a new set of considerations; because the user, during the possession of the tenant for life, cannot be reasonably referred to a mere wish on his part or a willingness on his part that the public should enjoy a right which did not exist when he came into his title. Under these circumstances it is very naturally and very reasonably tacked on to antecedent evidence, and goes undoubtedly to strengthen the evidence of what was done both before and after his time. Now, in this case, if Mr. *Buckmill* were right in saying that you might altogether obliterate, as it were, from the case this period

from 1832 to 1887 his case would stand, of course, a great deal better than it does. But then you have this important piece of evidence that the plaintiff's grandfather tried to stop the people coming down the lane. You have the evidence of the gamekeeper Bushell, that his instructions were to try and turn people back, and you have the evidence of Wright, that the present plaintiff gave him the same instructions. During the whole of the period, therefore, during which the life tenant was either the plaintiff's grandfather, or his father, or himself, you have a person in ownership for the time being of Tinker's Lane, who did not wish the public to pass, and who would have stopped, and wished to stop, their passage if he could. If so, and if the impression left upon your mind by the bulk of the evidence that you have heard, is that notwithstanding his objection to it, he was not able to stop it, and that the thing went on, surely it is a strong ground for supposing that there really was a right acquired by the public before that time which he could not interfere with. It is right, gentlemen, in a case of this kind which has lasted over a considerable period, that the judge should take his part in the joint responsibility, and should present before the jury shortly what seem to him the salient points upon the evidence. Now I have pointed out to you that the evidence from 1832 down to 1887, the period of the tenancy, is necessarily of less value than if there had been a person competent to dedicate during the whole of that time. I have also pointed out to you, that it cannot be disregarded, and if you find that during the whole of that time there were persons who were very willing to put a stop to it if they could have done so, any tribunal I think would be justified, if they thought it was a proper thing to do, in acting upon slighter evidence in respect to the evidence antecedent to 1832, when the life tenancy began, than if that antecedent slight evidence were not fortified by the fact of the continuous user since that date, notwithstanding the opposition and the reluctance of the persons who had to submit to it. It is entirely for you to say, but, to my mind, I cannot help saying it, that, with regard to there having been a continuous user of this road as such, a road would be used if it were a public road by the limited portion of the public passing along and wanting to use a road of that kind. With the exception of one witness, who gave his evidence upon commission, the evidence seems to point to user by people who did not belong to the estate, and whose user cannot be explained away in that way, because, of course, people who belong to an estate where there are ... of this kind, are sure to have rights of ... even if there is no public way, and, therefore, in all such cases it happens constantly that the evidence of user, if it can be watered down to user only by tenants and persons who might be presumed to have permission upon other grounds than that of legal right, does not come to much. But in this case is there one witness, who has been called either for the plaintiff or for the defendants, who does not either attempt to prove, or admit according to which side he is called upon, that more or less user by people who wanted to go along this road was exercised? It seems to me that nearly everybody who has been called for the plaintiff has been obliged to admit this in cross-examination; but is there one or are there more than a very few, from beginning to end, who do not say that during the periods of which they speak, some of which, no doubt, are covered by the period from 1832 to 1887, when the life tenancy existed, such sort of people as were likely to want to use a bye-road of this kind in a country place, and in a sparsely populated district did not use it? To what extent that is likely to have been, you are better judges than I am. It seems that there is a turnpike road, or a high road, on one side of Cadnam Common; on the other side, there is that road that leads to the disputed portion, and beyond that if you pass over that disputed portion, you come to Tinker's Lane which leads apparently to a number of places. It seems to connect itself with the high road to Salisbury, and with other more important centres, and I should rather gather from what I have heard that there are more important centres of population in the opposite direction. You have heard what Mr. *Bucknill* says about there being that better and shorter road by which to go. All that appears to me on the evidence is that, for some reason or other, whether it was that they liked the picturesque (which is not very likely), or whether it is that it is really shorter; there were a certain portion of the people from first to last who wished to go that way. It is by the continual passage of people who wish to go along a particular spot that evidence of there being a high road is created; and taking the high roads in the country, a great deal more than half of them have no better origin and rest upon no more definite foundation than that. It is perfectly true that it is a necessary element in the legal definition of a highway that it must lead from one definite place to some other definite place, and that you cannot have a public right to indefinitely stray over a common for instance. It is a very common notion that such a right can be acquired. When an owner of property in the exercise of his undoubted proprietary rights wishes to put an end to a kind of unlimited straying over