

THE HIGH COURT**ON CIRCUIT****[2008 No. E 562]****NORTHERN CIRCUIT****COUNTY OF DONEGAL****BETWEEN****JOHN DOHERTY****PLAINTIFF****AND****ROBERT (OTHERWISE KNOWN AS BERTIE) LONG****AND****PETER HARTIN****DEFENDANTS****JUDGMENT of Mr. Justice Herbert delivered the 21st day of March 2013**

1. The issues raised in this litigation are whether a right of way exists over part of the plaintiff's lands for the benefit of the lands held by the defendants and, whether if such a right of way had existed it was abandoned.

2. The plaintiff purchased the dwelling house and lands comprised in Folio 22454F, Co. Donegal in 1988. The purchaser and the vendor were represented by separate firms of solicitors. I am satisfied on the evidence of a sealed and certified copy of Folio 22454F, Co. Donegal, proved in evidence that no easement of way was registered as a burden affecting the lands in that Folio or any part of them. By a Statutory Declaration made on the 8th February, 1988, pursuant to the provisions of the Statutory Declarations Act 1938, the vendor, Susan Harkin, widow, solemnly and sincerely declared that to the best of her knowledge, information and belief, none of the interests (which would include easements of way), set out in s. 72 of the Registration of Title Act 1964, and stated to be capable of affecting registered lands without registration, applied to the lands being sold to the plaintiff. Requisitions on Title were delivered and answered. In reply to Requisition 3.3 inquiring whether the property or any part of it was subject to any right of way or any public right of way, the reply furnished by the solicitors for the vendor was, "None".

3. The plaintiff's lands are bounded on the north by the lands comprised in Folio 32260F, Co. Donegal, of which the first defendant is the full registered owner with an absolute title. He inherited these lands from John McDonald, a previous registered owner, who died at Christmas 1995. Part of these lands are in turn bounded on the north west and north east by other lands, the property of the first defendant and of his son and, by the lands comprised in Folio 32345F, Co. Donegal, of which the second defendant is the registered full owner with an absolute title. The second defendant gave evidence that he purchased these lands at public auction at Christmas, 1979 from James Doherty. All of these lands are effectively bounded on the north by a county road save to the extent that part of the lands of Folio 32260F lie under and beyond this road. The plaintiff's lands are partly bounded on the south by a dwelling house and lands, the property of Mark Kelly, grandson of Susan Harkin. This dwelling house was built in 1988/1989 following the sale of the dwelling house and lands comprised in Folio 22454F to the plaintiff. The lands of the plaintiff and Mark Kelly are bounded on the south and south east by another county road. These county roads meet at a crossroads about 350mtrs northeast of the plaintiff's lands.

4. A lane starts at the county road south of Mark Kelly's dwelling house and land. It continues north in a generally straight direction along the western boundary of Mark Kelly's land, then through the centre of the plaintiff's lands in Folio 22454F, and into the first defendant's lands in Folio 32260F. Thereafter it follows a backwards tilted "S" shaped path, through the lands of the first defendant, briefly bordering the lands of the second defendant in Folio 32345F and ends at the county road on the north. The evidence established that this lane is on average throughout its length approximately 2.8mtrs wide and has an underlying metalled surface of impacted gravel or broken stone. This lane is bounded on both sides by a substantial field-stone, dry-built wall several feet in height enclosed in broad and high hedges incorporating small trees. The oral evidence and the photographs proved in evidence establish that this lane rises at a shallow gradient from the county road at Gortkeeran on the south to a low ridge just beyond the northern boundary of the plaintiff's lands where the lands of the first defendant and the second defendant meet, from where it drops at a somewhat steeper gradient to the county road at Glenmakee on the north. I am satisfied from the Ordinance Survey Maps produced in evidence that this lane was in existence immediately prior to 1900. It may well date back to the first half of the 19th century having regard to the nature of the walls bounding it. However, as no evidence was given at the hearing by an archaeologist or social historian or other suitably qualified expert witness, I can make no finding as to the age or purpose of this lane or as to what rights, if any, adjoining landowners and others may have been granted or exercised in respect of it at any date prior to 1945.

