Neutral Citation Number: [2012] IEHC 24

THE HIGH COURT

[2008 No. 7738 P]

BETWEEN

JOSEPH WALKER

PLAINTIFF

AND
NIALL LEONACH AND NOEL BARRY

DEFENDANTS

JUDGMENT of Mr. Justice John MacMenamin delivered on the 8th day of February, 2012

Introduction

1. For more than a decade prior to the hearing of this action, the plaintiff and the defendants have been engaged in a dispute as to the existence of a public right of way over the plaintiff's land at Annacrivey, Enniskerry, County Wicklow. That question is the central issue in this case.

2. The plaintiff's property is depicted as "J. Walker's land", it is coloured in blue on the map to be found at Appendix A to this judgment. In broad terms, the route may be described as starting at the boundary of the plaintiff's land at "point F" on the map, at the base of Annacrivey Wood. Thereafter it travels southward, and then westward, through points E, D, and C to point B where it meets Hughes' Lane. The features found on the route will be described later in greater detail.

A brief summary of the background

3. The two defendants are both members of an informal group of people who, in 2004, ultimately coalesced into the Enniskerry Walking Association. Some individuals from this group had been active before that year, in furtherance of the aim of facilitating hill walking in the North Wicklow/South Dublin area. This issue had caused controversy for many years. The evidence revealed that there had been other such disputes before the one dealt with here. There are many undercurrents in issues of this kind. But in this one, in the year 2002, two of their number, Mr. Kevin Warner and Mr. Albert Smyth, published a pamphlet on the subject of *Ten Walks in the District of Enniskerry*. In the pamphlet they identified a number of routes as public rights of way. The route in question was one of these described.

4. The plaintiff's father, the late Norman Walker died in 1980. The plaintiff then inherited the land subject to a life interest in favour of his mother. He became full owner in 2005, upon his mother's death. Both mother and son had objected to what was said in the pamphlet in 2002. They said that there was no public right of way over the land. The plaintiff attended at the launch of the publication and threatened the two authors with legal proceedings for slander of title.

5. Between 2003 and 2005, conciliation talks took place, some under the aegis of the Wicklow Uplands Association, an organisation of the various groups who go and who live there; farmers and hill walkers, and those interested in the area's natural integrity. In other meetings, the plaintiff and the defendants themselves were involved. Unfortunately, the negotiations did not prove fruitful. The dispute escalated; some objectors resorted to intimidation tactics. The defendants were not involved in these activities. Early in 2004, over 100 trees which the plaintiff had planted in a commercial forest on his property were destroyed.

6. But in contrast to these unlawful actions, the defendants and their associates organised protest walks, some of which attracted substantial media coverage. In two of these, the plaintiff barred their entry and forcibly halted hill walkers seeking to cross the land. In the same year, 2004, the Enniskerry Walking Association was formally established. The first named plaintiff, who is a teacher, was Chairman; the second named defendant who is a retired bus driver was secretary of the organisation.

7. One such walk was arranged for 19th September, 2004. The plaintiff claims as many as 300 people were involved. The organisers had intended to go first to land owned by a Mr. Peter Collen, with whom they were also in dispute; but he obtained an injunction, and the protest then diverted to the subject property. The walkers came down a laneway up to the plaintiff's land at "point F" and made to enter. To stop them, it is said he employed security men who used walkie-talkies and video cameras.

8. The plaintiff claimed that, on another such walk on 20th February, 2005, the first named defendant assaulted him. This claim was not pursued in the case.

9. At that time, and afterwards, the plaintiff thought it necessary to erect reinforced fences and barriers around his property; he put up warning notices to the effect that there was no right of way. One such notice, some distance from the plaintiff's house, was shot full of bullet holes. On other walks there were incidents on the plaintiff's land which stopped short of outright violence.

The *Collen* case

10. In 2004, Peter Collen initiated proceedings in the Wicklow Circuit Court against Janni Petters, one of the campaigners; he also named the first named defendant herein, Niall Leonach as a defendant. Mr. Collen alleged that the defendants there, including Niall Leonach had published an article wrongfully claiming there was a public right of way across his land. A report of the *Collen* case from the '*Irish Times*' Law Reports (11th June, 2005), indicated that the Circuit Judge observed that the case had become "somewhat politicised", and that it had been the subject of considerable press comment. Mr. Collen failed in his application in the Circuit Court. On appeal to the High Court, this decision was reversed by O'Leary J. (*Collen v. Petters* [2007] 1 I.R. 791).

Some observations on this case

11. However, the legal determination in the *Collen* case did not end the dispute between Joseph Walker and these defendants. This entire case conveys the impression of being the culmination of a dispute where the parties were misguided; where matters got out of hand on both sides. The litigation has broken up long standing friendships in what I am sure is a close knit community. The parties' lawyers are not to blame; the plaintiff and the defendants should have seen the light of day well before now.

12. As this is rather a lengthy judgment, I pause here to make a number of other observations. This case lasted eleven days. It was brought in the High Court; the very similar *Collen* case was heard in the Circuit Court, although thereafter appealed. Even that appeal lasted only three days. The defendants in this case did not apply to have the case remitted to the Circuit Court so as to save costs. The case moved inexorably onto full hearing. Neither side was prepared to back down. It was necessary for this Court to engage in case management while the case was at hearing; this should have been done months before. But for case management, the case

could have lasted twice as long. The potential cost exposure to any unsuccessful party could be ruinous, perhaps running into six figures. The Court repeatedly suggested that the parties should try to resolve their differences and save costs. Mediation was proposed; more than once. Yet the parties could not or would not compromise.

13. The words "compromise" and "toleration" lie at the heart of this case. To an outside observer, the possible terms of a compromise might have been written on two or three lines on one sheet of paper; the landowner could have given permission to the Walking Association to cross his land on a number of occasions each year; the Association might have acknowledged that this was subject to his permission. But this might have been seen as an acknowledgment that there was no public right of way. There was a sense that the litigants were like some figures in a 19th century novel who were engaged in an interminable case they could not or would not control; in fact the possibility of control was always in their hands; but that often means compromise.

14. The defendants took on the task of asserting the route was a *public* right of way. I point out here that in fact local authorities, and the State itself have such a role both by statute and otherwise. Perhaps the defendants here felt frustrated that Wicklow County Council would not take on the issue. They took on the issue themselves. In this case both parties sought outcomes which the law does not allow. The plaintiff in effect sought what is called a declaration "*in rem*", that is an order that the route was *not* a right of way which would be binding, not just on the defendants, but on the whole world. As the judgment shows, the Court has no jurisdiction to grant such an order. In turn, the defendants sought to establish that the route was a public right of way. They attempted to rely almost solely on the legal principle of "long established public user as of right", a legal test which will be explained in detail later. In England this test has been recognised in statutes as allowing a court to form inferences that a public right of way exists. But our law and English law differ. Law reform is best done by legislation, not litigation. As other judges have pointed out, there is a strong case for reforming the law in this area; I would suggest any such law reform should include compulsory mediation as a preliminary to litigation.

15. The plaintiff apparently believes the case is politically motivated. There were similar suggestions in the *Collen* case. Motivation is not relevant; the defendants are as entitled as the plaintiff to avail of the courts. I should also say that the case which the defendants advanced had some substance, it was supported by expert evidence; and it required detailed analysis. Their protest walks attracted support from people across the political spectrum.

Events leading up to the litigation

16. I return to the background summary. The campaign went on. On 30th January, 2006, there was one event which stands out to the credit of one of the parties, Mr. Noel Barry. He had been friendly with the plaintiff over a long number of years. He had met the plaintiff and given him old historic material. He wrote to Mr. Walker referring to a number of old maps which had been identified as part of the material which "we in the Enniskerry Walking Association have continued to gather". Mr. Barry referred to a traveller's guide book, *Wright's Guide to County Wicklow* published in 1822. This alluded to a "tolerably good old road", which he claimed, was the one through the Walker land. He referred to photographs of the route, and a number of affidavits taken from local residents. Mr. Barry said that the Association would be able to satisfy any court in the land that the route, which he described as "the Old Coach Road", was and is a public road, in use since ancient times and which had been in continuous use as a pedestrian route. The conciliatory tone of the letter has an ironic ring to it now, after an eleven day hearing. The bitterness now existing between the parties was clear, even in court.

17. The *Collen v. Petters* appeal was heard between 15th, – 18th May, 2006. O'Leary J. delivered judgment on 19th June, 2006. He found that there was no public right of way through Mr. Collen's lands. This did not reduce the tension between the plaintiff and the campaigners: other incidents followed. The pamphlet referred to earlier was republished that year. The publishers corroborated with the plaintiff who objected to a repetition of what was said in 2002. The friction remained in 2007 and 2008. Both sides may have done things they regret during that period, some third parties did things which were both regrettable and unlawful.

18. Tempers did not cool in 2008. The defendants still strongly believed that the plaintiff was wrongfully obstructing them in their lawful entitlement to cross the lands. They organised another walk for 20th September, 2008. This led to initiation of these proceedings.

The Injunction Application

19. On 10th September, 2008, the plaintiff's solicitor sent a warning letter to the defendants as Chairman and Secretary of the Association, indicating that, in the absence of an undertaking that the projected walk would not take place, proceedings would be issued against them as the main officers of the Association. No undertakings were given. On 19th September, 2008, the plaintiff applied *ex parte* to this Court and obtained an interim injunction against the defendants. The timing of the application made it impossible for a court to order the application be made on notice to the defendants. In the proceedings the plaintiff sought a declaration that his land was not subject to a public right of way and damages against the defendants for trespass and wrongful interference with his lands.

20. For context in what now follows, it is necessary to identify that, in our law, one *aspect* of the proof necessary in establishing a public right of way is whether there has been long continuous public user, often beyond living memory. Old maps records and guidebooks can be evidence. A court will inquire whether by explicit action, or by inference, there has been an act of "dedication" by an owner, or "acceptance" by the public; a court asks questions such as: did the owner by act or deed show that he meant a path to be open to public use? Was there public use expenditure or maintenance of the land? But an inference of a public right of way can only be drawn having regard to *all* the circumstances.

21. For the injunction application, the plaintiff swore an affidavit outlining, in trenchant terms, what he claimed was aggressive behaviour by the defendants themselves, the Enniskerry Walking Association collectively, and others who had participated in previous walks. Prior to swearing such an affidavit for the purposes of an *ex parte* application, he will have been fully advised by his lawyers that he, as a deponent, owed a duty of candour to the court; he must set out *all* relevant facts. The affidavit was quite detailed. But the plaintiff did not refer at all to the material which Mr. Noel Barry had given to him, which went to the question as to whether there was *actually* a public right of way. I have no doubt that the plaintiff felt the aim of the injunction was to restrain what he saw as yet another organised walk from trying to cross his land. He may well have been angry and frustrated; but so too were the campaigners. But this highly relevant documentary material was not mentioned. It should have been. The application was brought on the day before the walk. The plaintiff was very remiss in not referring to the material. The fault for this omission lies only at the plaintiff's door. It is one of a number of factors which may have a consequence in costs.

22. By contrast, the evidence at the full hearing was ultimately directed to the consideration of a vast range of such maps, starting with Neville's 1760 map and ending with the modern Ordnance Survey. Historical and cartographical experts were called on both sides. Just as in *Walsh & Anor v. Sligo County Council* [2010] IEHC 437 (McMahon J.) (the *Lissadell* case) other historical records, travel guides, and questions of title were painstakingly parsed and analysed by both legal terms. There was evidence directed to showing long public user.

23. But before considering this evidence, the judgment must briefly trace the course of the proceedings. Thereafter, it goes to the legal principles applicable in a case of this type; next the non expert and expert evidence; and finally the application of those legal principles to all the facts, as found on the evidence.

The course of the litigation

24. The order granted on 19th September, 2008 restrained any entry on to the plaintiff's land by the defendants, or persons having notice of the proceedings. This interim order was made returnable to 24th September, 2008. The defendants said later they were aggrieved that the plaintiff had not referred to the material he had been shown by Mr. Barry. But surprisingly, despite that concern, they actually gave undertakings on the return date that they would not enter onto the plaintiff's land pending the plenary hearing. Later, they filed replying affidavits hotly denying allegations of intimidation, claiming the plaintiff himself had been the aggressor and drawing attention to the maps and other material and criticising the plaintiff for not having referred to the material.

25. One and a half years later, when matters had advanced to full hearing, the defendants sought a number of orders in a notice of motion dated 30th March, 2010. They *only then* sought an order seeking to vacate the *ex parte* injunction, which by then had been in existence for a year and a half. But their undertakings of 24th September 2008, had subsumed the *ex parte* order. If they so wished, they should instead have applied to have the interim order set aside for the plaintiff's failure to disclose material in his grounding affidavit. They might have sought to be released from their undertakings. They did neither. The court has not been told why. I should comment here also that the defendants' case altered significantly in the course of the dispute. It was said that this was an "Old Coach Road" then "an Old Road" then a lane or path which could be traversed on foot or on horseback.

Was it necessary to obtain a *fiat* of the Attorney General?

26. In the same notice of motion the defendants sought an order that it was unnecessary to obtain a *fiat* or permission from the Attorney General. It is necessary to explain why. In the past, such a consent was often deemed necessary. What is in question here is a *public* right. I must turn next therefore to the question as to whether such permission was in fact necessary. This question occupied much court time. The parties engaged in a degree of legal "fencing" as to the nature and effect of the reliefs each was seeking. On the one hand, (while at the outset not accepting they were actually asserting a public right of way), the defendants pointed out that the plaintiffs was seeking a judgment *in rem* at to the status of the route itself; but they were reluctant to apply for a fiat for their counterclaim: wherein they asserted on a "contingent" basis there was a public right of way through the land. I am uncertain as to what precisely the term "contingent" meant; however, the intent of the defendants was clear.