his property which in times past has been harmless, but which, from increase of population or one thing or another, has become very detrimental—when he puts up fences and so on, you have a party of people who assemble in great numbers with swords and axes, and cut down what he has done, and assert their rights in that way, and it very often happens that they imagine that they can set up and establish a right of indefinitely straying over a place to walk upon. There is no such right as that known to the law. Therefore, there must be a definite terminus, and a more or less definite direction; indeed, there must be a definite direction, subject to this which makes me say what I do. Where the right of passage exists on the part of the public, and where the road over a common or an unenclosed space or anything of that kind which would naturally be taken, is foundrous or is allowed to become foundrous, the public have a right, and it is a principle which is to be found in all our law books, and it is one which has been exercised from the earliest times down to the latest of doing that which would be otherwise trespassing beyond the bounds of what I may call the legitimate highway, the straight direction across in which they ought to go, if things were all right for them; and they have a right to deviate right or left in order to get along upon those parts that are less foundrous, as the old law books say, parts which are less muddy and dilapidated. If there is a right of passing from Kew Lake Lane, which is a public highway, through the gate into Tinker's Lane, it is absolutely certain I should think, with a greensward such as that appears to have been in the earlier times and practically down to the present time, that there will be a quantity of deviation. We hear that it is a very boggy and wet sort of place, a place very apt to get out of order, and, therefore, there is perfectly certain to be something of that kind. It is true that nobody can establish a right to have a sort of fan as Mr. *Bucknill* put it, but it may be that the fanlike expansion of the tracts is really, under such circumstances as that, only a legitimate exercise of the right of getting out of the foundrous part of the road, and going upon sound ground which may not be in the proper line. At the gate, and if there be a highway up to that gate there is no possibility of deviating because everybody has got to pass through that gate. On the other side there is a physical possibility of deviating. It does not seem to me, although this is entirely for you, a thing that is in itself of necessity fatal to the contention that there is a right of way in the direct line, because it may be that it is a way which is practicable under the circumstances, in the condition in which it has been, to get across. The case of the defendants would have been better if it had been nothing but one defined track, and Mr. *Bucknill* is fairly entitled to all he said about this deviation on one side and the other, as being an element of apparent uncertainty which has to be explained, though it is not wholly inconsistent with the defendant's case. I do not think it comes to more than that, and it is for you to say what value is to be attributed under the circumstances to the evidence. A good deal also has been said of this assumed track by the side of one hedge or the other. It is certain that if anybody were going north he would go alongside the hedge which forms the eastern boundary of the plaintiff's property on the far side; and it may be it is possible that the public might acquire a right, if the evidence were strong enough, that those of them who wanted to go up there might acquire a right to do it by continually going across there, although it was a trespass in the first instance. So along the hedge which runs east and west, and which forms the southern boundary of the green. But as to that there is the smallest possible evidence as it seems to me of their ever having been used in anything like a systematic way. Now there comes what is, in my mind, a very important general consideration here. There is a considerable body of evidence that Tinker's Lane is at all events now a public highway. Mr. *Bucknill* is right in saying that will not do for the defendants; they must have a highway before 1835, and what the evidence upon that point is, I will just shortly give you presently. But supposing you think Tinker's Lane is a public highway, what would be the meaning in a country place like that of a highway which ends in a *cul de sac*, and ends at a gate on to a common? Such things exist in large towns. In Leeds, which is a place where I have done a good deal of my hardest forensic work, there were scores of streets which ended with dead walls and which were repaired by the public. These are all gone now, but I recollect it perfectly well; but who ever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? I have known it successfully established in a beautiful walk leading to a cliff end or a place off the seashore. I tried a case at Haverfordwest a short time ago, where such a thing as that was established to the satisfaction of everybody except the people who lost. But what do you find such a thing for in this part of the world? I cannot conceive it. It is a just observation that if you think Tinker's Lane was a public highway, an old and ancient public highway, why should it be so unless it leads across that common to some of these places beyond? I cannot conceive myself how that could be a public highway, or to what purpose it could be dedicated or in what way it could be used so as to become a public highway, unless it was to pass over from that side of the country to this side of the country. Therefore, it seems to me, after all said and done, that the evidence with regard to this little piece across the green cannot be severed from the other; and it is comparatively of little importance, because if I were a juror, and were satisfied in my own mind that Tinker's Lane was really a public highway up to that gate, I do not know, but I think, it would take a great deal to persuade me that