5. The defendants and each of them claim a right at all times and for all purposes to pass and repass on foot with or without animals and with vehicles over and along the part of this lane which runs from the entrance to their respective lands through the plaintiff's lands to the county road on the south. No claim was made, nor would the evidence adduced before me establish that this lane was a public right of way between the two county roads with which it forms the base of an isosceles triangle whose apex is the junction of these roads. Neither was it claimed by the defendants that there was a customary right for the inhabitants of Glenmakee to travel over this lane to Gortkeeran and back, which had existed without interruption for time immemorial. As it has been held since 1934 that a claimed private right of way does not have to give direct access to the dominant tenement provided it can be said to accommodate it, the fact that this lane passes over part of the lands of the first defendant for approximately 50mtrs, from the gate into the lands of the second defendant to the boundary of the plaintiff's lands, would not in my view be sufficient to defeat a claim by the second

defendant to a right of way over the lands of the plaintiff.

6. John McDonald, the predecessor in title of the first defendant died, it was generally accepted, though no Death Certificate was produced in evidence, during the Christmas period in 1995. The second defendant gave evidence, which was not challenged that he purchased his holding from James Doherty at a public auction conducted in or about the Christmas period in 1979. It was accepted on all sides that Mr. John McDonald was 84 years of age at the date of his death. No personal information at all was furnished regarding James Doherty. I am satisfied on the evidence that John McDonald lived alone in a farmhouse surrounded by outbuildings and a farmyard through or beside which without any intervening fence, wall or other boundary the lane passes. From the evidence given by Ciaran Gallagher B.Eng., Civil Engineer, called in the case for the defendants, I conclude that this farmhouse is approximately 90mtrs further north along the lane, from the boundary of the plaintiff's lands and, is about 15mtrs beyond a gate into the lands of the second defendant which has been in existence since at least 1979. This farmhouse and this gate are on or slightly to the north of the highest point on the lane and look down on the county road on the north. The farmhouse, yard and buildings of the late John McDonald of which the first defendant is now the sole registered owner are approximately 150mtrs in from the northern terminus of the lane where it joins the county road on the north. The plaintiff's dwelling house is about 200mtrs in from the southern terminus of the lane where it joins the other county road on the south. The distance along the lane between the plaintiff's dwelling house and the farmhouse of the late John McDonald is approximately 200mtrs.

7. No evidence was given of any use of the lane by James Doherty, the predecessor in title to the second defendant. There was no evidence upon which I could rely of any use of the lane by the late John McDonald other than from his own farmhouse to the northern terminus of the lane. The evidence that the late John McDonald attended Sunday Mass and drew a pension almost to the end of his life was not challenged. However, I am fully satisfied that in so doing, he travelled over the portion of the lane between his farmhouse and the county road to the north. The evidence of the first defendant that from some date in the decade before 1970 until his death in 1995, the late John McDonald had let the entire of his lands each year on the traditional eleven months system to his nephew Eddie McDonald, a farmer, was not challenged. Eddie McDonald was not called as a witness during the case, nor was his evidence taken on commission. Jimmy McDonald, a brother of Eddie McDonald, who gave evidence in the case for the defendants stated that Eddie McDonald was unwell and was confined to bed. No certificate from a medical practitioner was produced in support of this statement.

