KING'S BENCH DIVISION.

March 6, 1929.

(Before SHEARMAN, J.)

THE ATTORNEY-GENERAL (AT THE RELATION OF THE PUBLIC TRUSTEE AND OTHERS AND THE PUBLIC TRUSTEE AND OTHERS) *v.* COUNCIL OF THE METROPOLITAN BOROUGH OF WOOLWICH.

Highway—Repair—Dedication prior to 1836—Liability to repair *ratione tenuræ*—"New street"—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 105, 250—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 77, 112.

The relators were trustees of two wills, and as such owned lands abutting upon a certain road in the Metropolitan Borough of Woolwich. By notices dated February 14th, 1928, the trustees were required to pay to the defendants two sums amounting to £1,473 11s. 2d., being the estimated expenses of making up as a new street certain portions of the road upon which their lands respectively abutted.

The Attorney-General claimed a declaration that those portions of the road were highways repairable by the inhabitants at large, and the relators as co-plaintiffs claimed a declaration that those portions of the road were not "new streets" within the meaning of the Metropolis Management Acts, 1855 *and* 1862. *The defendants contended that the road in question had not been dedicated to the public before March 20th,* 1836, *and was therefore not repairable by them. Further, they said that each of the portions of the road was in fact and in law a "new street" within the meaning of the Metropolis Management Acts, and that neither they nor their predecessors had at any time taken into charge or assumed the maintenance of the paving or roadway of the street of which the said portions of the road formed part.*

Held, (1) *that on the evidence there was nothing to show that the road in question was anything else than a public highway repairable by the inhabitants at large. The fact that repairs had been done by private owners for their own benefit was no evidence of any liability on their part to repair* ratione tenuræ, *and*

(2) *that neither of the portions of road in respect of which the claim arose constituted a "new street" within the meaning of the Metropolis Management Acts.*

Witness action.

The facts which are sufficiently summarized in the headnote are fully stated, together with the arguments, in his lordship's judgment.

Scholefield, K.C., and *R. A. Glen*, for the plaintiffs.

Montgomery, K.C., and *A. M. Trustram Eve*, for the defendants.

SHEARMAN, J.—This is in substance a consolidated action brought by two sets of land owners, whom I may call the Nash Trustees and the Dallin Trustees, against the Metropolitan Borough of Woolwich, asking, in respect of two demand notes which have been delivered to them, claiming payment of certain estimated expenses for making up two separate stretches of road, one in a place now known as Shrewsbury Lane and another in a place now known as Plum Lane, that they may be relieved from those payments on the ground that the demands are not legal. They base their claim, in substance, on two contentions: firstly, that both these stretches of road are parts of an old immemorial highway, which in law, up to the present day, subject to any subsequent statutory enactments, must be treated as a road which is repairable by the inhabitants at large, and secondly on the ground that neither of these stretches of road is a "new street" within the meaning of the Metropolis Management Acts. In my view, the plaintiffs are correct in both those contentions and are entitled to succeed in the action.

