be reason for holding that they should be actionable. It is true, as was said in a former case, that a physician might make a mistake in his treatment of a disease, because it was rather a proof of human imperfection than of culpable ignorance, but the consequences are often as fatal to him as though the charge was a general one. His mistake might be of "that pardonable kind" which would do him no injury in his profession, but the public might not pardon it. And what if he is not guilty of the charge? What if he has done his duty towards his patient, and has adopted every means in his power, and such as were recognised in the profession as suitable for the case, to restore him to health? The consequences, so far as the public are concerned, are the same, with the additional mental suffering which every man must undergo whose conduct and whose actions are grossly misrepresented before the community at large. True, the law does not deny him his remedy, if he chooses to take it. Perhaps it would be more fatal to resort to legal proceedings in any case. If he does, he is compelled to show special damages, for none will be inferred. This alone would cause many to hesitate before bringing an action. The difficulty attendant upon proving damages, the length of time intervening between the publication and the consequences of a slander, would deter many from the prosecution of the slander.

As the cases now stand, you may bring almost any charge of misconduct against a physician in a particular case, without subjecting yourself to an action for damages *per se*, provided it does not come within the category of a statutory crime, or impute to him general incapacity.

W. H. WHITAKER.

CINCINNATI, O.

RECENT ENGLISH DECISIONS.

High Court of Justice. Exchequer Division.

FINCH AND ANOTHER *v.* GREAT WESTERN RAILWAY COMPANY.

Where there is any express grant of a private right of way to a particular place, to the unrestricted use of which place the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant.

By an award under an Enclosure Act, there was set out "one other private carriage road and drift-way called Broadmead Drove, which shall for ever hereafter remain a private carriage road and drift-way for the use of the respective owners and occupiers for the time being of the allotments over which the same passes, and of several old enclosed meadows" specified, one of which was a field subsequently purchased by the defendants under their statutory powers, and in which they erected a cattle-pen at the spot where Broadmead Drove crosses their line, for the collection of cattle to be conveyed from or to their railway. At the time of the making of the award the way served merely as an access to a few meadows, and was used only for agricultural purposes, but the defendants were in the habit of driving cattle along it to and from the cattle-pen. In an action by the plaintiffs, as owners of the soil of the way, against the defendants for trespass, *Held*, that the right of way was general in its terms, and that the defendants were justified in using it in the way complained of; and that though the altered circumstances of the land had greatly increased the traffic on the road, that fact did not affect the right of the defendants, as owners and occupiers for the time being, to make use of it in the manner described.

SPECIAL case stated for the opinion of the court.

The writ in the action claimed damages for trespasses alleged to have been committed by the defendants upon certain land of the plaintiffs called Broadmead Drove-way, and an injunction against future trespasses.

A. Charles, Q. C. and *Bromley*, for the plaintiffs.

Herschell, Q. C., and *Medd*, for the defendants.

The material facts and the arguments fully appear in the following judgment of the court (KELLY, C. B., and STEPHEN, J.) which was read by

STEPHEN, J.—The material facts were as follows: A highway runs from Salisbury to Wilton. The plaintiffs are the owners of certain closes on the south of this highway, and also of the soil of a drove called Broadmead Drove, which separates two of those closes. The Great Western Railway runs parallel to the high road and to the south of the closes above mentioned. Broadmead Drove runs to and across the railway, and thence continues its course in a westerly direction to other closes, which need not be mentioned. At the point of junction between Broadmead Drove and the railway, the company have constructed a cattle-pen on land taken by them under their parliamentary powers, which land was formerly part of a meadow containing rather more than four acres belonging to Mr. W. Hayter. The company are in the habit of driving cattle from all parts of the neighborhood to this pen, and of