8. Jimmy McDonald told the court that his late uncle did not have a tractor and was dependent on others to help him with any work which might require a tractor. The first defendant gave evidence that the late John McDonald had a horse and cart only, but for what period was not made clear. The first defendant claimed that in the years 1993 to 1995 inclusive, the late John McDonald had kept the lane open between his farmhouse and yard and the boundary of his lands with the lands of the plaintiff by cutting back invasive briars and brambles with a bill-hook. Jimmy McDonald however, told me that he had never seen his late uncle using a bill-hook. I am quite unable to accept this evidence by the first defendant because in 1993 to 1995, the late John McDonald would have been between 82 and 84 years of age. At this time also all of his lands were let to his nephew, Eddie McDonald, who was then, I was told, a man in the fifth decade of his life. Neither did the first defendant explain why he had not done this work himself as it was his evidence to the court that from 1973 to 1975 he had helped Mr. McDonald. No details of this help were provided by the first defendant. I am satisfied on the evidence that the first defendant is by trade a building operative and has never farmed either before or since he inherited the lands from the late John McDonald. It is not open to the court to speculate as to what use, if any, the late John McDonald during his long life may have made of this lane from his farmhouse and yard to its southern terminus at the county road. The only evidence offered in this respect was by Mark Kelly, a grandson of Susan Harkin, who sold the property to the plaintiff, who recalled the late John McDonald coming to visit his grandmother. However, he did not state when this was, or how or by what route the late Mr. McDonald came, or how often it happened or even to what house he had come. The evidence established that Mark Kelly resided in the house purchased by the plaintiff from his grandmother in the period 1979 to 1988 and thereafter lived with her in the house built near the county road on the south of the plaintiff's lands until her death in 1998 and, thereafter until 2007.

9. Neill Joseph Hartin, age 72 years, gave evidence that in the decade 1950-1960 he walked or cycled hundreds of times over the entire of the lane from north to south and back to look after cattle on land rented by his father in the Gortkeeran area. Jimmy McDonald, aged 75 years, told me that from late in the decade 1940-1950 until early in the following decade he had frequently walked or cycled south and then back over the entire lane to tend to crops of potatoes and corn which his father had planted and sown on land rented by him in the Gortkeeran area. Mark Kelly, aged 34, gave evidence that he and other children used the lane to travel north to the national school, located a short distance along the county road beyond the northern terminus of the lane, from 1983 to 1990 inclusive and used the lane thereafter for some years visiting friends in the Glenmakee area. Jimmy McDonald also gave evidence that during the decade after 1944, when fuel was very scarce, he and his father used the entire of the lane on their way to harvest turf and to draw it home in a horse and cart from a moss (bog) some distance further along the county road from the southern terminus of the lane. The first defendant gave evidence that from 1963, when he was 10 years of age until he emigrated to England, he used the entire lane to get to this same bog about six times every year. He further gave evidence that once each year he had driven sheep over the lane from north to south and back again in order to avail of a sheep dipping facility which existed on a farm in the Glenkeeran area.

10. In my judgment evidence of this nature might be relevant if the issue before the court was whether this lane was a public right of way. It is not however sufficient to establish a private right of way such as that claimed by the defendants in the present case. Any such easement of way must accommodate the lands of the defendants, or of one or other of them, as the alleged dominant tenements. None of this alleged use of the lane conferred any benefit whatsoever on these lands or either or them. I am satisfied therefore, that as at 1973 there is no evidence to sustain a claim by the defendants to a private right of way over this lane through the lands of the plaintiff.

11. The first defendant claims that on his return from England to Glenmakee in 1972 or 1973, when he was 20 years of age, he purchased a T.20 Ferguson Tractor (since replaced) and a single axle trailer measuring 8ft x 6ft which he still has. He built his present house on a field adjoining the county road on the north next to the land which he subsequently inherited from the late John McDonald. He told me that apart from this field he had no land of his own. He stated that he helped John McDonald from 1973 to 1995 when Mr. McDonald died. He recalled that Mr. Patrick "Pakie" Harkin died on the 16th June, 1984 and that his surviving spouse, Susan, had sold the Harkin house, farm buildings and land to the plaintiff in 1988. He stated that between 1973 and 1995, he drew turf over the lane and also used the lane to move cattle from one farm to another. Since the evidence established that Eddie McDonald had continuously taken eleven month lettings of the entire lands of John McDonald since some time in the decade 1960-1970 and, as there was no evidence that the late John McDonald had or had rented any other land during the period 1973 to 1995, (he was 61 years of age in 1973), or had retained any livestock of his own, the farm animals which the first defendant alleged he had driven over the lane must have been the property of Eddie McDonald, himself or of some third party.