it was possible that that state of things should co-exist with no public way across the little piece of green. Therefore, it seems to me, it is a very important question whether this Tinker's Lane up to the gate is a public way, and with regard to that I have to tell you, speaking in general, what the evidence is, but there are just one or two specific things to which I should like to call your attention. There is evidence that repairs were done which the tendency of the evidence is to connect with the parish, and which it is sought to connect with the parish through a portion of the road which lies between the new Home Farm and the gate; that is at the very end of this road this way. If these repairs were really done, one cannot quite understand for what purpose they were done except for the use of the public. There is evidence which carries back these repairs to before 1835 and before 1832. However, the evidence of repairs is not touched by the date in 1832 —nothing to do with it. Repair by the parish is always, if it is made out, a strong indication of the public right. It is a burden accepted by the parish which would not be accepted unless there was a public way. Now, one witness seems to carry his evidence back to something like the year 1823, certainly beyond the critical period of 1835. Then there is further additional evidence which goes to substantiate the same point. On the other hand there is evidence, which the plaintiff necessarily and legitimately relies upon, that Tinker's Lane was twice altered by the landowner. Of course, especially since 1835 (and this was since 1835), he had no right to obliterate the old road although he substituted a new one for it without an order of sessions, and the strict legal result would be, that the old obliterated way would still remain if you could find out where it lay. No one would want to be bothered with any such question as that; but it is a thing which is more likely to have been done without objection. On the other hand, so long as the plaintiff and his predecessors cared to relieve the parish from the burthen of repairing these roads, you may depend upon it that the parish were not likely to be discontented with that state of things; and it is admitted, and it is rather made a part of his case, that from the time when he did effect that diversion he did more to the road, and it may very well be, that the people were very glad to let sleeping dogs lie. So long as the thing was in better order than it had formerly been nobody would say anything about it. This is about all the plaintiff has offered to rebut what seems to me a very considerable body of evidence, although it is worthy of your consideration the other way. Now, one word as to what has been done on the green. There is no evidence that I think anybody would think worthy of any consideration of any repairs being done to that from which anything could be gathered before 1866 or 1867 or thereabouts, which is very late in the day; but late as it is it was after Brewer, the tenant, had done it that the surveyor of that day clearly wanted to get them mended again, because he applied to the tenant who succeeded Brewer to do it; when that man refused to do it the surveyor did it himself, and the surveyor seems to have done it on more than one occasion since. He cannot give himself a right to do it by assuming it if he had not got it before 1835. On the other hand his conduct in doing it, and acquiescence in it, is a piece of evidence tending to indicate that he felt there was a right to do it. If so, that means that there was an ancient way before 1835. I am not laying this down as law; but I cannot understand how there could be a public way up to the gate—practically, I mean; I do not mean theoretically,—but how in a locality like this there could be a public highway up to the gate without there being a highway beyond it. If there were a public highway up Tinker's Lane before 1835, it does not seem to me at all a wrong step to take, or an unreasonable step to take, to say there must have been one across that green, and most of the witnesses who have been called for the plaintiff say that, if anything, there was more of a track formerly than there is now, and we can understand why that was. The plaintiff—I do not mention this as a topic of prejudice at all—said three or four years ago: "That road is too good. As it is people come along it. Let us have all the gravel and stuff taken up and make it foundrous." I doubt whether he would have a right to do more than let it get foundrous and leave it alone. I doubt very much whether he would have a right to do what he did, to pick up the gravel and make it worse; but never mind whether he had or not, assume that he had, the result must be, of course, that it looks a good deal less like a road than it was likely to look before the operation was completed. Gentlemen, you will be kind enough to consider your verdict. The question for you is: Do you think that the track across that bit of green was an ancient highway? I mean not necessarily from time immemorial, but a real old highway, an existing highway at the time when the act of 1835 came into operation? If you do think so, your verdict ought to be for the defendants; if you think there was no existing highway before 1835, you must find for the plaintiff. In that case it is not a question for damages. It will be quite sufficient if you say whether you find for the plaintiff or for the defendants.