collecting in it cattle brought by the railway from all parts of their system, and driving such cattle along Broadmead Drove to the high road, and thence to other places in the neighborhood. The question is whether they are entitled to use the drove in this manner under the following circumstances: Before 1790, all the land in question was common field. In 1790 an enclosure award was made, whereby, after recitals as to their authority and proceedings, the commissioners set out certain roads in the following words: "We * * * have set out and appointed, and by this our award do set out and appoint, the several roads and ways in, through and over, or by the sides of the new enclosures or allotments to be made by virtue of the said act in such directions and of such breadths as are hereinafter mentioned and particularly described (that is to say): 6. One other private carriage road and drift-way of the breadth of twenty feet called Broadmead Grove" (then follow the abuttals), "which said road or way we, the said commissioners, do hereby award, order and appoint, shall for ever hereafter remain a private carriage road or drift-way for the use of the respective owners and occupiers for the time being of the allotments over which the same passes, and of several old enclosed meadows and woodlands," one of which was the field of about four acres in extent already referred to. There seems to be no doubt that at the time of the award the drift-way in question served merely as a mode of access to a few meadows, and exclusively for agricultural purposes. The Great Western Railway now passes through some of these meadows, and the cattle-pen already mentioned is in one of them. The result, of course, is that probably thousands of cattle pass along the drift-way for every one that passed when the award was made, and the question is whether such a user of the way allotted by the award can be justified.

Upon the whole, we are of the opinion it can be justified, that the right of way is general in its terms, and that though the altered circumstances of the land have greatly increased the traffic on the road, that circumstance does not affect the right of the Great Western Railway, as owners and occupiers for the time being, to make use of it in the manner above described.

We have not arrived at this conclusion without some difficulty, as the authorities which bear upon it are many, and some of them may not be altogether consistent.

The view presented to us on behalf of the plaintiffs was, that the

provision in the award gave the owners and occupiers for the time being, a right to all the private way as a drift way for bringing cattle to and from the different closes which it traverses, and for no other purpose; that is to say, the defendant's land having been agricultural land at the time when the Act passed, the road to it can still be used only to the extent to which, and in the same manner, as it was used while the land was agricultural land, although the land was awarded to the predecessors of the company without any particular description, or limitation or qualification. In support of this view, reference was made to the following authorities: 1 Rolle's Abr. 391, pl. 3; *Howell* v. *King*, 1 Mod. 191; *Lawton* v. *Ward*, 1 Lord Raym. 75; *Allan* v. *Gomme*, 11 Ad. & E. 759; *Skull* v. *Glenister*, 16 C. B. N. S. 81; and *Williams* v. *James*, L. R. 2 C. P. 577. All these, except *Allen* v. *Gomme* and *Skull* v. *Glenister*, refer to cases of prescription, and may be said to establish the proposition that where there is a right of way proved by user the extent of the right must be measured by the extent of the user. The strongest and the most recent case of this kind is the case of *Wimbledon Commons Conservators* v. *Dixon*, L. R. 1 Ch. D. 362, in which it was held that immemorial user of a way over Wimbledon Common for agricultural purposes, did not authorize its use for the purpose of carting building materials to a place on which houses were to be built. Of the cases which were mentioned, two were cases of express grants, viz.: *Allen* v. *Gomme* and *Skull* v. *Glenister*. These require examination, as their consistency with authorities referred to on the other side is not immediately apparent, though we do not say that they are really inconsistent. In *Allen* v. *Gomme*, there was reserved to the occupiers of a certain tenement "a right of way and passage over the said close to the stable and loft over the same and the space and opening under the said loft, and then used as a wood-house." The court held that the meaning of this reservation was that "the defendant should be confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed." They did not indeed consider that the right of way depended upon the space being used as a wood-house, but they thought it must be used for purposes compatible with the ground being open, and that if any building were erected upon it (which happened), "it was no longer to be considered as open for the purpose of this deed."

In *Henning* v. *Burnet*, 8 Ex. 192, Baron PARKE said: "In

Allen v. *Gomme*, a more short rule was laid down than I should have been disposed to adopt, for it was said that the defendant was confined to the use of a way to a place which should be in the same predicament as it was at the time of making the deed. No doubt, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by the cottage being altered." This is quoted with approval by Vice-Chancellor MALINS in the *United Land Company* v. *Great Eastern Railway*, L. R. 17 Eq. 167. It seems to us, upon the whole, that the proper view to take of *Allen* v. *Gomme*, is that it establishes no general principle, but turns on the construction of the particular deed referred to; a deed bearing no resemblance to the grant in the present case.