12. The first defendant stated that Eddie McDonald had rented a number of fields at Gortkeeran near the southern terminus of the lane, but he did not state for how long he had taken them. Eddie McDonald did not give evidence at the hearing of this appeal. The first defendant did not state how often this movement of cattle took place, or when, or by what means or who else was involved.

Mark Kelly stated that he had seen Eddie McDonald in wintertime bringing feed in a tractor mounted box along the lane near the plaintiff's house when he was 16 years of age, (1995). This must have been just before the late John McDonald died as Eddie McDonald, left or was required to quit the lands immediately after this death. The first defendant gave evidence that he had drawn turf along the lane with his tractor and trailer about 12 times a year. In cross examination he stated that it was his own saved turf that he was drawing and that he stored some of it in John McDonald's yard. He said that the late Patrick "Pakie" and Susan Harkin knew he used the lane in this fashion, though he had never discussed it with either of them and, they had never made any objection. He accepted that farmers were very accommodating about permitting neighbours to use lanes and tracks like this particular lane and there was a strong custom of neighbours helping each other out in the Glenmakee and Gortkeeran areas. He told the court that he believed the late John McDonald had contributed to the cost of having the lane resurfaced, but he could not remember if or when this was done. Jimmy McDonald gave evidence that to assist his brother Eddie McDonald he had brought silage in a tractor box from John McDonald's yard to land which Eddie McDonald had taken at Gortkeeran between 1993 and 1995. His evidence was as general as this: he did not identify seasons, or dates, the exact location of the lands, the type of tractor used, the numbers of cattle involved, or any other such details which might render the evidence plausible. The first defendant told me that he had seen Eddie McDonald and his wife, Jimmy McDonald, Anthony Porter, Neill Joe Hartin and Charlie Hartin using the lane.

13. Peter Hartin, the second defendant, told me that he works as a shuttering carpenter in Northern Ireland. He said that at Christmas 1979, he had returned from the United Kingdom where he had been working as a shuttering carpenter. His brother had given him a site a short distance up a side road on the opposite side of the county road from the field, the alleged dominant tenement in these proceedings. The second defendant insisted that the only entrance to this field at Glenmakee which he purchased at public auction in 1979 was the gate at the top of the field near the late John McDonald's farmhouse and yard. He told the court that he had let part of this field to his brother but kept a horse and a donkey on the other part as pets. He said that until the first defendant had inherited the lands from the late John McDonald he had never sought to obtain access to this gate from the northern terminus of the lane as he felt that it was private and he did not wish to disturb the late Mr. McDonald. Until the first defendant inherited the lands at the end of 1995 or early in 1996, he had obtained access to this field by travelling along the county road on the north to its junction with the other county road on the south, then travelled along that road until he came to the southern terminus of the lane from where he travelled up the lane through the plaintiff's lands to the gate into the field. He said that he would usually do this either on a Saturday or a Sunday as he worked during the week in Northern Ireland. He had his own tractor until 1997 when it fell into disrepair after which he used the first defendant's tractor. In cross examination by the plaintiff, he told the court that he had been concerned about access to the field before he had purchased it and had spoken to Patrick "Pakie" Harkin and Susan Harkin about it. At the auction, the auctioneer had announced that there was a right of way to the field. He said that the donkey had died, but he got a new horse about every four years. He said that there was not now and never had been any access to this field from the county road on the north which was separated from it by a roadside drain and a bank. However, he accepted that Liam O'Donnell had placed a plank across this drain and had put half a barrel inside the bank into which he put silage for the second defendant's horse.