27. Ultimately, on 12th July, 2010, the plaintiff's solicitors wrote a letter to the Attorney General about the *fiat*. They requested confirmation as to the attitude of the Law Officer should the Court proceed to determine the matter as to whether the plaintiff's lands were burdened by a public right of way ". . . in *rem and not in personam* notwithstanding the *fiat* of the Attorney General". They wanted an order binding on the whole world and not just the defendants. The Chief State Solicitor's response dated 23rd September, 2010, must be analysed. He wrote that the then Attorney General had considered the matter and had no objection in the circumstances of the case to the issue of the public right of way ". . . being pleaded and litigated by the defendants as part of their defence without his *fiat*". But this carefully phrased letter did not indicate that there was *consent* to the Court *determining* whether the lands were burdened by a public right of way *in rem*, as opposed to *in personam*. The writer also pointed out that, in view of the "extensive statutory functions and responsibilities that local authorities have in relation to public rights of way", the relevant local authority (Wicklow County Council) had been made aware of the proceedings, and provided it with copy papers in the matter to enable it to consider what position, if any, it wishes to take in the case.

28. Here, the Chief State Solicitor was clearly referring to statutory mechanisms for the protection and vindication of rights of way under the Roads Act 1993, and s. 14 of the Planning and Development Act 2000. These provisions provide a procedure whereby a local authority may protect a public right of way within its area. Despite being put on notice, Wicklow County Council chose not to participate in the proceedings. This has some significance in light of the fact that one relevant piece of material which the defendants sought to introduce in evidence was said to emanate from the County Council. The documents are considered later. The defendants contend they were specifically affected by being barred from entry and by the incidents described herein.

The Attorney General's *fiat* is not always necessary

29. Historically the defence of the public interest in litigation is committed to the care of the Attorney General. It is her function to represent the public interest (*Attorney General v. Open Door Counselling Ltd*. [1988] I.R. 593). There is a public interest in whether there is a public right of way. Consequently old legal authorities frequently refer to the fact that it was necessary to obtain a *fiat* or permission for this reason. Can private parties litigate about a public right? Here the situation is slightly more nuanced, in that the plaintiff who brings the proceedings asserts that there is *no* public right of way against the defendants' assertion that there is one. There are some modern authorities which indicate that it is not always necessary for that officer to be joined in proceedings.

30. In the Supreme Court judgment of *Connell v. Porter* (1972) [2005] 2 I.R. 601, Ó Dálaigh C.J., himself a former Attorney General, dealt with the question of a public right of way in a decision in which no mention is made of the Attorney General.

31. More recently in *Smetlzer v. Fingal County Council* [1998] 1 I.R. 279, Costello P. noted that it had:-

> "… been long established that only the Attorney General or persons specially injured can sue in respect of an obstruction to a public right of way. This rule can be overcome by an aggrieved member of the public obtaining the leave of the Attorney General to institute in the Attorney's name a relator action. This has not been done in this case, but the defendant has not raised any question of the plaintiff's *locus standi* to institute these proceedings (probably to avoid the delay which such a plea might produce), and in the absence of objection, I am prepared to determine the legal issues which have been argued before me."

32. In the absence of the *fiat*, therefore, Costello P. dealt with the issue before him as one *between the parties,* that is a question of

locus standi inter partes. In my view, the decisions are clear authority on the question. This Court adopts the same approach. It is to be seen in light of the Chief State Solicitors observations as to the parameters of the case. Thus, these proceedings can only be viewed as a *lis inter partes*. I would point out, however, that the history of *Connell v. Porter* demonstrates precisely the problem which can arise in such actions between two or more private individuals; subsequent questions of *res judicata* can arise; in *Connell* the question had previously been determined with a different plaintiff, and on different evidence, in the High Court in 1956. Both cases concerned precisely the same laneway. (See *White v. Porter* (Unreported, High Court, Dixon J., 23rd March, 1956). The fact that neither, the local authority, nor the Attorney General, are not involved means that there can be no finding on this Court binding on the public at large.

33. How is a public right of way established? I turn now to the general principles of law applicable in a case of this kind.

How is a public right of way established?

34. In *Smeltzer*, referred to earlier, at p. 283, Costello P. observed:-

> "The law relating to highways and the creation of public rights of way is a very ancient one and the relevant principles are well established. A distinction is made between a permission granted by an owner of land to members of the public to walk on pathways on its land and dedication to the public of those pathways. To establish a public right way, what has to be proved is an intent on the part of the owner to dedicate its land to the public, an actual dedication, and acceptance to the public of the dedication." (p. 283 of the Report)

35. In some cases there will be evidence of actual dedication, however, actual dedication may also be *inferred*. Here, the question of "user" is of fundamental importance. But as has been pointed out such an inference can only be drawn in "*all the circumstances of the case*". Context is all important. The focus in *this* case is upon the question of whether dedication can be *inferred*. The defendants invite the court to infer dedication of the route as a public right of way; they have adduced evidence regarding long user from old travel guides and maps and other users of the route. However, they do not assert that at some specific time, some landowner's action show a time and occasion from which dedication might be inferred. They do not point to any prior owner of the land holding a legal capacity to dedicate who might have actually done so. Capacity to dedicate hinges on whether the owner holds sufficient title to engage in an act of dedication; for example by holding the fee simple in the land. The defendants' case is derived, rather, from historical sources and from a particular form of user, that is, effectively, by members of the public who are transient, who used the route in question as a shortcut or as a route for hill walking and from the old maps which they say show a public right of way.

36. In the absence of evidence of any act of "public" acceptance for example, by local authority expenditure or maintenance, the focus of their enquiry can only be as to the nature of the user evidence from which dedication is sought to be inferred. Is there evidence of public user? What was the nature of that use? Can such evidence give rise to an inference? This first requires some analysis of the authorities.

37. Prior to considering the case law, I pause to observe that the legal principles are long established; but there is an important policy dynamic in play in them. There are modern English authorities which are *discussed* in the *Lissadell* judgment which demonstrate a different judicial approach. Those authorities are not part of the *ratio decidendi* of that decision, however. In England, in certain circumstances, user may be inferred after twenty years (see the Right of Way Act 1932 and later legislation). Observations made by English judges must be seen in light of the fact that there is, evidently, a judicial policy at work which is to be seen in light of the intention evinced by the British Parliament in its legislation.

38. In this case, the defendants, in effect, invited the court to apply principles developed in modern English case and statute law. But our law does not support this approach. There has been no legislation in our State on the issue as to when a public right of way may be presumed. The question of acquisition of right of user can be an acutely sensitive one. The relationship between hill walkers and sightseers, on the one hand, and farmers, on the other, is sometimes troubled. The legal principles which apply as to "user" in this case involving a significant land-holding in North Wicklow, might also be applicable to the case of a small holding sheep farmer in West Cork, Kerry, Connemara, or in Co. Wicklow itself. Not all cases of this kind concern significant-sized properties, or big landowners.

39. Among the questions which emerge from the case law are, first; what is the *extent* and *nature* of the user which gives rise to inferred dedication, and second, what is the extent of *toleration* by a landowner, big or small? Was the toleration of such a degree that it may be inferred that the owner was 'acquiescent' in public user so that dedication should be inferred? These are questions of fact to be determined in each case.

40. A court considering the issue of inferred dedication by long user often asks a threefold question about such user. Has the use been *nec vi, nec clam, nec precario*? These terms are derived from Roman law, then civil law; then old common law but each term is still relevant. Such shorthand is not always as helpful as might be thought. *Nec vi* necessitates asking whether the user as of right was "without force or violence". The second, *nec clam*, puts a court on inquiry whether the user was "in secret or whether it was obvious". The third is whether the use was *nec precario*; was there "permission or consent or toleration"? But "permission", "consent" and "toleration" are not synonymous terms, and then difficulties can arise (see the discussion in *'As of Right"; All in the Mind*, Simpson [1998] 62 Conveyancer, November/December). See also Lawyers' *Latin*: *A Vade-mecum*, New Ed 2006, (John Gray).

The distinction between rights acquired by prescription and dedication

41. The process of analysis is assisted by identifying the difference between rights acquired by *prescription;* (which do not apply here) and, by contrast, those acquired by *dedication*.

42. In the *case of prescription,* the focus is on *the "right user*". He or she acquires the right by use, frequently long use; it becomes vested in the user by the elapse of time, and in circumstances where there has not been "force, secrecy or consent". The common law developed a doctrine known as "lost modern grant" to overcome difficulties in establishing these proofs. A court could presume from long user, that at some time in the past, an easement had been granted by deed but that deed had been lost and could be produced. This may arise in the case of a private easement. (But see now the Land and Conveyancing Law Reform Act 2009).

43. But by way of distinction, *a public right of way* is created by the *dedication* of the way as a public way by a *landowner*. What did the landowner do? That act of dedication need not be formal. Sufficiently unequivocal conduct by an owner, evincing an attention to dedicate will suffice. There must also be acceptance of the dedication by the public, evidenced by their use of the path or way. Consequently, long user of a path, with an acquiescent owner standing by and taking no action may be seen as allowing an inference of dedication and acceptance. But such user must be *nec vi, nec clam, nec precario.* As a component part of these tests the court considers the *notoriety of the user*; or, to put it another way asks itself was the public user *obvious*, or should it have been so? The

court will look to how the owner then acts or fails to act.

Was user as of right referable to toleration or dedication?

44. I observe earlier that the term "toleration" lies at the heart of this case. This is true in more than one sense. In *Regina v. Oxfordshire County Council ex parte Sunningwell PC* [1993] 3 WLR 160, Lord Hoffmann engaged in this short helpful historical analysis as to how the law evolved on this topic. It showed the fact that user "as of right" was not determinative; such user may be based on toleration rather than dedication and therefore not give rise to an inference of dedication. That judge observed:-

> ". . . as one can see from the law of public rights of way before 1932, toleration is not inconsistent with user as of right; see also per Dillon L.J. in *Mills v. Silver* [1991] Chancery 271, 281. Where proof of a public right of way required a finding of actual dedication, the jury were entitled to find that such user was referable to toleration rather than dedication; *Folkestone Corporation v. Brockman* [1914] A.C. 338. But this did not mean that the user had not been as of right. It was a finding that there had been no dedication despite the user having been as of right. The purpose of the Act of 1932 was to make it rebutting evidence, to treat user as of right as sufficient to establish the public right."

Earlier in the same judgment, the judge explained the "pre-statutory" English position in this way:-

> "The difficulty in the case of public rights of way was that, despite evidence of user as of right, the jury were free to infer that this was not because there had been a dedication but because the landowner had merely tolerated such use: see *Folkestone Corporation v. Brockman* [1914] A.C. 338. On this point, the law on public rights of way differed not only from Scottish law, but also from that applicable to private easements. This made the outcome of cases on public rights of way very unpredictable and was one of the reasons for the passing of the Rights of Way Act 1932, which introduced a statutory presumption of dedication and way of rebutting deemed dedication."

How obvious must the "user as of right" be?

45. While our law as to presumption now differs from English law, some illustrations from English cases may still help illustrate *particular* concepts. One of these is the nature of the user inconsistent with the landowner rights. *Mills v. Silver* [1991] Ch. 271 was in fact such a case. There, at p. 281, Dillon L.J. warned even in the context of English statutory "prescriptive" rights:-

> "It is to be noted that a prescriptive right arises when there has been user as of right in which the servient owner has, *with the requisite degree of knowledge*, which is not in issue in the present case acquiesced."

46. The "knowledge" test therefore remains fundamental even in English jurisprudence. In *Mills v. Silver* the owner simply could not deny "knowledge". What was in question was an *actual track* constructed across his land. This is, of course, very different from occasional sporadic or irregular entry. Here, the interlinkage of the *nec clam* with *nec precario* requirements is essential; the question of toleration or acquiescence imputed to a landowner must be linked to the degree to which the user of the land was obvious to the owner and the extent to which that use was inconsistent with the owner's rights over the land.

The established legal authorities which apply to this case

47. The starting point for consideration of our law is *Connell v. Porter* (1972) [2005] reported at 3 I.R. 160, referred to earlier. It is a binding authority on this Court. As context is vital, the facts of this case are now outlined in more detail than would normally be necessary. The emphasis on what is seen as "weak" evidence and what is "strong" evidence is a key part of the analysis.

48. In *Connell*, the plaintiff owned licensed premises from which a side door opened onto his *cul de sac* laneway. The defendant was the lessee of the laneway and an adjoining property. The defendant conceded that as the plaintiff's bar customers had used this side door for access to her premises for many years, the plaintiff had acquired a prescriptive right of way for her customers over the soil of the defendants' property. In 1966, the defendant erected a gate on the entrance to the laneway and supplied the plaintiff with a key for use by the plaintiff together with the patrons of her public house. The bar owner brought proceedings to have the gate removed claiming that the laneway was a public highway and that her prescriptive right of way allowed her to pass and re-pass through the laneway without obstruction.