In the case of *Skull* v. *Glenister*, a plot of land was granted to Wheeler, "together with a right of way and passage over a certain new road to certain other roads." Glenister bought land adjoining Wheeler's close, but having no communication with the new road. He afterwards became the tenant of Wheeler's close, and wishing to build on his own close, stacked building materials on Wheeler's close, using the new road in order to bring them there. The materials were afterwards conveyed from Wheeler's close tc Glenister's close. The case decides that, under these circumstances, the learned judge who tried the case was right in leaving to the jury the question "whether the defendants used the way as a way to Wheeler's land, or was it a mere colorable user of it for the purpose of getting at their own land." "Did the defendants use the way merely for the purpose of carrying the building materials through Wheeler's close to their own land?" Mr. Justice WILLIAMS based his judgment on a passage in Gale on Easements, which quotes at length a passage from Rolle's Abridgment, and the case of *Ward* v. *Lawton*, and concludes by saying: "These authorities appear to us to establish the principle that, if the defendants here had directly used the road in question as a way over the grantor's land, through Wheeler's close to Glenister's, that would have been an excess of the right. The question was whether they had not substantially done so." On the authority of these cases, but particularly on that of *Skull* v. *Glenister*, we were pressed to say that, to use Broadmead Drove as a way on to Hayter's meadow, merely in order to pass out of Hayter's meadow by

the railway, which subsequently to the award had been made through it, was an excess of the right conferred by the award. It must be admitted that there is a considerable resemblance between the cases, though they are not absolutely identical. To use a private road into one close merely in order to pass over it into an adjacent close, is not quite the same thing as to use a private road into a close in order there to make use of a public highway carried through the close subsequently to the grant.

We must also observe, upon the judgment of Mr. Justice WILLIAMS, that all the authorities quoted in the passage from Gale on Easements are cases in which the right was prescriptive, and the question to be solved was the extent of the grant to be inferred from user. Moreover, one of the two passages quoted from Rolle seems inconsistent with the inference deduced from the authorities. "It was said that if a defendant justified under a right of way from defendant's Blackacre, if the plaintiff replied at the time of the trespass the defendant went with his carriages from the defendant's Blackacre, and thence to a mill, the replication would not support the action, for when he was in Blackacre he might go where he pleased."

These considerations are not without their weight, though probably, if they stood alone, we should not regard them as warranting us in differing from *Skull* v. *Glenister*. There are, however, several later decisions in cases closely analogous to the one before us, which must now be considered. Before examining them we may remark that one distinction between the cases cited on behalf of the plaintiffs and the case before the court is, that the former are cases of the grant of a way, or of prescription which implies a grant, the latter is one in which the way is granted under an award made under an Enclosure Act, which grants to the predecessors in title of the defendants a piece of land which they are entitled to confer without restriction or limitation. In this the case before the court resembles the cases which we now proceed to consider. They seem to us to establish the principle that, where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant. The first of these cases is *The United Land Co.* v. *The Great Eastern Railway Co.* In this case the

Great Eastern Railway purchased land from the Crown for the purpose of their line, intersecting land acquired by the Crown under an Act of Parliament which prohibited building upon it, as it was within the range of the guns of a fort at the time of the purchase. The land was used only for pasture. The Great Eastern Railway Company agreed to make four level crossings over their line, by which access could be had from one part of the severed land to the other. Some years after the agreement the part of the land beyond the crossings was sold to the United Land Company, and the statutory prohibition against building being removed, the land was laid out in lots for building purposes. The railway company contended that the level crossings ought not to be used for purposes of access to the houses so built. It was, however, held, both by Vice-Chancellor MALINS (L. R. 17 Eq. 158), and afterwards by the Court of Appeals in Chancery (L. R. 10 Ch. App. 586), that they were so entitled, on the ground that the "crossings were to be communications for every purpose for which at the time, or at any future time the owner should think fit to appropriate his land." This comes very near to the case before us, though no doubt there are several circumstances in the grant which throw more light on the actual intention of the parties than is to be had in the case before us.