14. Mrs. Anne Doherty, who told me that she was married to a cousin of the plaintiff and who gave evidence in the case for the plaintiff, said that she had grazed a horse on the plaintiff's land since 1990. She stated that she had ridden over all the Gortkeeran and Glenmakee areas. She said that from 1990 to 1994, she had frequently ridden north from the plaintiff's house along the lane to its northern terminus and beyond. She said that in accordance with her invariable practice, she had asked the late John McDonald for permission to pass along the lane through his yard and lands. She said that she had become very friendly with Mr. McDonald and had visited him quite often until his death. The fact of this friendship was accepted by the first defendant and also by Jimmy McDonald. She recalled that in 1994 after her mare had foaled and she had resumed riding she found that she could no longer ride along the lane from the plaintiff's land onto the late John McDonald's land as it had become overgrown with brambles and briars. She told me that in 1995 one could not get a cat through the tangles. After 1994, she had visited the late John McDonald by riding the circuitous route along the county roads and entering the lane at its northern terminus. She said that shortly after John McDonald died someone had erected a gate at this northern terminus of the lane and she could no longer use it. The first defendant accepted that by 1996 the lane between the late John McDonald's farmhouse and yard and the boundary of the plaintiff's land had started to become overgrown, but he said that it remained possible to traverse the lane with a tractor up to 2004 when the plaintiff stopped him and the second defendant from crossing his land. He accepted that since 1996 he had let all the land to Anthony Porter whom he said used it mostly for grazing cattle, but also made some silage. This was also the evidence of Anthony Porter.

15. Anthony Porter told the court that he was a waterworks inspector employed by Donegal County Council, but farmed in his free time. He said that he had eight acres of land surrounding his home place which is situated considerably beyond the northern terminus of the lane. From 1996 onwards to date, he had taken continuous eleven month lettings of all of the land which the first defendant had inherited from the late John McDonald. He used this land mostly for grazing about ten cattle, but that he also made some silage. He told me that he also took other grazing land on a similar basis at Gortkeeran along the county road beyond the southern terminus of the lane. No further evidence was given in this regard such as when he had taken these lettings or what area of land was involved and no documentary evidence of any sort, such as owners' or auctioneers' receipts or copies of common form eleven month agreements entered into, or even cheque stubs, was produced. Anthony Porter stated that in each year from 1996 to 2004, with the assistance of at least four relatives, he had walked and driven his cattle along the lane from the first defendant's lands to these other lands and back again about four times each year between April and October. These movements of cattle were made at evening time as he would be at work during the day.

16. In cross examination, Anthony Porter said that in February 1996, when he had first taken the lands there was someone living in the late John McDonald's farmhouse and he was unable to travel over the lane from its northern terminus. In February 1996, he had driven in a small van from the southern terminus of the lane to the lands which he was going to take from the first defendant and back again. In 1996 and in 1997 he had carried 38 silage bales singly on a tractor lifter from the southern terminus of the lane to the lands taken by him from the first defendant. Neill Joseph Hartin gave evidence that he had helped Anthony Porter in carrying out this operation, though this was something which Mr. Porter himself appeared to have forgotten. He did not explain where these bales were held or why it was necessary for him to move them in such a time-consuming and troublesome way over what I am satisfied on the evidence was then an unmaintained and overgrown lane. From his own evidence and from the evidence of Mrs. Anne Doherty, the reason may be that he did this out of necessity because the farmhouse of the late John McDonald was then in the occupation of someone who objected to persons using the well maintained northern end of the lane. It is somewhat singular that the first defendant made no mention whatever in his evidence of letting this farmhouse to anybody. Anthony Porter stated that he did not have any problems using the lane to move cattle until the plaintiff removed approximately 30mtrs of the wall and hedge above his house. Mr. Porter said that this had occurred in 2004 and that to the best of his recollection it had happened in June of that year. Thereafter he said he had stopped moving cattle along the lane because it had become too difficult to prevent the cattle from straying from the lane into the plaintiff's lands from which it was very difficult to extricate them. From 2004 onwards he penned the cattle and moved them by road in a trailer entering the lands of the first defendant by the lane at its northern terminus with the county road.