49. Having outlined the general principles by which a public highway could be created, the Chief Justice concluded that where there was no direct evidence as to the intention of the owner, an *animas dedicandi* (intention to dedicate) might be presumed, either from the fact of public user without interruption, or from the fact that the right of way had been maintained and repaired by the public authority. A landowner who had permitted the expenditure of public monies on his roadway could not be heard to say, if this was coupled with public user, that it remained a private road. The court noted that the extent of the public expenditure included a laying of concrete in 1931, road sweeping and cleaning, bin collection and public lighting up until 1962. Coupled with *evidence of public user,* the court concluded this was sufficient to support the trial judge's finding that the laneway was a public highway. But the weight the court imputed to these two factors is fundamental to the test. The use by ordinary members of the public, while *a* factor; was not in itself determinative. At p. 604 of the report, the Chief Justice noted that the defendant had conceded that the plaintiff's bar customers had used the right of way for entering and leaving the licensed premises and that the plaintiff thereby acquired a prescriptive right of way for her customers over the soil of the defendants' premises. The laneway had also been used for anti-social purposes by members of the public late at night to the distress, annoyance and displeasure of the defendant.

50. But at p. 606, there is the following important observation:-

> "… The evidence of user, in this instance, if it *existed in isolation*, I would consider weak and insufficient; *but when taken in conjunction with the evidence of expenditure, for various purposes, of public monies* on Nash's Court, a strong case is made out for the presumption of dedication." [Emphasis added]

51. This evidence of "ordinary" public user referred to customers in a bar who must have been frequent and numerous. But this evidence *in isolation* was *weak* and *insufficient*. What made the evidence conclusive was that this frequent customer user was to be seen in the context of expenditure of public monies on maintenance and repair on the lane.

52. On the final page of the judgment (p. 608 of the report), the Chief Justice observed that the maintenance of Nash's Court by the corporation as a highway was *such a notorious and obvious fact* that it would require strong evidence on the part of the owner of the fee to displace the presumption that he must have been aware of it. *Connell* is a clear illustration as to the manner in which the principles should be applied and weighed. In my view it shows a conscious and deliberate calibration of the scales demonstrating a

judicial policy which this Court must apply.

53. *Bruen v. Murphy* (Unreported, High Court, McWilliam J., 11th March, 1980) is to similar effect and illustrates the same emphasis.

54. The evidence there established that persons in the area of Templeville Drive and Fortfield Drive in Templeogue crossed, though without difficulty, several field boundaries and eventually clambered over the remains of a wall at the back of Templeogue Village. As McWilliam J. pointed out, there was a complete absence of evidence as to the ownership of the fields between Templeogue Road and Templeogue Village or as to the use to which the fields were put or as to there being any identifiable track across the fields or along the wall of the village and no evidence was tendered to facts which could support a presumption that the owner or owners of the land had dedicated a way for the use of the public. What occurred was that the construction of houses on Templeville Road had led to two passages, into, and out of, a disputed plot, creating a shortcut between Fortfield Drive and Templeogue Road.

55. The judge observed that during the ten years in question there had been undoubted use of the plot by many persons for many purposes, some of them objectionable, but equally certainly, a number of persons used the route as a shortcut. He concluded, however, that there was no actual dedication of the public right of way and he considered that he could not:-

> "assume that the casual user by members of the public for dumping, rowdiness and occasional passing across it between the two roads was such that I should imply the assertion of a public right of way with a knowledge and acquiesce of the (then owners)."

Here, again, the user was considerable but in the absence of more the court could not infer dedication. The *weight* to be given to particular types of evidence is fundamental public user by maintenance or expenditure is "strong" evidence; ordinary user by itself was weak or insufficient.

56. The same policy emphasis underlay the decision in *Collen v. Petters*, referred to earlier. Much of the long user evidence there was described by the judge as being merely a "neighbourly convenience" and therefore not giving rise to any assertion of rights inconsistent with those held by the owners. He concluded that the use of various paths from a house to a public road that conveyed for the purpose of convenience had nothing in common with a public right of way; such use would retrospectively convert a local convenience into a right for the public at large. He held also, that for a public right of way to be presumed, it must commence at a public place and terminate in a public place, although this was not necessary where the destination of the presumed right of way was to a place of natural beauty requiring access; and that the act of erecting a gate at an entrance to a public road thereby preventing all access, including pedestrian access, was wholly inconsistent with a public right of way.

Distinguishing aspects of the *Lissadell* case

57. As indicated earlier, the nature of the user evidence described in the very recent *Lissadell* case was very distinct from that which arises here. There, McMahon J. found the evidence showed the disputed land was used for regular recreational purposes; that there had been public expenditure by the local authority on the land on more than one occasion; that the property had figured in the County Development Plan published by the County Council; that Gabrielle Gore-Booth, of the family who owned the "big house" had made known in 1969 in letters to the President of the High Court, and to the President of Ireland, that her father had "opened up" the estate to the public as far back as 1900; and in her view that for "upwards of 60 years Lissadell has been a popular social meeting place". The evidence established that Mr. Caffrey, the estate manager appointed in 1957 said in a letter to a solicitor for the Ward, Sir Michael Gore-Booth, that the level of public access enjoyed up to 1957, was such as to be a cause of concern to a previous solicitor for the Ward. The phraseology used in the letter was that:-

> "…in plain words [the estate] was gone into a 'commons'." (See para. 83 of McMahon J's judgment.)

The position here is fundamentally different. None of the factors just described are in play.

The ratio of the *Lissadell* judgment

58. However, the *ratio* of the Lissadell judgment was in fact based *not only* on obvious acknowledged long user, and obvious and public acceptance by expenditure, but also, vitally, by inference as to the *identity and capacity of the dedicating landowners*. At para. 267 of the judgment, McMahon J. stated:-

> "During the period 1857 to 1861 in the case before the court, I am prepared to say that dedication was not only possible, but on the facts I am prepared to presume that there was joint dedication during that period…. in our case the life tenant and the remainderman lived in the same house at the same time, so it is easier to infer dedication in these circumstances. Furthermore, it must be recalled that the same parties consented to the disentailment of the estate in November 1857, an act of much greater legal significance than dedication."

59. Thus in addition to the other factors, there was a presumption of joint dedication by both the life tenant and the remainderman who, taken together, would have had the capacity to dedicate. This very important question did not arise in the instant case; it was not explored by the parties asserting the public right of way. Insofar as the defendants here have sought to characterise the *ratio* in *Lissadell* as being based *simply* and only on inference of dedication by virtue of long user, they were incorrect.

60. In our law therefore, (as distinct from the law now in the neighbouring jurisdiction) proof of long, continuous and uninterrupted user of a way by the public, though it is evidence from which dedication *may* be inferred, does *not* create a presumption of law and favour of a dedication, which unless rebutted must prevail (per Lord Atkinson *Folkestone Corporation v. Brockman* [1914] AC 338). This decision, to which I now refer in more detail, illustrates many of the principles which apply in the instant case.

What Folkestone Corporation v. Brockman established

61. In Lord Atkinson's speech in *Folkestone* there is a passage which although couched in very old fashioned language is still relevant. At p. 369, he observed quoting from observations in *Simpson v. Attorney General* 1904 A.C. 476 at 493 that:-

> "…nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

Here Lord Atkinson was quoting from observations of Lord Macnaghten in *Simpson v. Attorney General* [1904] A.C. 476 at 493.

62. Lord Kinnear in his concurring speech in *Folkestone* said of the justices who had come to the conclusion that there was no intention to dedicate that:-

> "It is said that they should have come to a contrary conclusion in law, because user creates a *præsumptio juris* (*presumption in law*) in favour of dedication. This proposition is too vague to be helpful in argument, since each of its terms is ambiguous. The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case…"

63. That judge continued:-

> "The law is stated more exactly by Lord Blackburn in *Mann v. Brodie* (10 App. Cas. 378, at p. 386). He begins by citing the doctrine laid down by Parke B. in *Poole v. Huskinson* [1843] 11 M&W 827 at 830: 'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate - there must be an *animus dedicandi*, of which the user by the public is evidence and no more.' And then he adds more particularly with reference to the effect of user, that 'where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, *must* have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was a dedication by the owner, whoever he was." [Emphasis added]

64. The speech of Lord Kinnear is helpful also, in that at p. 385, it clearly again distinguishes between the theory of dedication, on the one hand and on the other theory of acquisitive prescription which in 1914 was the law of Scotland but not England. A court may proceed therefore on the basis that the presumption of dedication from user is a probable inference from facts proved to be fact in issue, and it follows that in a particular case it is for the judge of fact to determine whether on the evidence adduced it can reasonably be drawn (per Lord Kinnear at p. 354). The other authorities how that factors such as local reputation and state of mind of the user may arise.

A summary of the questions derived from the decided authorities

65. In summary, then, a court may ask itself the following questions as to whether dedication may be inferred:-

> Was there any actual dedication? Here, and in the question of acquiescence, the owner's state of mind is material.
>
> Was there any act of public acceptance?
>
> What is the evidence of public user?
>
> In these questions documents of title maps and other public and private records may be relevant.
>
> Is the evidence of public user "as of right"?
>
> Can that evidence be linked or connected with acts of public expenditure on the land?
>
> Is the evidence of user consistent with the three tests of *nec vi, nec clam nec precario*? Whether such user was long, continuous and uninterrupted are relevant considerations, but may not be determinative.
>
> Is the evidence of user referable to acquiescence or, alternatively, simply to toleration not amounting to acquiescence?
>
> Is there evidence of public user "as of right" and connected with a requisite degree of knowledge which can be imputed to the landowner such as to show acquiescence? Was some prior inconsistent user of the owner's rights or public expenditure such a "notorious and obvious fact" that it can raise a presumption that a landowner *must* have been aware of it?
>
> Over what period of time did the public user take place?
>
> How intense, and on what occasions did such use take place?
>
> What steps did the landowner take to counteract such user?
>
> Were such steps proportionate to the acts of trespass in the sense that they were a commensurate action to prevent repetition of such acts?
>
> Is there evidence of local reputation of the disputed route being a public right of way?
>
> What was the user's state of mind? (This last may be relevant in circumstances illustrated later in the judgment.

The court must address these questions having regard to all the circumstances of the case.

The plaintiff's case

66. As described earlier, the plaintiff's land is outlined in blue on the map which is Appendix A to this judgment. Was the route used *nec vi, nec clam, nec precario*? Was there public user as of right? It is necessary now to turn to the evidence on these questions. I return now to the history of the route itself. The general location of the land can be seen in the 1981 Ordnance Survey map of the Wicklow Way P. 17 Appendix B.

Topographical and historical background

67. The plaintiff now resides with his wife and family in the Old School house shown on the maps. The property lies north of the Military Road (now the R115) which was constructed very early in the nineteenth century. An original building, St. Kevin's Roman Catholic Church adjoining the plaintiff's garden, was built in 1824. It was replaced by the present building in the late 19th century. To the north of the church lies a graveyard, still in use. Beyond that are the subject lands, now largely in forest.

68. The land is located in the Wicklow Mountains west of the Powerscourt Estate, lying between Glencullen, Enniskerry and Glencree. A section of the Wicklow Way passes north/south relatively close to the west of the plaintiff's land through Curtlestown Wood. To the east of the plaintiff's property is Annacrivey Wood, now managed by Coillte. To the north again is an area known as Raven's Rock, now in commonage, where the plaintiff enjoys shared rights.

69. The land in question was originally a Norman deer forest. From the 12th century until near the end of the 16th century, the area was under the dominion of the Wicklow clans who were then dispossessed by the Crown. In 1603, the Wingfield family were granted the lands around Powerscourt including the subject property. Ultimately, the Wingfields became the Viscounts Powerscourt. They were landlords who held vast estates, at one point measuring approximately 12,500 acres. The family retained these lands throughout the many regime changes of the seventeenth century. There was a large walled demesne just west of Enniskerry which contained ornamental gardens as well as a large house. This demesne covered the area where the plaintiff's house and Annacrivey Wood are now situated.

70. To the north of the Military Road, the land rises quite steeply northwards through the church grounds, the graveyard, and up towards Annacrivey Wood. The terrain is rocky, and is unsuitable for much agricultural use. There are substantial rocky outcrops interspersed with bog or peat terrain. The plaintiff's land, and Annacrivey Wood, as well as the territory around Ravens Rock, were used by the Wingfields for hunting, and forestry plantation. A very detailed Powerscourt estate map of 1816 shows how the land in the area was then apportioned; it identifies each tenant by name, and the size of each field to each acre, road, and perch. It is a remarkably precise document and an example of the surveyors' discipline and the map makers' art. (See Appendix B page 1).

71. In the latter part of the 18th century, the Wicklow uplands were seen by the then administration as wild and sparsely populated. Neither the Crown nor its agents found it possible to build roads in the area until after the 1798 rising, and the ending of Michael Dwyer's campaign in 1803. The Powerscourt estate continued in being until the latter half of the nineteenth century. With the passing of the Land Acts, the estate was broken up by degrees, and a large amount of the land south of Annacrivey Wood was assigned to purchasers who sometimes in turn subleased the properties. The process was largely complete by 1897.

72. There is no evidence in the case as to the ownership of the land in the intervening period from 1897 until 1945. It follows, therefore, there can be no question of there being any person identified as capable of being fixed with even the capacity to form an *animus dedicandi* (intention to dedicate) during that later period, any more than during the earlier Powerscourt/Wingfield era which the defendants also did not explore in evidence although one of their witnesses Mr. Rob Goodbody carried out a thorough search in the Registry of Deeds.