Newcomen v. *Coulson*, Law Rep. 5 Chan. Div. 133, more closely resembles the present case. An enclosure award, made in 1760, set out certain roads for the owners, for the time being, of certain allotments, and their tenants and farmers to and from certain allotments. It was provided that one of the roads should be thirty feet wide, and that if any owner of an allotment should "street out" the way, it should always remain eleven yards wide between the quicksets. More than a century after the award was made, one of the allotments was used as a building land, and the owner began to convert the cart-road into a metalled-road. The plaintiff tried to restrain him from doing so, and from using the right of way for other than agricultural purposes, but the application was refused by Vice-Chancellor MALINS, and his decision was upheld by the Court of Appeal. In delivering his judgment, the Vice-Chancellor said: "I am at a loss to see any principle on which a person who takes land under an enclosure is bound for all time to use that land for the purpose for which it was used when the enclosure was made. If that is the case here

it is the case all over the country, and I suppose hundreds of thousands, if not millions of acres of land would have this principle applied to them, that the owner of the land under the enclosure could only use the land for the purpose for which it was used when the enclosure was made, that is, for agricultural purposes; because, although they might use the land for other purposes, they could not use the roads for other purposes." The Vice-Chancellor also laid stress on the case of *Dand* v. *Kingscote*, 6 M. & W. 174. The pleadings in that case are exceedingly complicated, but the effect of the decision is shortly stated thus by Vice-Chancellor MALINS: "The decision in *David* v. *Kingscote*, was that a reservation of a right of way from and to the colliery entitled the man who had the right to adapt it to the improvements of the age, and the improvements of the age required he should have a right to use a locomotive over the land." If a right of way, which was granted to give access to pastures, may be lawfully used for access to a town subsequently built on them, and if a way-leave reserved for working a colliery by horse-power may lawfully be worked by steam-power, it seems difficult to resist the inference that a drift-way, which when granted gave access to pastures, may be used for the purpose of access to a railway cattle station afterwards built upon it.

Mr. *Charles* attempted to distinguish *Newcomen* v. *Coulson* from the case before us on a variety of grounds. He said that in *Newcomen* v. *Coulson* the road was thirty feet wide, which the Vice-Chancellor regarded as clear proof that it was never intended to be confined to agricultural purposes only. He also pointed out that the owner of the allotment had power expressly reserved to "street out" the road. And he observed, lastly, that the object in that case was undoubtedly to get access to the allotment, and not to go beyond it.

None of those distinctions appear to us to be substantial. As to those which turn upon the character of the road, it must be observed that in the present case no question as to the character of the road arises. It retains the width and character specified in the award. It is, as it always was, a drift way, twenty feet wide. The only difference in its user is that more cattle must pass along it than was formerly the case. As to the point that in *Newcomen* v. *Coulson*, the road led to the allotment in its new condition, whereas in this case the cattle pass away from it by the railway, it appears to us

that it would be impossible to maintain that if people were to have free access by a private way to new houses built on an allotment, they should be bound, as often as they used that way, to return by it, instead of using any other road which might happen to be open to them.

It is remarkable that *Skull* v. *Glenister* was not cited in the argument in *Newcomen* v. *Coulson*. It appears to us that if the two are inconsistent we must follow *Newcomen* v. *Coulson*, but the cases may be reconciled (though the reasoning in the judgment of Mr. Justice WILLIAMS seems scarcely consistent with the later case) by treating *Skull* v. *Glenister* as deciding only that, if there is a private right of way to one close, it must not be used colorably with the real intention of going to a different though adjoining close.

Upon the whole, therefore, there will be judgment for the defendants, with costs of the action and special case.

It seems obvious enough that if a right of way is created *by grant*, which is unrestricted in its terms, the way may be used by the grantee for any lawful purpose, and its use is not to be confined to any particular use or purpose, even though the grantor had himself used it for such purpose only previous to the grant, or even though the grantee continued to use it for the same purpose only, for many years after the grant. He may, notwithstanding, afterwards modify or entirely change the use, according to his necessities or conveniences. And if the grant itself be general and unlimited, parol evidence that the parties understood, or even agreed at the time, that it should be used for only some particular purpose, would not be competent to control or limit the words of the grant, the familiar rule being that where the terms of description used in a deed are clear and intelligible the court will put a construction upon the terms, and parol evidence will not be admissible to control the legal effect of the description; but when the description is uncertain and ambiguous, parol evidence may be admissible to show to what it truly applies. See *Waterman* v. *Johnson*, 13 Pick. 261; *Bond* v. *Fay*, 12 Allen 88.