Now the action is a very interesting one, and I have received great assistance from the labours of both junior and leading counsel on either side, and I think I have been put in full possession of all the authorities, which are numerous, dealing with the law on the matter. Very often when you are dealing with things immemorial you are dealing with legal fictions rather than legal realities. As the result of the evidence put before me, I am satisfied of two things: that both these stretches of road, which have been separately called new streets by the defendants, are part of a very ancient highway. Without any opposition a number of maps were put in, including county maps, dating from about 1775, the earliest brought from the British Museum and the earliest ordnance map and a tithe map of the year 1843, and from all those maps—of course, I know that old maps are rather in the habit of being copied one from the other—which are publications of different origin, the evidence, to my mind, is overwhelming that this was a very ancient highway. Looking at the neighbourhood, there was the old main Dover Road going up Shooter's Hill and leaving Woolwich on the left. There was then another road into Woolwich and leading round up to Plumstead, and there was a curved or meandering road leading from there up to Plumstead Common. From Plumstead and Plumstead Common there was another road leading back to the old Dover Road, but it only reached it some considerable distance off, according to all these different maps. Meanwhile, from the top of Shooter's Hill there was a road marked in all these maps, the width varying as described in all the maps, running from the top of the Hill to Plumstead Common. It is one of those roads which people believe to be straight, but which in fact meanders a bit because it follows ancient tracks. Ludgate Hill is an example of that; people think it is straight up as far as St. Paul's, but it is not. When one looks at the contour on the maps in this case, it is quite clear that both these roads form one roadway leading from the top of Shooter's Hill to Plumstead Common. It was the only road which would get you from Plumstead Common across to the Dover Road without circuity, and it went up a very high hill such as to make horse traffic, if the road was not well metalled, extremely difficult and troublesome. Apart from that there is what I may call local reputation and name, and the present contour of the place. None of the witnesses who have been called on either side has told me that there is any trace of what I may call consistent metalling on the road at all. The evidence nowadays cannot go back to the passing of the Highways Act in 1835; it only goes back to the 'sixties of last century and up to the present time. But still it is important as showing the reputation. All the old witnesses who have given evidence say that there was very little wheeled traffic. The maps show that there were only one or two stray houses. There is evidence of recollection that at some time there had been a brickfield there, which may account for some of the evidence which has been given; but the road degenerated into practically a country walk, although it was occasionally used by carts going, no doubt, to the few houses which were there, or taking a short cut when the state of the weather permitted them to go that way, or, I dare say, going to the brickfields, in what was essentially a rural district. There is evidence by one old lady connected with one of these families that she was in the habit, as a child, of being driven in a pony phaeton by her mother along this road, and there is the evidence of a number of people who knew it as a kind of Sunday or lovers' walk. One witness who was called remembered that they went there in a wagon, but could not get up the hill because the wagon sank up to its axles in the mud. Those unacquainted with the rural countryside would imagine this was not a highway because it was not metalled. But those who have studied history and those acquainted with the rural countryside known how many deserted or quasi-abandoned highways there are in this country. To my mind this was at one time a comparatively important highway. But there is no trace anywhere in the records of an indictment showing that any private individual or any set of inhabitants were indicted for not making it up. It was a highway which gradually got disused. The evidence of one of the witnesses spoke of a new road by Dallin Hill called Eglington Road, which caused a still greater abandonment of this road. The steepness of it, and the fact that it was not made up, no doubt gradually led to its abandonment. But it is one of many highways which, I dare say, was in existence prior to the passing of the

Highways Act, 1835. I look at the contour of the land from the photographs and also the maps, and I also consider the name "Plum Lane"—a "lane" usually means a minor road leading between one main road and another main road—and the name "Shrewsbury Lane," named after the house called "Shrewsbury House" near there, and in my judgment, on all the facts of the case, this was obviously one land in all. In my view it was quite obviously a highway which prima facie at the passing of the Highway Act was a highway for all purposes, for carriages, a horse track and a footway, and it was repairable by the inhabitants at large, although there is no evidence by records or witnesses of its ever having been actually repaired at the public expense.

Mr. *Scholefield* referred me to the case of *Eyre* v. *New Forest Highway Board (1892)*, 56 J. P. 517. It is a decision of the Court of Appeal affirming a summing up to a jury by WILLS, J., on the subject. He says: "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." Of course, that is subject to proof of the contrary, that this was not a highway repairable by the inhabitants at large, which must be of two kinds. If repairs were done, evidence must be, and always is, given, in such cases of repairs having been done by private individuals, and on that the argument, as in many other arguments in law as to something in the nature of prescription, is that if you can prove a practice you can assume a legal origin for that practice. What is the legal origin presumed? It is said that the adjoining land owners of this mile or so of land held it *ratione tenuræ*. That in theory means that they got a grant from the Crown at some time which imposed upon them the obligation of repairing their own roads. That is substantially the ordinary meaning of holding it *ratione tenuræ*. Is there any evidence of sufficient repairs of that nature in the history of this case? Is there any evidence from time immemorial to the present time, to enable me to say that I have come to the conclusion that prior to 1836 this was land held by the owners *ratione tenuræ*? There is no record of any indictment or of any prescription against any private individual. It is quite obvious from the state of the road now that its essential character always has been that of an ancient highway. If much metalling had been put down—I am not talking about photographs from the air by which such things can be discovered now—by digging you can get evidence showing that there is subsided metalling. But there is no evidence of any description in this case that this road ever had been metalled by private owners or otherwise. But there is a body of evidence by some of these pedestrians called on behalf of the plaintiffs, who said that the road got gradually worse, and that at times adjoining owners used to put down bricks and cinders to fill up the holes. That is all the evidence we have as to the making up of the road until the making up of the road by the Woolwich Borough Council, and on that there are some letters to which I will refer.