1945: The Walker Family acquire the land

73. In 1945, the plaintiff's father, Norman Walker purchased Annacrivey House next door to the Powerscourt demesne, and south of the Military Road (see map Appendix B, p. 7). About 250 acres of land then ran with the property. He later sold the house, along with approximately 80 acres. He unfortunately died in 1980 in a road traffic accident. The plaintiff, who is now an accountant in his early 60s, then came into the estate subject to his mother's life interest. He converted the old school house and commenced using it as a family dwelling. He has lived in the area most of his life except in periods when he attended university in Dublin and another period when he lived in Castlebar.

The property in Norman Walker's time

74. During his lifetime, Norman Walker used the land as a farm. He herded dairy cattle, sheep, and later, wild ponies. Annacrivey Wood was and is separated from the plaintiff's property by a stone wall. There is a similar wall in place along part of the disputed route between Butler's Cottage at point F and Canavan's Cottage at point E. (See Appendix A). As one proceeds from Hughes' Lane to point B, and then towards point D, part of the route or path is walled on both sides. There are still part of it where the plaintiff goes about on a quad bike. The higher parts of the route are extremely rough, rocky, and boggy. As one proceeds along the line eastwards, and then northwards, the land is now heavily afforested. At some points, this forest is entirely impenetrable. From Canavan's Cottage onwards, it is impossible to discern any route or pathway at all. At other points, south and closer to the old Military Road, at the walled portion, the track would be sufficiently broad to allow perhaps four people to walk abreast. Elsewhere, even the remnants of any track have been entirely obliterated by the forest planted by the plaintiff in 1988.

The plaintiff's forestry plantation in 1988

75. In 1988, the plaintiff planted approximately 110 acres of spruce, and some broad leaf trees; the latter were quickly destroyed by deer. The southern section of the plaintiff's land near the schoolhouse was not, however, planted. It remains open, although now much changed by the removal of earth for a large access road or track which the plaintiff decided to build recently; this crossed the path of the disputed route. The conifer trees flourished, at one time managed by a consultant company which subsequently became insolvent. The plaintiff erected forest fencing around the plantation, which was made up of sheep wire run between wooden posts with a strand of barbed wire running along the top. There were gates at both ends of the route. Again by reference to Appendix A; the plaintiff's property ends at a point roughly midway between point F, and point G, that is to say between Butler's Cottage and Burned House. Thereafter, there is then a clear track which inclines northwards to point K, ultimately joining Blackhouse Lane.

Non-joinder of adjoining landowners as parties to the counterclaim

76. Surprisingly, the defendants did not seek to adduce positive evidence as to whether or not any part of the neighbouring property to the north of the plaintiff or the track leading down to the plaintiff's land is a public right of way. No application was brought to join Mr. Patrick Geoghegan, an adjoining property owner, or any other owner along that track to defend the counterclaim, brought by the defendants' which sought to establish that the route through the plaintiff's property was *part* of an old public right of way, going as far as point K. through the adjoining land. The consequence of that decision is that the defendants are left asserting a "public right of way" which as it was put by the plaintiff's counsel, is a "road to nowhere". The failure to join Patrick Geoghegan and other landowners on the lane north of the plaintiff's property is puzzling, as well as creating a fundamental procedural obstacle for the defendants.

The plaintiff's own evidence

77. I turn then to the plaintiff's testimony. In general, I considered him truthful in court. However, I think that he was also remiss in failing to apprise the court of the fact that he was actually going to build the new access track, though he did say in evidence that this was his intention.

78. The new track itself is now very unattractive. The work involved shifting a great deal of earth, now strewn at the side of the track. The track crosses the disputed route. The new entrance fronts onto the Military Road with a (presumably, temporary) unsightly gate with large warning signs prohibiting entry. Throughout the lands, there are other signs indicating that trespassers are unwelcome, and that there are dogs loose.

79. I think Mr. Walker's judgment on some issues has been affected by the pressures of the Right of Way campaign. His wife also testified that she found the situation difficult. Neither side in this case has shown the degree of toleration you would normally expect. The actions on both sides have been totally disproportionate to the issues at stake.

80. The plaintiff testified that, after his father bought Annacrivey House, he kept dairy cattle on the lower pastures nearer the Military Road. Norman Walker later reduced his level of farming activity, and sold part of the land. The plaintiff recollected that Hughes' Lane was used by tenants who lived in Canavan's Cottage and also in Cottage No. 1 (See Appendix A). A cottage further to the west was once occupied by a family of Polish refugees.

81. I should comment here, that Canavan's Cottage, and the land around it, stands directly across the route of the alleged right of way. A number of maps show a cottage at or adjacent to the same site for nearly two centuries. In fact, there is a cottage shown just there in the Powerscourt Estate map of 1815 (Appendix B, p.1). The cottage is clearly shown in the Ordnance Survey map of 1885 (Appendix B, p.5). A laneway leads up to the Canavan's Cottage from Hughes' Lane, but goes no further. It was a *cul de sac* even then.

82. When the plaintiff came into possession in 1980, both Cottage 1 and Canavan's Cottage were in disrepair. The land around them had become overgrown with furze. The southern and western boundaries of his property were walled, and the remaining sides were fenced at the time when his father held the land. After Mr. Norman Walker died, his son disposed of the ponies, and later decided to plant the forest on the property which had otherwise been vacant.

83. The planting in 1988 took place over much of the area described in the map in Appendix A as "J. Walker's land". It crossed much of the route between the points E and F. The only area on the Walker property not planted were the southern fields closer to the plaintiff's house.

The plaintiff's testimony on "public user"

84. The plaintiff's earliest memories of persons walking along the route went back to the 1950s when he was nine or ten years old. He testified his father had become agitated about an article on hill walking written by the well known writer and hill walker of other years, J.B. Malone. This suggested there was a route northwards through the plaintiff's lands up to Raven's Rock. Mr. Norman Walker made a complaint about this suggestion. The plaintiff testified that, beyond his property, to the north and west of Annacrivey Wood there lay between points H and J (Appendix A) a private right of way giving neighbouring residents access to the wood. Mr. Norman Walker occasionally gave permission to boy scouts and others to enter the lands.

85. The plaintiff testified that in the 1950s, any hill walkers tended to come onto the subject land to the north in the region of Raven's Rock. His father became quite upset at any incursions. The plaintiff said his father had no difficulty with local people entering on his land for business, for example to recover stray sheep. However, the late Norman Walker did not accept recreational use of the land with the exception of occasions when he gave permission. As well as the boy scouts, the only other person with permission to enter the land freely was a local doctor who used to enter the land to shoot. The plaintiff himself still allows school groups to camp on the property from time to time as well as allowing access to cycling groups and for game shooting. The plaintiff's evidence was that, from his father's time, there was a gate at Butler's cottage, and a gate at Canavan's cottage. There was barbed wire fence where the lands ran along Hughes' lane.

86. On foot of the case management directions, the defendants had furnished proofs of evidence of their witnesses. The plaintiff did not dispute their evidence as to use of the disputed route. He had spent a lot of time on the land but never met any of the witnesses personally. He accepted the lands were not continuously policed, and it would have been easy for people to walk through unnoticed. As can be seen from the maps, the schoolhouse is perhaps 70 yards from the route, and perhaps 100 feet lower. Much of the track is hidden from the house (See Appendix B, p.17).

87. The plaintiff said that, at one point, the land between Canavan's Cottage and Butler's Cottage had become so overgrown that it would have been necessary to make a significant diversion around those lands. He recalled a wall running along the track at point F to point G in a north easterly direction, at which point there were closed gates. He described the track after point F up to point G as being quite narrow although it widened after the boundary with what is described in the map as "Sold Land" that is land which was sold to his neighbour Mr. Geoghegan. At point G, the entrance to Annacrivey wood, there was a stone wall for access purposes. A stile was there sometimes used for indirect access to his farmland as it was less a climb from his house. The plaintiff denied that either he or his father expressed any intention to dedicate the route as a public right of way.

Did the plaintiff and his wife acknowledge the existence of a right of way?

88. I turn next to a question of admissibility of evidence. It was put to the plaintiff he had acknowledged the existence of a public right of way in 1990. He denied ever having a conversation either in that year or the year earlier with a person carrying out a survey on behalf of Wicklow County Council. He denied that he ever made such a concession or accepted that there was a public right of way. He stated that such a suggestion had no substance and was inaccurate.

89. It was put to the plaintiff in cross examination that the Wicklow County Council had actually recognised or designated the route as a public right of way in 1990. Two documents were put to him suggesting that he and his wife had acknowledged the existence of a right of way then, and that these documents were in fact part of a County Council survey. However, the documents were never proved in evidence. I comment later on this when dealing with Mr. Kevin Warner's evidence. The plaintiff was not undermined in his evidence. It was not suggested that in other areas his evidence was so incredible as to render his testimony on this point suspect. Thus the Court must therefore accept his denial, and that of his wife.

The plaintiff's actions when the claim was openly made

90. The plaintiff testified that, in 2002 he became aware that Mr. Kevin Warner and Mr. Albert Smyth had written a book called *Ten Walks in the District of Enniskerry*. The book asserted the route was a right of way. He strongly denied that there was any right of way through his lands and threatened to sue them. He did accept, however, that local residents had paid for the partial tarring of the lane north of his property near point K. This is passable by vehicles, but is not within his boundary.

91. He said there was an increasing number of people coming through his property particularly along the path marked A – G. When he met such people, he said he made clear to them that they were trespassing on private property, and asked them to leave, particularly any he encountered between points B and D.

92. The lands adjoin publicly owned forestry. The plaintiff estimated that quite a few hundred people would annually pass along the route, sometimes in groups of two or three, but on occasion in groups as large to thirty or even fifty. These were mainly strangers, although he came to know one or two. The fences which protected his property at Butler's Cottage at the boundary to the "Sold Land" were pulled down and trampled on in various places. Another section of the route at the top of Hughes' Lane at the other end of the route was tidied up and ferns were cut back so as to make it passable. A wire fence surrounding the forest set back from Hughes'Lane was also cut up. He regularly installed new fences along the boundaries of his property. These were accompanied by notices stating "private property – keep out". However, he found these did not last; they were cut down and the notices removed. He testified about the notice in an inaccessible location which was shot through with bullet holes. The plaintiff described two other incidents which took place from 2004 onwards. The first was where the trees were "barked", or killed by cutting around the base of the tree and removing the bark. In a second incident, small fires were lit on the pathway, he thought with the intent to intimidate rather than actually place life at risk.

93. I would comment here, that both of these two actions, even if seen in isolation, demonstrate that the plaintiff had made entirely clear that he would not tolerate persons crossing his land. It must have been widely known. It is not suggested that the defendants engaged in these actions. The irony is that these unlawful and intimidatory actions were entirely counter-productive in this case they negative acquiescence; they strongly support the plaintiff's case that he objected to persons entering his land, and that this was obvious to anyone.

Conciliation efforts followed by escalation of the dispute in 2004

94. The plaintiff described the conciliation meetings. At one of these he was shown the "Liam Price Notebooks" which described the author walking a route on 18th of December, 1932. This entry describes a line which I think is consistent with the disputed route. The plaintiff, however, did not feel in a position to accept this in light of the paucity of detail. As a matter of probability, however, I think there is little doubt on the matter. But the author is by no means an insignificant figure: Liam Price was a District Judge and a prominent and recognised antiquarian, archaeologist and authority on place names. He was a precise observer. Volume 1 of his "Notebooks" was published by Dúchas in 2002. This was part of the material Mr. Noel Barry the second named defendant showed to him in 2006, if not before. As a matter of probability, I find that this entry describes the author walking "the old road" above Curtlestown towards Kilmolin refers to the route in question.

95. The plaintiff gave evidence regarding a walk which took place, he said, in June 2004. This was organised by the Enniskerry Walkers Association, he erected a steel barrier between points F and G where his property on the north end met that of his neighbour Mr. Geoghegan. He said a number of people came up Blackhouse Lane, turned left at point K, crossed a locked gate at point H, before assembling at the barrier, and seeking to cross onto the plaintiff's land. He described the first named defendant making a speech about "landlordism" to the crowd after which the march then dispersed. There was an exchange of words between himself and the first named defendant. This barrier was subsequently removed without his authorisation, as were fences.

The organised walk in 2005

96. The plaintiff described another organised walk on 20th February, 2005. Then he encountered a group of people on his lands including the first named defendant and he claimed that he was knocked to the ground. These allegations were not put to the first named defendant in cross examination, and I expressly do not make any finding of fact on this point. The first named defendant is now entitled to be exonerated from this allegation.

97. The plaintiff accepted that, during 2005 and 2006, the Walking Association representatives referred him to a series of maps to which reference will be made later in the judgment. The dispute continued. It seems there were a number of other unpleasant incidents in the meantime. In September 2008, the defendants organised the walk which triggered the injunction.

Mrs. Anna Walker's evidence

98. Mrs. Anna Walker married the plaintiff in 1977. She testified that her husband inherited the property in tragic circumstances when his father was killed in a road traffic accident. Subsequently, in another accident, his mother was seriously injured at the same location.

99. The witness said that in the late nineteen seventies, she went on walks on the property with her father in law. She described the route in question as being overgrown with ferns. Neither she nor her father in law traversed the whole route. Her evidence was that she never met anyone while out walking the route with her father in law. She felt that if Norman Walker had met anyone there, he would have told them they were on private property, although he would have drawn a distinction between local people and mountain walkers.