Therefore where the owner of a large tract of land conveys a portion thereof, "with a right of way to be used in common over and upon land of the grantor, on the easterly side of the land conveyed," parol evidence is not competent to show that the grant of the way was intended by the grantor to be only a right to reach a *portion* of the land conveyed. Nor in such case is oral evidence admissible to show that at the time of the execution of the deed the uses and limits of the way, as it then existed, were known to both parties, and that the intention was to grant only a right in the way as it then was, including a right on the grantor's part to maintain a fence across the way, with an opening or bars in it for entrance upon the granted premises, as this would be obstructing the free use of the way by the grantee, and therefore inconsistent with the terms of the deed: *Miller* v. *Washburn*, 117 Mass. 371.

So in *Cousens* v. *Rose*, Law Rep. 12 Eq. 366, a lease of a dry-dock described it as bounded on the west by a roadway or passage running between the dock and certain warehouses, with free liberty and right of way for the lessee, during the time of the demise, in, by, through, and over said roadway, lying to the west of

the premises, jointly with the lessor. At the date of the lease there was a strip of land between the dock and the warehouses, about twenty-three feet wide, of which a portion, about fourteen feet wide, next to the warehouses, was paved, and then there was a strong curb of stone about three inches high, separating this fourteen-feet strip from the remaining strip of about nine feet wide adjacent to the docks, and soon after the lease a high fence was erected on this curb; but it was held that the lessee took a right of way over the whole strip of twenty-three feet wide, and was not confined to the nine-feet strip next adjoining the dock. And see *Tudor Ice Co.* v. *Cunningham*, 8 Allen 139.

Comparatively little difference of opinion can exist as to the uses to which a way obtained by deed can be put, but where the right is obtained by prescription more difficulty arises. On the one hand it is clear that the extent and measure of the right must be determined by the measure and extent of the use; and therefore if the use is merely for taking and carrying away wood from the claimant's wood-lot, it cannot afterwards be extended to other purposes, after the wood has all been taken off, and the wood-lot used for dwellings and cultivation: *Atwater* v. *Bodfish*, 11 Gray 150.

On the other hand, although the right exists by adverse use and enjoyment only, and although, generally speaking, evidence of the exercise of the right for a single purpose will not prove a right of way for other purposes, yet it is clear that proof that the way was used for a variety of purposes, covering every purpose then required by the dominant estate, in its then condition, *is evidence* from which may be inferred a right to use the way for all purposes which may reasonably be required for the use of such estate while substantially in the same condition: *Parks* v. *Bishop*, 120 Mass. 341.

In *Sloan* v. *Holliday*, 30 Law Times (N. S.) 75[2], in the Queen's Bench, June 5th 1874, apparently not elsewhere reported, the owner of a dwelling-house had a right of way to and from it over the yard of another person to the highway. The building had never been used except for a dwelling-house; but the owner opened a shop in one room, and his customers used the same way to and from the street; and it was held that this was not such a change or alteration in the dominant estate as to make the use of the way unlawful.

So in *Dare* v. *Heathcote*, 25 Law Jour. (N. S.) Ex. 245 (1856), also not in the regular reports, that where a right of way had been used only for driving cattle to pasture for more than twenty years, that being the only use to which it was then necessary to apply the way, and afterwards the defendant built a farm-house on the dominant estate, and used the way for all purposes connected with the occupation of the farm, and with carts and horses also, as well as cattle; it was held that the prior use was sufficient *prima facie* proof of an easement for all purposes, sufficient to warrant a jury in finding a general right of way. The court saying: "The case is clear. The principle was established in *Cowling* v. *Higginson*, 4 M. & W. 245. The direction was quite right; and therefore the rule will be absolute for a new trial." See *Williams* v. *James*, Law Rep. 2 C. P. 577; *Ballard* v. *Dyson*, 1 Taunt. 279; *Wimbledon & Putney Commons* v. *Dixon*, 1 Ch. Div. 362; Goddard on Easements, Am. ed., p. 315–19.

It seems equally clear therefore that whether a right of way be acquired by express grant, or by prescription or implied grant, yet if it be a general right, it is not restricted to any particular purpose merely because the owner had occasion for many years to use it only for such special and limited purpose. See *Holt* v. *Sargent*, 15 Gray 97.

EDMUND H. BENNETT.