Now what is the law with regard to that? It is not necessary to cite a number of cases; one will be sufficient. The case of *Rundle* v. *Hearle*, [1898] 2 Q. B. 83, lays down this, that the fact that a person has done repairs for his own benefit is no evidence of any liability to repair *ratione tenuræ*, and it goes on to draw a distinction between the two kinds of repairs. So far as repairs done on demand are concerned, it has to be shown that a legal demand has been made, and if it has been complied with that is very strong. But once you say that something has been done which is ambiguous in its nature, and which might have been done by an adjoining owner because it benefited himself, you should be slow to assume that he did it under a personal knowledge of his own responsibility to do it for the benefit of others. Lots of people may do things when they are the chief persons to benefit by it themselves. There is a similar case referred to in the judgment in *Rundle* v. *Hearle*, *supra*, of *Hudson* v. *Tabor (1877)*, 42 J. P. 20; 2 Q. B. D. 290, where people repaired the sea-wall primarily to protect their own property, and it was said that it did not help in assuming that they did it under an obligation to, and for the benefit of somebody else. I really cannot attribute any importance to the evidence that I have of adjoining land owners filling up holes by throwing down cinders, and gradually giving up doing so because, I dare say, the Countess of Shrewsbury no longer used the roads or because the brickfields may have been abandoned, or because people may have found other ways round for taking their carts. Of course, it would not affect pedestrians, because, as long as pedestrians are left in this country, they never mind getting their boots muddy.

Now what is left? Some letters were read showing that one of the owners, the predecessor of the present Nash Trustees, no doubt accepted the liability put upon him by the Woolwich Borough Council when they asked him to make up the road. But all the history we have as regards the Nash Trustees is this, that a letter was sent to Mr. Nash, the predecessor to the Nash Trustees, dated December 22nd, 1909, which runs as follows: "Complaint has been made to my Council as to the defective condition of the portion of Plum Lane, Plumstead, between Nithdale Road and Dallin Road. This roadway, which is undedicated"—the statement was made to him that it was not a highway at all—"has only been partially formed." I have no doubt it was quite an honest letter, and I do not suggest that there has been anything *mala fide* or improper on the part of the Woolwich Borough Council. They evidently looked upon it as if it had been a road, newly developed by somebody who was developing an estate. Then they went on to say: "The Council has no power to spend money out of the rates to improve the condition of private roads." In other words, they are saying: "We are coming to you because you have got a private road in an estate which is being developed." Apparently the owner accepted the situation, and I am entitled to assume that he and the Woolwich Borough Council believed it to be accurate. But in my view, and from what we know now, at that moment it was a highway repairable by the inhabitants at large, having been a public highway prior to the Act of 1835. But how were they to know it? The assumption I draw in the matter is that Mr. Nash did as a good many of us have done: when we get a demand from a public authority we assume that they know what they are talking about and we accede to their request and do what is demanded. But I am wholly unable to say that all this which was done by the borough council and acceded to by the owners in the last twenty-five years or thereabouts, is evidence of repair upon which I am to assume that this was land held *ratione tenuræ* prior to 1835. The whole of that evidence, to my mind, is wholly insufficient to convince me that this was anything else than a public highway which ought to have been repaired by the inhabitants at large, although there is no evidence that it was actually repaired. Therefore, on the first contention that this was a public highway repairable by the inhabitants at large, I think that the plaintiffs have made out their point.

The second point is: Is either of these stretches of road a new street? It is said first of all, on behalf of the defendants: "We are only dealing with a small portion here, and you must look at this road as one great whole, and if there is a development on one portion of it and a street is made, you are entitled to treat the whole mile of it as a new street." To my mind, that is quite an unarguable contention. When one looks at the definitions in the Act it is quite clear that a portion of a road may be a new street within the meaning of the Acts, and another portion may obviously not be a street. But when one looks at the argument that once you can prove that this is a road leading from point A to point B you can treat it as a whole, I do not know where one would stop. I do not want to argue by way of *reductio ad absurdum*, and to say that an old road from London to Grantham must be treated as a whole because you have a street at the beginning of it in London and a street at the end of it in Grantham. Once you get a road carrying traffic from one point to another, to say that because at one end of it there are houses on it, the whole of it must be called a street, is unarguable, and to my mind the framers of the Act were well aware of that sort of thing when they gave authorities power to take over a portion of a road. The question that I have to decide is: Does this ancient highway at the present moment come within the definition in either of the relevant sections of "a new street"? The first of these sections is s. 105 of the Metropolis Management Act, 1855, under which this demand was made. That section provides: "In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish

or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair." That is the section, together with that of the amending Act, under which this demand was made. The next section of this Act is s. 250, which goes on to define a street. It says: "The word 'street' shall apply to and include any highway (except the carriageway of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley or passage." In the Metropolis Management Amendment Act, 1862, s. 77 says that you can get a contribution not only from owners of houses but from owners of land abutting on such street. Then again there is an interpretation of "new street" in s. 112, which says: "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the pavement and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors or other authorities, having control of the pavements." I may add, with regard to that, that there is no evidence that this highway was ever taken charge of by any public authority subsequent to the passing of the Act of 1835. In my view, as it was a roadway repairable by the inhabitants at large prior to 1835, the obligation still remains upon them to repair it. I do not think this case lays down any new law, but it emphasises the law, and it is, in that way, of some importance. From the definition I have read in the earlier Act, we may well assume that any alley or highway, whether a thoroughfare or not, could be treated as a new street, and, looking at the actual words, the people here may easily have fallen into the error into which I think the legal adviser of Woolwich fell in one of the letters which I have read, saying that this was a new street because it was a "lane" and was included in the definition of "street." But in a number of cases, and notably in *Vestry of St. Mary, Battersea* v. *Palmer and Winder* 60 J. P. 774; [1897] 1 Q. B. 220, and *Arter* v. *Hammersmith Vestry*, 61 J. P. 279; [1897] 1 Q. B. 646, it is made quite clear, and it has since been affirmed in the Court of Appeal, that the meaning of those words is not that every lane and every alley can be treated as a new street, but that if it is a new street in the plain meaning of the word, the fact that it is an alley would not prevent its still being called a new street, and that a new street has substantially the popular meaning of a new street, where there are some houses on both sides, or at any rate a great many houses on one side and only one pavement. It is a question of fact for the tribunal to say whether it is in fact a new street. To my mind it is perfectly clear that neither of these portions of road is a new street; you have to look at the portions which are declared to be new streets in the demand note, and not at the adjoining neighbourhood. You cannot, because somewhere near there is a building, say, "Oh, it will be very convenient for people coming there to walk up the road," and so make the owners make up the road. The Woolwich Borough Council have treated certain other sections of this old road as new streets, and they say that the two portions in question are also new streets. As to one of them there is not a house on one side or the other worthy of the name. I think a shed has been put up in Plum Lane, but that obviously does not make it a new street. It is quite obviously a country road leading past one or two old country houses.

To my mind these are not new streets. Those two findings of fact seem to me to dispose of this action.

There is one other matter I ought to have mentioned, but which I have forgotten, and that is one of the arguments which was put before me. It was that under the Electric Lighting Order Confirmation (No. 3) Act, 1905, this particular road is described as, and has therefore become, a highway not repairable by the inhabitants at large. The facts are these. I have no doubt quite honestly the Woolwich Borough Council, believing by this to be a highway not repairable by the inhabitants at large, so described it in the application under the Electric Lighting Act and put it in one of the schedules under that description. It is argued that the result of that is, that this highway is not repairable by the inhabitants at large, and that, therefore, I must accept it. I can only say that to my mind that is a *falsa demonstratio*. It seems to me that there is neither sense nor justice in the argument, that if you obtain powers to dig up a road, and describe it as a private road when it is in fact a public road, or *vice versa*, and nobody pays any attention to it, the power being obtained *alio intuitu*, that can affect third parties. To my mind that is an argument to which I cannot give any force, but I mention it as it was put before me, and I should have mentioned it in my judgment.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: Freshfields, Leese and Munns.

Solicitor for the defendants: Sir Arthur Bryceson, Town Clerk, Woolwich.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

April 10, 1929.

(Before Lord MERRIVALE, P., and HILL, J.)

ELLIS *v.* ELLIS.

Husband and Wife—Wife's summons for neglect to maintain—Maintenance order—Husband's appeal—*Res judicata*—Order discharged.

A wife obtained an order from the borough justices for maintenance on the ground of her husband's desertion. This order was subsequently revoked by the same bench on the ground that the wife had wilfully refused to return to her husband. Later the wife summoned her husband before the county justices in the same town for alleged wilful neglect to maintain her. This bench of justices overruled an objection that the matter was already res judicata, *and that no new evidence had been adduced, and made an order in favour of the wife for* 25*s. a week. The husband appealed.*

Held, *a court of competent jurisdiction had found that the wife had refused to live with her husband and revoked the previous maintenance order. The county magistrates agreed that the only matters which they could entertain were happenings since the date of the revocation of the previous order, and there was not a scrap of evidence to support their decision to grant a fresh order, and their order must be discharged. Appeal allowed.*

Husband's appeal from order of county magistrates at Dewsbury (Yorkshire), granting the wife an allowance for herself and child.

Mrs. Grace Ellis, of Lower Hopton, on September 1st, 1927, took out a summons before the Dewsbury borough magistrates alleging desertion against her husband, Mr. Ernest Ellis, an electrician, of Baslow, Derbyshire. The summons was heard on September 13th, 1927. The marriage had taken place on August 31st, 1920, at Trinity Chapel, Mirfield, and there was one child, a son born in 1921. They lived together until August 17th, 1927, when the wife left her husband, taking the son with her. The justices were satisfied of the truth of the complaint, and granted her a maintenance order of 25*s.* a week and the custody of the child. At the same court on August 2nd, 1928, a summons by the husband was heard asking for the revocation of the order, on the