17. The plaintiff claimed that he had removed the wall and fence between the lane and the small triangular shaped haggard or garden behind his house sometime in the period 1991 to 1993. I find that he is incorrect in this recollection. Mark Kelly who then lived in the

neighbouring house could not recall when this work was carried out by the plaintiff. Mrs. Anne Doherty did not remember the wall and hedge coming up to the back of the plaintiff's dwelling house in 1990. The second defendant stated that this portion of the wall and hedge was removed by the plaintiff in 2004. The plaintiff's wife recalled that a short portion of the wall and hedge nearest to the back of their home had been removed between 1990, when she moved into the house and, 1993/4 when the thatched roof of what was then a long single story farmhouse was destroyed by fire. I am satisfied that her evidence in this regard is correct and is corroborated by a photograph taken in 1994 during the course of the renovation works when the main house was raised by the addition of a second story and a pitched slate roof. The plaintiff's wife believed that another portion of this wall and hedge was removed in 2000, in September she thought, but she could not recall exactly what portion of wall and hedge this was. She recalled that the entire wall and hedge up to the nearest field boundary was removed in 2004. I am satisfied that her recollection with respect to both these matters is correct and is corroborated by an Ordinance Survey High Flown Orthophotography Print of 2000 and photographs taken in 2004. I am satisfied that this Print shows most of this wall and hedge still in place as at 2000. It also shows the lane unobstructed but entirely grass covered from the plaintiff's dwelling house up to and slightly beyond the boundary between the plaintiff's lands and the lands of the first defendant. After this point the lane appears to be totally obstructed with shrubbery. However, it is not possible to be satisfied that this is not simply an impression created by the camera angle and high bushes or trees on the side of the lane. I am satisfied however, that it shows that this section of the lane, in marked contrast to the sections south of the plaintiff's house and north of the late John McDonald's farmhouse and yard was used infrequently, if at all for some considerable time prior to 2000.

18. The evidence of Mark Kelly that he taught himself to drive a tractor using his grandfather's old tractor in the lane in the vicinity of the plaintiff's house does nothing to advance the defendants' claim to the existence of a right of way accommodating their lands. I am satisfied for the reasons given in evidence by the plaintiff that Mark Kelly was treated by the plaintiff and his wife like a favourite nephew and in the words of the plaintiff, "had the entire run of the place". Mark Kelly did not give evidence in the case for the defendants at first instance. Neither did his aunt Ms. Peggy Harkin whose evidence was taken on this appeal by a Commissioner appointed by me.

19. In the course of her evidence, taken on Commission, Ms. Peggy Harkin, who was born in 1944 in the house sold by her mother Susan Harkin to the plaintiff in 1988, and who resided there until that date, said that everyone used the lane as a shortcut instead of going right around the road to get to a shop which when existed at Glenmakee down near the school, where people, she said, did two thirds of their shopping. She said it was always called the right of way. She recalled going up the lane with two white buckets to fetch water at a well before the house was connected to a mains supply. This well, she said, was not far from the back of the house. In the plan attached to Folio 22454F, Co. Donegal, a well is shown marked on the left side of the lane about 30mtrs north of the rear of the plaintiff's house. In those days, she said, the hedges were cut, weeds cut, and everyone who was using the lane paid their share to keep it, because they were glad of the shortcut up and down to the shop and school and all of that. At that time, she said, they all "went together" and had the lane surface cleaned and stuff put on it. Cars were always going up and down then and people walking. No one was ever stopped. In cross examination she stated that she knew nothing about anything her mother had signed at the time of the sale of the Harkin place to the plaintiff. I find this very difficult to accept in circumstances where her father had died about four years previously and she and her mother and possibly another sister were the only adults in the house. Giving evidence in chief she said that she did not know how people could say that there was no right of way, "it was all in the maps and not just a word of mouth, sure it's there, there proof". She said that after she moved to the new dwelling house nearer to the southern terminus of the lane in 1988, by looking out a window of the house, she could see people walking up and down the lane. She was asked if she saw the defendants and she said that they were going up and down on tractors mostly at turf time, "or something like that, they'd be up and down". She was twice asked in giving evidence in chief whether the tractors were for agricultural purposes and she agreed. I can attach no weight to that particular piece of evidence. Ms. Harkin said that she knew the first defendant and the second defendant as she had been at school with them both.