100. Mrs. Walker said that in the nineteen eighties, the area between Canavan's Cottage and Butler's Cottage was overgrown with gorse through which one could move with difficulty. Following the publication of the pamphlet in 2002, she found living in the area to be stressful and lonely. There was an increased number of walkers, damage to trees, some fires were set and other acts of petty vandalism and intimidation occurred.

Mr. Patrick Geoghegan's evidence

101. Mr. Patrick Geoghegan, a pharmacist and neighbour of the plaintiff, came to live in the area in 1987. His land lies north of the plaintiff's property bounded by Annacrivey Wood, (managed by Coillte) to the west, and by a Mr. Duggan to the north (Appendix A). The witness now owns the "Sold Land" which he bought from the plaintiff. Much of this witness's evidence was not directly relevant to the subject route, but rather was focused on the route from J to H and H to G. But he did say there was a gate across the lane

down to his house, near Burned House which was relocated some years before the events here. He identified a further gate at point H, and a wall across the laneway below Burned House. The witness was unaware of any public rights of way, though he accepted that when walks started in the late nineteen nineties, one was asserted at the entrance to Annacrivey Wood.

102. The witness described that his van had been hijacked as one of a series of intimidatory incidents which took place in the late nineteen eighties or early nineteen nineties. As I infer it, the witness was suggesting these events were in some way connected to a dispute as to access to his land.

103. Mr. Geoghegan testified that in the late nineteen eighties the laneway between point G and F had become completely overgrown with bushes and rocks. He cleared this in the early nineteen nineties to allow for traffic and cut stones were put down so as to afford access to the Burned House at point G. The witness accepted he had an interest in the outcome of the proceedings as he was concerned that the result could impinge on paths running across his property. Counsel for the defendants put to him a number of questions regarding another alleged dispute many years before between another neighbour and Wicklow County Council as to the existence of rights of way. No evidence was called to prove these allegations, they are not therefore evidence on which this Court can act.

Mr. Harry William's evidence

104. Harry Williams is a farmer in his mid seventies from Ballybrew. (Appendix B, p.17; south of the Glencullen River). His family have been there for six generations. He described there being a stone wall at Burned House. He described Norman Walker's lands as having been an open meadow, where there were horses and sheep. He testified that, on occasions, his sheep would stray on Norman Walker's land when stone wall boundaries became dangerous. He described times when groups of three or four walkers might stray onto his or the Walker's lands. From time to time he himself crossed the Walker lands to gain access to other land which he farmed. He did this as a shortcut and as part of a gentleman's agreement between farmers. He denied that there had been continuous walking by strangers across the Walker lands. He testified that he had never in past times heard of any claim of there being a public right of way across the Walker lands.

105. I turn then to the defendants' evidence on public user contained in the next section of the judgment.

The defendants' case based on user and acquiescence

The defendants' evidence

106. Ironically, the defendants' evidence on user does not establish that the two defendants themselves were frequent users of the route at all. The first defendant, Mr. Nial Leonach testified he walked along the route a number of times in the early 1980s and again in the early nineteen nineties. He stated he did not record any obstructions but described the road as being quite overgrown. His walks took place only after Norman Walker's death. He accepted that he saw a gate at a point doing the route. He used the route to visit his mother in law, Mrs. Wrigley who lived locally. He did not remember gates but did remember the trees growing up in the nineteen nineties. Mr. Noel Barry, the second defendant testified that he ran doing the route when he was training for marathon runs in the early nineteen eighties and part of the nineteen nineties. He was then friendly with the plaintiff. Mr. Barry's involvement in a number of meetings with the plaintiff, in an effort to resolve the dispute, has been described earlier.

Ms. Marie McDonnell's testimony

107. Ms. Marie McDonnell is a retired Civil Servant. She was not a local resident. She was for many years a director of An Óige. She was also an active member of the Legion of Mary which organised hill walks in the nineteen sixties. Her evidence was given in a very forthright manner. She testified that she has used the route while engaged in walking groups as far back as the time she was involved with the Legion of Mary and then in An Óige groups going to the youth hostel south of the plaintiff's property. She never met anyone on the route who suggested to her she was not entitled to walk there. She never met any member of the Walker family. She took the view that she was entitled to walk there unless or until somebody told her otherwise. She did not give evidence of her basis for this belief. She recalled walking along the route at a time when she first heard it had been planted with forest. She was shocked to see the trees had been planted in what she regarded as a roadway. Initially, she concluded that there had been a mistake, and actually pulled up a number of trees which she found there. She had previously cut down furze. The witness testified that she had been through the route "loads of times" since the forestation. She denied that there had been any stone wall, but did remember a locked gate at one stage which was easier to get over.

108. I infer from her evidence that she accepted there was fencing at the Burned House and of the route, but did not recollect any fence on the Hughes' Lane end. She remembered meeting a gate what was a bit shaky. She accepted that this gate had been locked. She described the land as having been ploughed or ripped up for the purposes of tree planting. She stated that in earlier times groups of up to 50 people may have been involved in the An Óige walks. She stated that walkers would enter the plaintiff's property having traversed the lane down from point K as being part of a recognised route which she considered was a public right of way.

Mr. Séan Fox and Ms. Vera Fox

109. Mr. Séan Fox and, his wife, Mrs. Vera Fox, testified that they walked the route from 1951 when as a sixteen year old, he joined An Óige. They were persons with local connections. He stated there was a wall near the Blackhouse end, but that there was a stile in the wall which presented no difficulty walking across it. He occasionally came across temporary gates made fro pallets and branches. He did not consider there were any significant obstructions along the route, however. He did remember livestock on the land. In the early nineteen sixties he became involved in walking the route, first as a member of the Irish German Society, and then as a member of the Irish Ramblers Club in 1964. Since approximately 1972, he walked the route with his wife as part of an organisation called Na Coisithe. Mrs. Fox's parents bought a shop in the vicinity and they both spent a considerable amount of time in the area in the summer at weekends up until the nineteen eighties. Mr. Fox testified that on a number of occasions when he was walking the route, he met Mr. Norman Walker, who he stated, took "no attitude at all" to them being on the route, and did not prevent them from proceeding. However, he conceded that they did not meet him very often as, on most occasions they met nobody. Mr. Fox testified that it looked as if the late Mr. Walker recognised that the route was a right of way. He did not give any basis for this inference. Clearly Mr. Fox recognised Norman Walker, the question arises therefore whether Mr. Walker saw him as a local resident. Mrs. Vera Fox corroborated her husband's evidence and stated that she was walking the route from the early nineteen forties onwards. She testified that occasionally they would meet Mr. Norman Walker although they never really got into conversation with him. While Mr. and Mrs. Fox actually lived in Glasnevin, they had local family connections in the area.

Mr. Kevin Warner's evidence

110. Mr. Kevin Warner, a member of the Enniskerry Walking Association, sought to introduce the documents said to record the outcome of a survey as of land use carried out by Wicklow County Council in 1990. One of the purposes of this survey was apparently to identify public rights of way.

The documents not proved in evidence

111. But while Mr. Warner *produced* the documents said to come from this Wicklow County Council survey, these were never formally proved in evidence. He had no legal authority to prove them. The defendants were given ample opportunity to address this point. Documentary evidence of acknowledgment of a public right of way may be admissible evidence. But no matter how flexible a court may be, to render a document admissible there must be testimony as to its source or provenance (see the discussion on evidence in the *Lissadell* decision particularly at para 151 *et seq*.) The documents here purported to say the plaintiff and his wife had accepted there was a right of way along the route. But there was no evidence at all where the documents came from; or who prepared them, or for what purpose; or in what circumstances this acknowledgement was made. Even if the two pages had been admitted in evidence they would have been of little evidential weight, in the absence of these vital details as to context, purpose, and identity of their maker. It is not disputed that Wicklow County Council never designated the route as a public right of way this raises further questions as to status of the documents. To accept such material as evidence as to acknowledgment in the absence of any form of proof whatsoever would amount allowing hearsay upon hearsay. What was in question here could have been very significant. But (unlike in *Collen v. Petters*) the two pages were not in the nature of a signed letter by the landowner. In *Collen* such letters were deemed significant although interpreted in two different ways at first instance and then appeal which might have been quite different. The defendants said that a witness to prove the documents was seriously ill. It is difficult to see why other official witnesses could not have been subpoenaed from the County Council to prove the documents, if they emanated from it and were held in its custody. It was not even shown there had been such a survey or who conducted it. No application was made to hear evidence on commission from the witness who was ill.

Mr. Francis Wrigley

112. Mr. Francis Wrigley is the first named defendants' brother in law. He was 73 years of age at the time he gave evidence and grew up in the area. He walked the route three times a year from a teenager. He never saw any obstructions save for a gate going into the wood. He never met Norman Walker on the route. He had not travelled the route for 40 years. In cross-examination, he admitted that Albert Smith (one of the pamphlet's authors) typed up a statement for him. Mr. Smith helped him with the historical background for an affidavit which he swore. When he was ten years of age, he remembered a motorcycle rally passing over the route in 1948 or 1949. He never saw any stone wall. He went on the land as a teenager to hunt rabbits. None of his neighbours objected when he did this. He did odd jobs for Norman Walker when he was growing up, and Mr. Walker would have had no difficulty with him.

Mr. Lochlan Cameron

113. Mr. Lochlan Cameron walked with his children on the route in the early 1980s perhaps once a year. He never met Norman Walker. He remembered red metal farm gates. Sometimes he passed by the Polish refugees' house. Sometimes he went up to Raven's Rock, or around the hills, or wherever the fancy might take him. An affidavit was prepared for him to sign by somebody he did not identify. He is a member of the Countryside Hill Walkers Association most of his life, is a neighbour of Noel Barry. He could not remember the trees since they were knee high. I infer from this he had not been on the route for at least twenty years. He described the route as being a lane, not a field, with houses at various points, and could not therefore remember there being any stock on it. When pressed, he seemed to remember there may have been horses on other properties.

Mr. Pat Coogan

114. Mr. Coogan was 67 years of age and grew up in Ballybrew. He had relations in Blackhouse. He walked the route when he was six, seven or eight years of age to visit the Burtons who were school friends. He described Hughes'Lane as Barnamire Lane. He remembered no significant obstructions and never met Norman Walker.

Mr. Patrick Cronin

115. Mr. Cronin grew up in Kilmolin and as a child played Cowboys and Indians on Hughes' Lane, which he described as Barnamire Road or the old lane. He also went down Blackhouse Lane to collect sticks from the forest or to bring a log back on his back, but this did not appear to involve entering the plaintiff's lands. In 1967 he took up residence in "the middle cottage" by arrangement with Mr. Walker and lived there for four years. The disputed route was then grazed by sheep and goats. He had driven a motorcycle back up from the pub at night time. In good weather, in the summer, hikers from Johnny Fox's would use the disputed route. The locals used it to play cards in different people's houses and to visit their relations.

Mr. Eddie Swaine

116. Mr. Swaine was 58 years of age and grew up in Parknasilogue near Kilmolin from the age of nine in 1953. As a schoolboy, he sold Alpine Draw tickets to Mr. Tom Cullen at the far end of the route. He never met Mr. Norman Walker on the route although he knew him from elsewhere. In his earliest school days he could remember no obstructions. He described Mr. Walker's sheep as being fenced in. He took part in the 2005 protest walk. He described an incident in a further protest walk between the plaintiff and Mr. Leonach before the plaintiff made a charge at "one of the guys at the front of the walk". He said Mr. Leonach called the police but they did not come.

Mrs. Áine Redmond's evidence

117. Mrs. Áine Redmond has been living in Kilkenny since she was a child but she was originally a local resident. In 1979 she wrote a letter to Wicklow County Council to complain about another owner, a Mr. Kennedy who lived in Blackhouse and was erecting a gate and a sign saying private property. Her evidence was unclear as to whether this was on Mr. Geoghegan's property. It appears that the dispute took place in 1979. The witness made no subsequent complaint that Mr. Geoghegan had actually erected a gateway on the laneway leading to his house. She did remember a barbed wire fence at Hughes' Lane which she said had fallen down. She remembered going up to the Polish Cottage many years ago. She accepted that Mr. Walker would have had no difficulty about her doing this.

Assessment of the defendants' witnesses on use of the route

118. The defendants' witnesses were generally credible. I accept their testimony. I consider that they came to court to tell the truth

and that the Association members and their associates may well have believed that the route in question was a public right of way. I do not think that their views were purely fanciful. The defendants and the Association to which they belonged later carried out the research which they felt supported them in their views.

119. On one aspect of the user's testimony, however, I prefer other evidence. This is not to say that anyone of the defendant witnesses was trying to mislead the court. But some of their testimony cast doubt on there having been fences and gates when referring to a time when this was a farm with livestock and ponies. Some went so far as to say there were no fences and gates or that they remembered none. As a matter of probability I find the lands were fenced and gated at this period and at all times afterwards. It is impossible to conceive that sheep and ponies were kept on the land over years without fencing and gates back to Norman Walkers time. From that time onwards the plaintiff's evidence on fencing and gates was simply not challenged in cross examination. Had the question been seriously in doubt I have not doubt it would have been rigorously tested. This evidence from both sides must be taken in conjunction with the expert evidence adduced in the case set out in the next section of the judgment. The totality of the circumstances must be considered.

Dr. Vandra Costello's evidence

120. Dr. Vandra Costello is a landscape historian. She holds a doctorate in that subject from the School of Architecture in University College Dublin as well as a masters degree in Landscape Architecture and a Degree in Legal Science. She teaches courses in University College Dublin, Waterford Institute of Technology and the University of Ulster. She has published widely. She was retained by the plaintiff to prepare a report.