Foote (with him *Bucknill*, Q.C.), for the plaintiff.—I am sure your lordship does not suspect me of wanting to criticise the summing up; but my learned friend, Mr. *Bucknill*, asked me to submit to your lordship that it might be desirable to ask specific questions—viz., first, whether there is a public highway now, and, if so, whether it became so before 1835, or afterwards, and, secondly, whether, if before 1835, it was more than a right of passage not involving a right to repair?

WILLS, J.—There is no such thing as a right of passage not involving a right to repair before 1835.

Foote.—That is a point we desire to reserve to ourselves,—that across a common there may be a right to go without a right to repair or metal a road. There may be a dedication *sub modo*, that is a dedication of a highway so far as the right of passage is concerned without the right to put gravel. I do not want to argue it at all.

WILLS, J.—In my opinion, the duty to repair an ancient highway was always co-extensive with the right of passage by the public. The liability of the parish attached, though there were thousands of instances in which it was never exercised.

Foote.—I do not desire to argue it. I only want to make the point clear.

WILLS, J.—I think if you want to raise that point you had better go for a new trial, because that goes to the root of my summing-up.

Foote.—It does, my lord. In the case of a footway it is common to have such a dedication. I mean, take the case of a footpath across a cornfield where the farmer ploughs it up every year and sows it with corn. No one could say that the public can gravel that, yet it is a highway, and I submit that there may be a right of passage not carrying with it the right of repairing and gravelling. We ask your lordship to put that to the jury.

WILLS, J.—Inasmuch as there has been no evidence whatever directed to any such distinction as that, I had better put it generally.

The jury found for the defendant board. This was an application on the part of the plaintiff to set aside the verdict on the ground that the evidence of mere user did not show a dedication to the public as a highway, nor any right beyond the user.

Hopkinson, Q.C. (with him *Foote*), now moved for a new trial for the plaintiff.—It is one thing to have tracks or mere paths, and a very different thing to have hard roads. The change would seriously affect the amenities of the property, and prejudicially affect its value. The mere user of a way across such lands was not enough to show a dedication to the public as a road or highway, or a right to repair it and metal it as such. The *locus in quo* was green, and there had been no repairs on it before the year 1866. The mere user by the public of a right of way over open or waste land only showed a right to go over such land, not to have it made into a hard road. That depended upon whether there had been a dedication to the public as a road or highway. The mere user as a way only showed the right to continue such user.

Lord ESHER, M.R.—Then you say the public must in wet weather walk in the mud?

Hopkinson—They must use the way as they have done before.

Lord ESHER, M.R.—Surely it depends on the act?

Hopkinson—The learned judge did not put it on the act. There was only a limited dedication. There may be a right of way across common lands without an absolute dedication to the public. Here there was only a right to go over the common as people go over most of the commons of England. There was thus misdirection.

Murphy, Q.C., *Bullen*, and *Austin*, for the defendant board, were not called upon.

The COURT (Lord ESHER, BOWEN, L.J., and A. L. SMITH, L.J.)—The point now urged was not taken at the trial until the case on both sides was closed, and, therefore, it cannot be taken now. The question at the trial was whether there was a right of way at all, not as to a limited right of way or a limited dedication. The summing up was copious and clear, and a complete exposition of the law on the subject; it was a clear and correct direction to the jury on all the points raised. At the close of the case, the point as to a limited dedication was taken; and now this court is asked to grant a new trial upon it. That ought not to be done.

Motion refused.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

December 9, 1891. (1945) KB. 43

DENT, APPELLANT, *v.* OVERSEERS OF COMMONDALE, RESPONDENT.

Poor rate—Liquidator assessed—No appeal—Distress warrant.

D., the liquidator of a company was inserted in the rate book as owner and occupier, and did not appeal against the rate, and did not pay.

Held, *that as the rate was good on the face of it, the justices were right in issuing a distress warrant against him.*

This is a case stated by us, the undersigned, four of Her Majesty's justices of the peace in and for the North Riding of the county of York, on the application of the above-named appellant under section 33 of the Summary Jurisdiction Act, 1879:—

1. At a court of summary jurisdiction holden by us at Guisborough within the said riding, on the 21st day of July, 1891, the overseers of the poor of the township of Commondale within the said riding, and within the jurisdiction of the said court by John Robinson, one of the said overseers, duly preferred a complaint against the appellant for that he being a person duly rated and assessed to the relief of the