121. The witness was not aware that the defendants would confine their case to inferred dedication by user alone. Consequently, her researches went further, and considered whether there was any evidence of actual dedication from the time of the Powerscourt estate onwards. She went to a number of sources including the Ordnance Survey reports, Boundary report books, and fair plans held in the National Archives; historical maps held at various libraries; the Powerscourt estate papers held in the National Library; the leases held in relation to the area; travel guides and walking travel guides from the nineteenth century onwards available in the National Library, and the Price monograph. She also walked the route on a number of occasions so as to familiarise herself with it.

122. Her evidence was that by a "road" she meant a public road that would be under the charge of a Grand Jury. For this purpose, she considered the various Presentments to the Grand Juries under the Grand Jury Act 1765 to 1865 and the Restriction of Public Roads Act 1796. Such Grand Juries were the precursors of the modern day local authorities although they were comprised mainly of local landowners. They were the bodies responsible for raising funds from local landowners for public works and road construction and maintenance. In order to comply with requirements such a road would have to be 21ft wide and be serviced by drainage. The role of Grand Juries is described in the *Lissadell* judgment. (See paragraph 190 *et seq*)

123. The witness testified there was no evidence that the route in question was a public highway as and from the eighteenth century. Indeed the indications were to the contrary in that there simply were no such highways in the Wicklow uplands at that time, although there are indications that there was a track or path either proposed or in existence along part of the route. (This can be seen by reference to the maps, the 1760 map of J. Nevill and the 1798 map of his nephew A.R. Nevill. (Appendix C, pp.1 & 2)

124. Dr. Costello considered the 1819 Grand Jury Presentments which identified a list of the roads under the supervision of the Grand Jury for the Barony of Rathdown (the relevant area). It is unnecessary to identify all the names on the list. The disputed route was not mentioned. However, apart from public roads there were internal estate avenues and service routes which would benefit the landowners and people who lived on particular estates such as the Powerscourt estate. Such estate roads would not tend to be as large as public roads unless in the case of a particularly a grand avenue.

125. The witness testified that there was no evidence that there ever existed an "old coach road" along the disputed route. The postal coaches served by postchaise in the eighteenth century which served Enniskerry would have taken the old road to the east passing through a Newtownmountkennedy, Kilmolin, Wicklow, Rathdrum and Arklow.

126. In addition to the postal communications there were also early stage coaches. There was no evidence at there was any coach road which served Glencree. Significantly, she testified that the references to an "Old Coach Road" was relatively recent in origin, and did not appear in any historical documents at all. The witness testified that given the relatively sparse population in the area as well as a fear of attack, it is unlikely there would have been any demand for a coach road. In total, the area had a total of nineteen people resident in Lower Curtlestown in 1841; and in 1851 there were nine. However, she accepted that these figures may not be reliable as the census figures may be confined to houses and not impermanent dwellings such as cabins.

127. She was cross examined in some detail on this issue and in particular whether or not the population of some hundreds in the upper Glencree Valley as shown in the mid nineteenth century census might have used the route as a mode of communication from Glencree to Glencullen or Enniskerry. She replied that this was not demonstrated by any historical evidence.

128. The witness testified that Curtlestown developed very slowly. The graveyard adjoining the Roman Catholic church was donated by the then Lord Powerscourt in the latter half of the nineteenth century. It post-dated the military road. The Roman Catholic church was erected in 1824, and then replaced by the present church in 1891. Moreover, she made the point that were one proceeding to or from Glencree, it would be more logical to proceed along the military road rather than across country from Butler's Cottage to Canavan's Cottage.

No challenge to Dr. Costello's evidence on the Powerscourt estate title records

129. In contrast to the findings in *Lissadell*, it was not suggested that *any* Powerscourt Estate title documents (or any other documents) indicated that at any time during the nineteenth century, or subsequently, *any* owner of the land had engaged in *any* act which might be inferred as an act of dedication of the route. The defendants did not adduce any evidence in relation to the Powerscourt Estate documentation or relating to other previous owners. That documentary evidence was as available to the defendants as to the plaintiffs. Mr. Goodbody, the defendants' historical expert, meticulously carried out a similar search in the Registry of Deeds and found no evidence of a public right of way on any relevant title document. He did not find any evidence of public expenditure at any point either. The defendants here chose not engage with this aspect of proof.

The mapping evidence

130. I preface consideration of the evidence on maps, by the following. First, it was accepted that the fact that a path, track or even avenue is illustrated on a map in the eighteenth or nineteenth centuries is *not* in itself evidence that such a route was a public

right of way. One need only look at the maps of Jacob Nevill and A.R. Nevill of 1760 and 1790 (See Appendix C). The indication of the (obviously private) avenue up to Powerscourt House itself is a double line the same as the track, road, or lane, along the disputed route shown in the Nevill maps. Much of the Wicklow uplands was not perceived as comfortable terrain for the government of the day or any of its supporters.

131. Second, as Mr. Rob Goodbody, the defendants' consultant, pointed out, pre-Ordnance Survey maps are not as reliable as their later, Ordnance Survey successors which were actually physically surveyed. As he very fairly testified, large-scale maps produced for landowners were often extremely accurate, while smaller scale maps on sale to the public were less so.

132. Third, I think that mapping evidence may sometimes be subject to "over interpretation". Maps seldom show the *purposes* for which a road, lane, avenue, or track was built. A sequence of maps may allow one to infer when a particular track or route was constructed; but old maps are silent as to whether the owner of lands on which there were tracks, paths or roads engaged in any act of actual dedication.

133. The evidence is that subsequent to the inception of the Ordnance Survey in 1837, maps are much more reliable guides as to what was found by the surveyors. Insofar as reference is made to maps prior to the Ordnance Survey, I take the view that on balance they are less likely to be accurate guides. But what is on a *number* of maps such as some adduced by the defendants may be significant and have evidential weight. So too are the Powerscourt estate maps of 1816 and 1850 to which reference will be made. In my view, the source, purpose, and detail of these two estate maps make them powerful evidence as to what existed "on the ground" when they were made. These latter come within the category of "large scale reliable estate maps" as identified by Mr. Goodbody. Those maps, which are among those which form the basis of the plaintiff's case are at Appendix B of this judgment. The maps upon which the defendants relied are at Appendix C. These maps show that the claimed termini of the route are located at Canavan's Cottage; and Butler's Cottage just south of the Annacrivey Wood.

134. There is good authority that old maps can be assistance to a court in case of this type (see *Re McNeill's Application*, Barr J., High Court, 14th December, 2001, Unreported). But this does not justify a court engaging in speculation. Some of the evidence, and much of the cross examination by counsel for the defendants, while ingenious and creative, was entirely speculative. There is *no* evidence of the public actually using the route for at least a century prior to Liam Price in 1932.

135. Finally, I must make clear that I find and proceed on the generally accepted basis that on the Ordnance Survey maps a single line on a map will symbolise a wall; a double parallel line depicts a track, lane or third class roads; parallel dotted lines depict an unfenced road. A single line does *not* depict a track, lane or path. (See Appendix B, p.21)

136. The focus therefore is on historically based evidence as made out by the maps. But it is simply not open to a court, in the absence of evidence to infer public use, or to make some form of "leap of faith" on the basis of speculation based on the possible movements of quite small numbers of people over a century ago without evidence. It was suggested that Glencree residents might, possibly, have travelled the route in question in the nineteenth century on their way to a well known hostelry in Glencullen; in fact, as a matter of probability, I consider if they wished to travel either to Glencullen or Enniskerry they are as likely to have taken a range of other routes, or more probably to have used the Military Road and then travelled onwards. There is no historical evidence of nineteenth century user; speculation is not evidence.

Mr. Michael Flynn:- the plaintiff's mapping expert

137. Mr. Michael Flynn is a cartographer with over forty year's experience. He worked for many years in the national army and afterwards in the Ordnance Survey office. He is clearly an expert in the discipline.

138. The witness prepared a book of maps which are both large scale and small scale at Appendix B. The first map in Appendix B is a composite map and extract from the Annacrivey town land drawn from the Powerscourt Estate map of 1816. I summarise my findings on the maps here – there is further discussion later in the judgment.

Appendix B

139. In summary, I find in relation to the plaintiff's maps:-

> (1) The Powerscourt Estate map of 1816 does not show any road or track between Canavan's and Butler's Cottage. I consider the solid single line between the cottages represents a stone wall boundary. At risk of repetition maps depict roads, tracks, and by-roads by double lines on the one hand; but they depict walls by single lines. A single line depicts a wall, not a track or path unless there is *some* indication to the contrary. A single pecked line running parallel to a continuous line shows a path or track.
>
> (2) The extract from the 1837 Ordnance Survey fair-plan, this again does not show a path or connection between Butler's Cottage, Canavan's Cottage, and the old road from Glencree to Enniskerry. The single solid line between the cottages illustrates a stone wall. There is no evidence of even a track.
>
> (3) The 1838 Ordnance Survey six inch map again shows no track or lane between the base of Annacrivey Woods and the old road. What is shown is, simply, a stone wall boundary.
>
> (4) The 1850 Powerscourt Estate map shows no road, track, or laneway between Butler's Cottage and Canavan's Cottage.
>
> (5) The 1885 Ordnance Survey fair plan, again shows no connection between the old road from Glencree to Enniskerry to the by-road leading from point K to Butler's Cottage. There is no laneway or path shown from Butler's Cottage to Canavan's Cottage.
>
> (6) The extract from the Ordnance Survey twenty five inch map surveyed in 1909 shows a by-road from the north terminating at Butler's Cottage. What is illustrated in that map between Butler's Cottage and Canavan's Cottage is a stone wall. Furthermore, the map shows that the track leading up to Canavan's Cottage from Hughes' Lane terminates at the gate of that property. It does *not* depict any track which leads from Canavan's Cottage past Butler's Cottage up to point K. Rather, it shows a stone wall from a home field of 0.258 acres beside Canavan's Cottage. At the west side of Canavan's Cottage there is a laneway leading up to the cottage from the old road. In my view, this presents particular difficulties for the defendants in that it places Canavan's Cottage and two surrounding home fields squarely along the line

of the route where it is suggested a public right of way existed. This is not reconcilable with a public right of way.

(7) An extract from the 1909 to 1937 Ordnance Survey – six inches to a mile – again shows no connection between Butler's Cottage and the old road.

140. For completeness, Appendix B includes a number of the defendants' maps which are also found in Appendix C. I deal with maps 8,9,10 and 12 in the context of the defendants' case therefore. These maps (relied on by the defendants) are Jacob Nevill 1760, A.R. Nevill 1798, John Taylor 1816 and G.N. Wright 1822. I move now to p. 11, Appendix B.

(11) The next map for consideration in Appendix B is an extract from William Duncan's 1821 map of Wicklow which clearly shows the route of the Military Road and its spur to Enniskerry. This shows a road which proceeds from Blackhouse through Curtlestown heading westwards to Glencree. But this road does not follow the disputed route. The road goes *through* Curltestown, not north of it through what is now the plaintiff's land. This is not consistent with the defendants' case.

(13) At p. 13 is found the 1857 Ordnance Survey map. I find this shows simply the old road from Glencree to Enniskerry, turning southeast and ending just north of Curtlestown National School. The by-road from Blackhouse lane ends at Annacrivey wood. There is no connection by road, lane, or pathway along the disputed route.

(14) I find the 1865 Ordnance Survey map and again does not demonstrate any connection between the by-road from Blackhouse lane through to the old road from Glencree to Enniskerry.

(15) An extract from the 1898 white cover Ordnance Survey map. I think this is to be taken in conjunction with the red cover map.

(16) This shows the "red cover" 1899 Ordnance Survey map. I find these two maps show the existence of a track proceeding from the end of Annacrivey wood southwards then westwards. I do not read this track, however, as connecting with the old road or Hughes' lane.

(17) The 1981 Ordnance Survey map of Wicklow way. This does not show any track or laneway rather, it shows a stone wall along the route.

(18) The 1987 Ordnance Survey Dublin district map. This again shows no connection across the route; rather it shows a stone wall.

(19) The 1990 Ordnance Survey heritage map again shows no connection, but rather a stone wall running along much of the route; although it does show an old road ending somewhat beyond Canavan's Cottage.

(20) The 1994 Ordnance Survey map. This again does not show any track or laneway connecting the two points.

(21) Characteristic sheet 1.

(22) Characteristic sheet 2. These are self explanatory and clearly depict the symbol for a wall as a single line.

Mr. Goodbody's evidence

141. The defendants' expert witnesses were Mr. Robert Goodbody, an Historic Building Consultant who holds a degree in historical geography and local history and is a town planner and Mr. Andrew Bonar Law, undoubtedly also an expert, but whose expertise lies particularly in sourcing maps and identifying their provenance and authorship.

142. Mr. Goodbody thought that, prior to the construction of the Military Road, the disputed route led westward up the valley towards Glencree and served simply as an access route to farmland. He relied on Powerscourt Estate maps as proof of this. The witness engaged in a most interesting comparison of relevant maps. There are two editions of the 1798 Arthur Neville map – both referred to. (See Appendix C, pp. 1,3, 5, 7 and 9). But relying on the Jacob Neville (1760), A.R. Neville (1798), John Taylor (1816) and G.N. Wright (1822) publications together, Mr. Goodbody concluded that they corroborated each other in showing a road ran along the disputed route westwards to Glencree. Using the county boundary (see heavy line) as a reference point the witness made a striking comparison by way of a transparent overlay. In my view, this comparison demonstrates too close a correlation between these four maps to be dismissed out of hand. The resemblance in outline between the line of the paths or lanes is too close to be coincidence. How then is this to be reconciled with the 1816 Powerscourt Estate map? As I suggest later I think it is probable that the three later maps are derived from the A.R. Neville map in 1798.

143. The witness testified that the records for the Wicklow Grand Jury had been destroyed in the Four Courts fire in 1921. He suggested this is at least part of the reason as to why records could not be found of any dedication of a public right of way or as evidence that repairs have been carried out. His testimony was that Grand Jury Presentments were more commonly held locally than had previously been the case. His view was that it was probable that the route had fallen into disuse as a result of the construction of the military road. It was likely that the construction of this road had the effect that local landowners who were on the Grand Jury were reluctant to expend monies in the repair and upkeep of the disputed route. He did not, however, accept that the route had been obliterated by Lord Powerscourt then or at any other time.

Mr. Andrew Bonar Law's evidence

144. Mr. Bonar Law testified as to the background of the Taylor and the two Nevill maps. The thrust of his evidence, insofar as it differed from Mr. Flynn was that the absence of a pecked line in showing a single line only along the disputed route did not *necessarily* indicate that no such route existed. The defendants' experts sought to adding the fact that there is only a single line on the route for a century as not inconsistent with a path or lane. I disagree.

145. The witnesses suggested given the nature of the area, and of the maps themselves, it was not at all unusual that the "route" was not shown by a double line for the century after 1816.

146. But here the case is fundamentally flawed. It cannot satisfactorily account for what is shown in the preponderance of the maps, and in those which are most reliable. If the route is shown as *a single line* in my view, it is not probable at all that it is a lane or path;

it is, rather, a stone wall. I have difficulty with any testimony to the effect that Ordnance Survey map makers were not 'really interested' in the line of the disputed route because it was an estate route, or that the position of Canavan's Cottage, and the absence of the route from 1912 Ordnance Survey map were simply evidence that the route had fallen into disuse, and not that it had never existed as a public right of way. The proposition that it was an "estate route" undermines the defendants' case. If it was an "estate route" it cannot have been a public highway. I do not think this satisfactorily explains the situation. Maps can either be taken as evidence as they stand or not. I do not think the single line stone walls shown on the nineteenth century Ordnance Survey maps lying directly on the route can be explained either as a mistake or a mis-observation by the surveyor. There are simply too many of them, and these corroborate the 1816 and 1850 Estate maps. The extraordinary and detailed 1816 Powerscourt Estate map, even in isolation, is an important piece of evidence on which the Court can place weight: so too is the estate map from 1850.

147. Mr. Bonar Law and Mr. Goodbody prepared a book of maps (Appendix C. The pagination is as in the book). These are numbered here as in the Book. The gaps in pagination numbers arises from opposite pages being blank. I now comment on these:-

(1) The Neville map of 1760. This map is strongly relied on by the defendants. It was one of the maps shown to the plaintiff in 2006. As can be seen, this *does* show a lane from Blackhouse southwards to Annacrivey. However, what is illustrated on this map is, I find, inconclusive. The illustrated laneway actually stops some hundreds of yards short of the Curtlestown Bann River. It does not show that the lane or path had any destination, or that it was a connection to any other road or population centre in the map. It is possible that in fact what is shown here is a projected road rather than an actual one. This is to be contradicted with the 1816 estate map referred to earlier.

(3-5) Two versions of the 1798 A.R. Nevill map. I find that this clearly shows a road proceeding from Kilmolin southwards to Annacrivey, and thereafter connecting to the military road. It is possible that what is being illustrated here was a projected roadway but what is shown is undeniable. It cannot be simply explained away especially in conjunction with other maps. I find this shows a road, or track, along the disputed route. My inferences as to what occurred are set out later.

(7) The 1816 John Taylor map of the environs of Dublin. I find this map, unusually, shows a by-road as parallel faint pecked lines extending westward from Blackhouse Lane across the valley to Loch Bray. This is again to be contrasted with the Powerscourt Estate map and the subsequent Ordnance Survey maps. The detail appears to be taken from A.R. Neville's map. There is a milestone "10" depicted along the line of the route which Mr. Goodbody says would be unlikely on a private road.

(9) A map from G.N. Wright's Guide to County Wicklow 1822. This has written commentary which reads:-

> "From Lough Bray there is a tolerable good road through the vale of Glencree in front of the barrack and along the foot of Glasskenny Mountain to Enniskerry a distance of about four miles passing Black house Killmalin and Killganon and joining the high road at Enniskerry Bridge."

This map is of some significance to the defendants' case, in that it would appear to illustrate *a* route, referred to in the guide book, along a route which may be consistent with that illustrated in the two Neville maps of 1760 and 1798. However the commentary is too imprecise to raise any inference; it might equally refer to the Military Road as to any other road.

(11) The Ordnance Survey six inch map 1839. I do not at all accept the defendants' experts' evidence that the line of a road is or could be shown by a single line which might depict it as being "fenced on one side" or informal. In my view, it is more probable that this line is illustrative of a stone boundary wall. I consider that any proposition to the contrary would be inconsistent with the accepted norms. I find it impossible to believe that this, single, line, could be intended to show a track, whereas other single lines on the map should be read as depicting boundary walls.

(13) The second edition of the 1885 Ordnance Survey six inch map again shows a single line; in my view, this demonstrates a boundary wall. What is significant, however, is that this 1885 map shows as does the 1816 estate map, that Canavan's Cottage is actually *on the line* of the route. Therefore, the 1885 map shows a boundary wall proceeding from the southern point of Annacrivey wood southwards and then westwards to Canavan's Cottage *where it stops*. I consider this is not at all consistent with the continuance of a track or lane to a terminus on the public road.

Different considerations arise however with the following maps relied on by the defendants.

(15-17) The Ordnance Survey one inch maps of 1904 and 1909 *do* show a track or path running through the disputed section. However, they do not show a double continuous line along the route, but rather, one continuous line and one broken parallel line. This would suggest a pathway running beside the boundary wall. However, I consider that this is not supported by the Ordnance Survey twenty five inch map for 1909 which simply shows a stone boundary wall.

(19) In my view the Ordnance Survey half inch maps of 1917 and 1918 are supportive of the defendants' case in that they undoubtedly show a double lined pathway along the disputed route.

(21) I would make a similar finding in relation to the Ordnance Survey half inch map of 1932.

(23) I find the Ordnance Survey half inch maps of 1945 and 1946, show a path or laneway along the route in question.

(25) The Ordnance Survey maps of 1948 – 1951 also show a path or laneway.

(27) Finally, the Ordnance Survey map of 1975 again shows the route as a double line leading from Blackhouse through Annacrivey to the Military Road at Curtlestown.

Conclusions on the expert evidence as a whole

148. In my view, the 1760 Neville map shows either a projected or actual route; but what is shown has no destination. It is not conclusive evidence as a right of way. The path of the route depicted does not traverse the entire of the disputed route. But the 1798 Nevill map does, as a matter of probability show a track, lane or road along that entire route. What was shown on this 1798 map (and on the Taylor and Wright maps) simply disappears on the 1816 estate map and all the Ordnance Survey maps of 1913. What

inference should a court draw? In my view, this was not a simple situation of a road falling into disuse. On the basis of the many later maps beginning with the 1816 Powerscourt Estate map what once apparently existed, simply no longer existed. It is no longer a road at all. It is true, of course, that "once a highway always a highway". But this dictum presumes that there was a highway from the beginning. The mapping evidence as a whole is in my view inconsistent with there actually having been a public highway. Had there been one, as a matter of high probability, it would have been identified in the Powerscourt title records or mentioned in Grand Jury Presentments, or in county or other local records. It appears in none of these. The fact that a path or road could actually "disappear" from maps for a century allows for only two possible conclusions; first; *possibly* it was a highway which was actually removed perhaps to assist in constructing the military road, or second, as I find more probable it was at all times an estate access track. Either of these conclusions is inconsistent with the defendants' case. If there had been a highway there why was there no indication of any remnant of its existence or even its remnants in *all* of the Ordnance Survey maps of the nineteenth century? In the light of the preponderance of the evidence I think the milestone on the John Taylor map evidence is far too slim a thread on which to hang the theory of a public right of way.

149. I find it more probable the route was an estate track, it follows then that it was not a public highway. But even if this finding was incorrect, I do not think the defendants' case advances as a result. It is true, of course, that a public right of way cannot generally be extinguished by simple abandonment as O'Hanlon J. pointed out in *Carroll v. Sheridan* [1984] 1 ILRM 451. The maxim is "once a highway always a highway". There cannot be a presumption of extinction. But in *Representative Church Body v. Barry* [1918] 1 I.R. 402, where an alleged highway had been stopped, the public excluded for seventy years and a new road made, Dodd J. held that he could presume the necessary legal steps had been taken to extinguish the highway under the Grand Jury Ireland Act 1836. Even if the route had been shown on some reliable evidence to be a public highway, I would be prepared to make a similar presumption on the very strong evidence here. Almost one hundred years absence from the maps is a very long time indeed. It must be seen in the context of the building of the military road on a location very close to the route.

The 1816 Estate Map and the maps from 1816 to 1822

150. Taking the 1816 map as the more probably reliable, I infer that as and from 1816, (and very likely before then, from the inception of the Military Road), there was in fact no road or track along the route. I consider it more probable that the Taylor, Duncan and Wright maps were derived from the earlier Nevill maps (probably that of 1798) and consequently more probably did not show what was on the ground by 1816 if not well before. Taylor Duncan and Wright were guide maps for travellers rather than estate survey maps. It is very improbable such a remarkably detailed estate map from 1816 would have failed to show a public road running through the Powerscourt Estate, if it then existed. It certainly showed every other detail. The Ordnance Survey maps following show a bare stone wall standing along the route for almost precisely one century thereafter. Not only this, but those maps show that Canavan's Cottage or a predecessor to it was situated *across* the route. I find this also negatives the defendants' case insofar as it is said that there existed a right of way during the remainder of the 19th century. The route was simply blocked. It cannot have been a right of way therefore.

151. I find it probable that a track was again constructed at the beginning of the last century. It is clearly illustrated in the Ordnance Survey maps of 1912, 1917, 1918 up to 1950. Much later, during Norman Walkers time it became covered at some points with furze nearer to Canavan's Cottage.

152. The difficulty of all this, from the defendants' point of view, is that there is *no* evidence from which it can be inferred that there was dedication, other than the fact that the lines showing a road path or lane were depicted on the Ordnance Survey maps later. When one goes to the Ordnance Survey map for 1981, eight years *prior* to the afforestation, there is no continuous connection shown between the termini, but rather, a single line depicting a stone wall. The track has again entirely disappeared. The 1987 1 inch to 1 mile Ordnance Survey Dublin District map; the 1990 Ordnance Survey Heritage Map of Wicklow; and the 1994 Ordnance Survey Map all show the same. If the route was an "old road", it is surprising that the first reference to it in this way is in a map of Dublin and West Wicklow mountains published in 1990 by East West Mapping.

Findings on the evidence as a whole

Actual dedication

153. The following findings are summarised having regard to the legal criteria outlined earlier in this judgment in the discussion of legal principles.

154. The plaintiff as a matter of probability has negatived any act of actual dedication. The evidence was that there had been no such actual dedication at any point during the Powerscourt dominion over the lands or at any point subsequently. It was open to the defendants to seek to controvert this, but they did not do so.

Public acceptance

155. There is no evidence of public acceptance or public expenditure, a powerful consideration in itself (*Connell v. Porter*)

156. I consider that the plaintiff has negatived the probability of inferred dedication up to the year 1950 when the defendants' evidence of user begins.

157. Were there then any acts or inactions consistent with "inferred dedication" by Mr. Norman Walker or by the plaintiff? Have the defendants established that by virtue of long user, a court should infer dedication?

Evidence of public user

Tolerance of occasional trespass by Norman Walker

158. In the late Mr. Norman Walker's time, the question of land use was by no means as sensitive as it subsequently became. Hill walkers were far less frequent. There was no friction of the kind that has arisen in the last three decades. Access to remote parts was less easily gained by public transport. Private cars were a rarity.

159. I consider the evidence establishes more probably that during Mr. Norman Walker's time, he did not always raise significant opposition to any occasional groups as took a shortcut through his property. But the evidence did not in any way suggest that hill walkers or others camped on his land, or used it in any way other than as a shortcut down towards the Military Road; this was tolerance, not acquiescence. The evidence here is sporadic use by occasional hill walkers and local people, and certainly nothing in

comparison to the situation from 2002 onwards. There is nothing in these events which posed an obvious challenge to his title.

160. There was no evidence that this route was used as a place of public recreation. Was the public user *nec vi nec clam nec precario*? Can mere tolerance by an owner of hill walkers crossing his or her land give rise to inferred dedication on its own? This question simply cannot be divorced from the nature of the user and the extent to which that user was obvious and "as of right" (*Folkestone Corporation v. Brockman*).

161. In fact the facts in the case bear some resemblance to *Bruen v. Murphy*. In that case persons quite frequently used the disputed route as being a shortcut. McWilliam J. did not consider that such user was sufficient. It will be recollected that he found that there was no actual dedication of a public way and that he could not assume that casual use by members of the public for dumping, rowdiness or occasional passing across it between the two roads was such that he should imply the assertion of a public right of way with the knowledge and acquiescence of the landowners.

162. As was pointed out in *Lissadell*, long user, or perhaps in certain circumstances, even quite short user (such as eight years), may be evidence from which an inference may be drawn. But this entirely hinges on the nature of the user. I would not wish it to be inferred that the basis of this Court's finding is purely on the basis of some concept of "toleration". That is simply too vague a test. The issue of toleration must be closely linked to that of the nature, intensity and frequency of the user. The true test is whether the user is not only *nec precario* (without permission), but whether it is *nec clam* (open or obvious); for a defendant to succeed; it must be obvious to the owner as being a direct assertion by the public of a user as of *right*. Paraphrasing the dicta of O'Leary J. in *Collen* much of the earlier use here, during Norman Walker's time, might be seen as neighbourly convenience; not to be seen retrospectively as giving rise to a public right of way. Put another way, the level and nature of the user is insufficient; the level of toleration does not show acquiescence.

The owner's state of mind

163. The evidence of occasional encounters with the late Mr. Norman Walker up to 1980 is in my view, sufficient only to demonstrate that on occasions, when hill walkers encountered him, he raised no objection either out of politeness or because it would have served little purpose because the incursions were so transient and insignificant. But that is not a basis for seeking to establish acquiescence or public user as of right based on long user. There is no evidence of challenge to the owner's rights. There is no public expenditure or public involvement with the land as in *Connell v. Porter*. The evidence simply does not go so far as to establish that Norman Walker was an acquiescent owner. In fact it established that he became "agitated" when it was suggested there was a public right of way across the land in 1948. Applying that "subjective test", as to his state of mind, I consider that the evidence falls short of what is necessary to infer dedication also. The user here in any case was not of right. (See *Folkestone v. Brockman* cited earlier). As regards the state of mind of the users, any objective assessment of that evidence can only be consistent with the view that they were tolerated, not permitted (see *Collen v. Petters*).

164. As is indicated in *Collen v. Petters*, the state of mind of the user may sometimes be material evidence as to whether the users were taking advantage of *permission*. There is no evidence of implied or express permission. Insofar as that evidence relates to Norman Walker's state of mind, I do not think it goes to establish that he was acquiescent in circumstances of brief encounters between himself and walkers on an occasional basis. The late Mr. Walker did not live at the Old School House, but rather, at Annacrivey House. There is nothing to suggest that there was any assertion of user *as of right* during Mr. Norman Walker's time. It cannot be said that the use by the occasional hitchhiker was either "*notorious"* or "*obvious"* (*Connell v. Porter*). Much of the user evidence has a strong "local" connection where witnesses obviously knew Norman Walker to see.

The plaintiff's actions and attitude from 1980 onwards

165. The evidence regarding the plaintiff's actions from 1980 is considerably stronger from his point of view. It establishes that he sought, on not one, but on many occasions, to re-establish boundary fences and that he erected signs indicating that trespassers should keep out. The signs were pulled down. So too, were the fences. Their meaning was clear to everyone, as shown by hostile actions of other persons.

166. I do not think that the evidence in the first two decades of the plaintiffs effective control (from 1980 onwards) is such as to establish any user which was "notorious"; it fell precisely within the same category as *Bruen v. Murphy* except here, there were hikers and hill walkers taking shortcuts through the land, rather than those categories described in that authority. It would be trite to observe that the witnesses are a rather close knit group with connections though friendship and through the Walking Association. The use was not continuous; it was occasional. It was not "obvious" in the sense of being a challenge to the owner. It was not "as of right". When the plaintiff encountered walkers, he remonstrated with them.

The period after 2002

167. As and from 2002, the actions of the defendants or others was such that it must have been obvious to the plaintiff that use adverse to his title was asserted. In order to defeat the title of a landowner, such user should be of such a definite and positive character as could leave no doubt in the mind of a landowner alerted to his rights that use adverse to his title was taking place or being asserted. This was undoubtedly the case from the time when the pamphlet was first published in 2002 and then in 2004 when the walks began. But both these actions were met with opposition. A single act of interruption by a landowner is much more sought upon the question of enjoyment than many acts of enjoyment; per Park B; *Poole v. Hutchinson* (1843) 11 M. & W. 823 at p. 830. In 2002, the plaintiff threatened to sue the authors of the pamphlet. From 2004 onwards, the plaintiff actively resisted and obstructed any entry on the land by hill walkers or members of the Enniskerry Walking Association. I have already dealt with the historical and mapping evidence.

168. Taking all the evidence together, and viewed in all the circumstances, I find the evidence and each part of it falls significantly short of inferred dedication and that that part of the counterclaim cannot succeed. Insofar as the plaintiff may have contended otherwise, I am not persuaded that the law states that a public right of way must necessarily lead to a public place (*Attorney General v. Antrobus* [1905] 2 Ch. 188; *Williams-Ellis v. Cobb* [1935] 1 K.B. 310). There is no rule of law either that a public right of way must necessarily connect two other public highways. It may lead to a dead end or *cul de sac* or beauty spot. But this is by the way. The evidence here is that at one end, the claimed right of way is and was blocked by Canavan's Cottage going back as far as 1816; at the other end, the route terminated at the boundary of Mr. Geoghegan's land where there is a lane which has not been shown to be a public right of way. The existence of an effective *cul de sac* on both ends of the route renders the route effectively landlocked. This contraindicates a right of way. The failure to join other interested parties to the proceedings also prevents the Court making a finding in the defendants' favour. The evidence did not go so far as to establish that the route held the local reputation of being a right of way. I do not think it is sufficient in any way to establish that a public right of way ever existed or should be inferred.

Finally and most importantly I bear in mind the weight given to user evidence by the ordinary public as compared to public use repair and maintenance in *Connell v. Porter*. The Court there specifically laid emphasis on expenditure, maintenance and repair; that is use by the public authorities. Other use by the bar owner and the bar customers was weak and insufficient. I find that the plaintiff succeeds on this aspect of the case.

169. I turn now to the other claims.

Trespass

170. Insofar as there is a claim for damages for trespass at all, it appears to me that such trespass occurred so long ago and was so limited and minimal so as not to give rise to any award for damages.

The wrongful interference with the land

171. The claim for damages for wrongful interference with the plaintiff's lands and for slander of title has been withdrawn.

Assault

172. There was never a claim for assault and consequently that does not arise.

The claim for injunctions

173. I do not consider that the evidence is sufficient to justify the granting of a *quia timet* injunction against the defendants either. There is no evidence of any proven risk of substantial danger or of repeated trespass. Such an order, generally to prohibit an intended act, or the repetition of wrongful acts, can only arise when there is a proven substantial risk of danger *Szabo v, Esat Digifone* [1998] 2 I.L.R.M. 102 at 111; see also Attorney General (*Boswell v. Rathmines and Pembroke Joint Hospital Board* [1904] 1 I.R. 165, in particular, the judgment of *Charleton V.C.* at first instance. The *Szabo* test has been subsequently approved and applied in other authorities (*Minister for Arts, Heritage, the Gaeltacht and the Islands v. Kennedy* [2002] 1 ILRM 94). The expiry of time, and the absence of any repeated conduct are such here that there is no sufficient evidence now, that would warrant the making of any such order. Indeed, any act of trespass would have to be so serious as would warrant the granting of a *quia timet* injunction. I do not consider a basis for this has been established.

Jurisdiction for a negative declaration

174. However, the situation with regard to a declaration is distinct. The facts show that the defendants were officials of the Enniskerry Walkers Association. They described themselves as such. The effect of a declaration is that it states, in negative terms, that the defendants and those engaged in the conduct and asserting the same interest have no right to cross the plaintiff's land. There has been a clear challenge to the plaintiff's assertion that no right of way existed. The acts of the defendants in crossing the plaintiff's land without permission were acts of trespass. His title to the land having been challenged, the plaintiff was entitled to rebut that challenge in law. The declaration then can be seen as serving a useful purpose from the standpoint of clearing the plaintiff's title.

Who will be bound by the decision?

175. The question arises as to who will be bound by the declaration. The defendants first sought to urge in their pleadings that they had no role in relation to other persons not joined or not named as notice parties. But later they sought to assert through their counsel that, even if the Court made a declaratory order, it could be binding only on the named defendants and no other parties. Passing over the question as to how counsel for the defendants might make a case for parties not joined in the proceedings (or why he would wish to do so), it is necessary to consider whether there may be other parties who were "privy" to the defendants' case. The term requires some explanation. Privity means something more than being interested in the outcome. It must involve such interest as would enable the privy to have a voice or say in how the proceedings are, or will be concluded (per O'Donnell L.J.; *Shaw v. Sloan* [1982] N.I. 393 or 410 (C.A.) On the evidence I am unable to establish whether any persons other than the defendants are *de facto* parties. Could other persons who were involved in the preparation, assertion and identification of the defendants' case; whose interests coincide entirely with the defendants' stance and who are on notice of the proceedings be bound by an order made against the defendants? On this, the following points might have been relevant. First, letters written prior to the proceedings clearly indicated that the first named defendant was the Chairman and the second named defendant was the Secretary of the Enniskerry Walking Association. Second, one letter, referred to earlier, specifically speaks of the evidence which "we", that is, the Association, had gathered. Third; another affidavit sworn by the original interlocutory motion (but not then opened to the Court) from Mr. Albert Smith, (also a member of the Association). Mr. Smith and Mr. Kevin Warner (a witness in the plenary hearing) were the authors of the pamphlet to which reference has been made earlier. It is necessary to look precisely at the relief that is sought. The plaintiff seeks a declaration the defendants were not entitled to enter on his lands; an injunction restraining them *or other persons having notice of the order from entering thereon*, a similar order restraining the defendants or *other such persons* from asserting or claiming that the lands were subject to a right of way or from otherwise slandering the plaintiff's title and damages against the defendants for trespass, wrongful interference with the lands and slander of title. Clearly, at all times, the defendants were acting in their capacity as officers of the Association. There is evidence that other members, Mr. Albert Smith and Mr. Kevin Warner were deeply involved in preparing the case. The evidence might be seen as showing at least *prima facie* evidence privity of interest between the defendants and those other members of the Enniskerry Walking Association who were engaged in the preparation and advancing of the case.

176. But no other persons were joined as parties; the plaintiff never sought a representative order. On this basis, therefore, I do not consider an order under O. 15, r. 9 of the Rules of the Superior Courts can now be made making the declaration binding on other persons or joining other defendants. The relief being granted is simply a declaration; were a court to grant an injunction different considerations might arise; if third parties ignored a court order or procured or assisted a breach of that order it might be quite different again. But that is not the situation in this case. Were an application for contempt of court brought for assisting the breach of a court order other considerations might also arise. But what is granted in this judgment is a declaration simpliciter.

Is the plaintiff entitled to a judgment *in rem*?

177. The question then arises as to whether the plaintiff is entitled to a judgment *in rem*.

178. Such a judgment may be defined as a judgment of the court of competent jurisdiction when it determines the status of a person or thing as opposed to the particular *interest* that a *party* to the litigation has in it. (See *Castrique v. Imrie* [1870] LR 4 HL 414 at

427) (See generally Halsbury, 4th Ed., (3) para. 162). A judgment *in rem* pronounced by a court of competent jurisdiction is conclusive, not only between the parties as in the case of a judgment in *personam*, but against the whole world (see *Castrique v. Imrie*). It will, in general, prevent a claimant from raising the same issue in the same cause of action. See *D. v. C.* (Costello J.) [1984] ILRM 173 at 192 and generally *Res Judicata* and *Double Jeopardy*; McDermott, Butterworth 1999.

179. Here, is it apposite to recollect the rule in *Henderson v. Henderson* [1843] 3 Hare 100 and also *Ahmed v. Medical Council* [2003] 4 I.R. 302. Repeated actions raising the same questions can be an abuse of court process, especially when the questions could have been raised in the first proceedings brought. Insofar as this case had a long duration, both sides had ample opportunity to raise and pursue any relevant evidential issue which they might have wished to contest, or to counterclaim. This judgment describes what matters were proved, and those which were not. Subject to entirely new evidence therefore, the outcome may, in addition to the issue between the parties themselves, possibly have a strong bearing on the situation of any person who might enjoy privity of interest with the defendants. But in the absence of any application as to joinder, I do not consider any such persons can be named or identified as parties in these proceedings; nor can they be *ipso facto* bound by the declaration granted by the effect of this judgment.

The declaration is not *in rem*

180. The question then arises as to whether an order *in rem* can be granted as the plaintiff seeks. I am not persuaded that it can be. The case is a *lis inter partes*. The rights which can be determined are only those between the parties and perhaps any person shown to be privy to the interests of the parties. An order *in rem* would be binding upon the whole world. The Attorney General granted permission for the matter to be *litigated*. But, just as in *Lissadell*, this will not give rise to a *res judicata* as a judgment binding on the public at large (see the authorities cited by McMahon J. para. 309 – 312). I do not interpret the Attorney General's permission, therefore, as being tantamount to being a *de facto* relator. It is *only* the Attorney General who can act in the public interest and, consequently it is *only* in circumstances where the Attorney General granted a *fiat* or is a party that a judgment *in rem* properly so called can be granted.

Conclusion

181. For the reasons indicated earlier, the declaration to be granted to the plaintiff against the defendants is that the route in question is not a public right of way. I will hear counsel on the question of costs which arise from this judgment.