20. The establishment of a private right of way by prescription or under the doctrine of lost modern grant does not require that there be evidence of continuous use of the servient land, without force, secrecy or permission. Even seasonal use (for example, access to turbary rights or hill grazing), dependent on the circumstances of the case might be sufficient for the purpose. However, I do not accept that vague and unspecific evidence of occasional or haphazard forays by a tractor with a mounted carrying box containing silage or animal feed over this lane, in respect of which I find that no maintenance works had been carried out where it crosses the lands of the first defendant from at least 1973 and, which on the evidence of Mrs. Anne Doherty and on the evidence of the first defendant had become or was becoming overgrown by briars and brambles in 1995/1996, is sufficient evidence of use to establish the right of way claimed by the defendants in this case. In addition, there is a disconcerting sameness and lack of any convincing detail about all of these alleged tractor journeys. There is also the remarkable fact that whereas before 1988 everyone saw and spoke to the Harkins, after 1988 not one of the alleged participants gave evidence of ever having met or even seen the plaintiff or any member of his household during any of these alleged journeys. Perhaps the plaintiff was always abroad on business when these journeys took place, but on the evidence his family did not accompany him on most to these business trips.

21. I was very concerned at the evidence given to this Court, but not the court below where they did not give evidence, by Mark Kelly and Ms. Peggy Harkin, that there was a right of way affecting the lands when they were sold to the plaintiff in 1988. The grandmother of the former and the mother of the latter made a Statutory Declaration at the time of the sale upon which I am satisfied the plaintiff relied in purchasing the lands that to the best of her knowledge, information and belief there was no right of way affecting those lands. In that formal document she stated that she conscientiously believed this to be true after the nature of what she was being required to declare had been explained to her by her solicitor. In cross examination, Mark Kelly even went so far as to tell me that he disagreed with what his grandmother had declared in 1988. However, when I recall that Mark Kelly was nine years of age in 1988 and no suggestion of the existence of a right of way was raised by the defendants or by anyone else prior to her death in 1998 I attach no weight to this evidence and I have regard only to the evidence of Mark Kelly with regard to his own alleged personal use of the lane and his alleged personal observations of others using the lane.

22. From a careful review of the evidence of Ms. Peggy Harkin, given on Commission, I am fully satisfied that in using the term, "right of way", she was not describing easements of way such as were addressed in the Statutory Declaration executed by her mother. I am satisfied that what she described in evidence and stated what was generally known as "the right of way" was a short-cut taken by all and sundry for a whole variety of purposes over this lane from one end to the other which had nothing whatsoever to do with accommodating or benefiting the land of the first defendant or the land of the second defendant or any other adjoining land that could be benefited or, with establishing a right of way for the benefit of either of those lands. It is quite impossible to impose any time frame on the evidence of Ms. Peggy Harkin, which took the form of a number of sweeping generalisations. However, it is possible to be certain that whatever use of the lane she observed after 1989 was from a window of the new dwelling house erected with the proceeds of sale of the original Harkin house and lands to the plaintiff, between that house and the southern terminus of the lane at the county road on the south, and was confined to the passage of persons and tractors across her line of vision and that everything else was mere supposition on her part.

23. If the first defendant and the second defendant and any other persons used the lane for getting to a bog or moss in the general

Gortkeeran area, this did not benefit or accommodate in any way either the lands of the first defendant or the lands of the second defendant. There is no dwelling house on the lands of the second defendant. On the evidence the first defendant never resided in the farmhouse on the lands he inherited from the late John McDonald. Even if I were to accept that the first defendant stored turf in the yard or outbuildings attached to the farmhouse of the late John McDonald—the necessity for which is difficult to reconcile with his evidence of twelve to eighteen trips to the bog annually, with the involvement of quite extraordinary labour intensive and time consuming loadings and unloadings of trailer loads of turf the necessity for which was not explained—this still did not accommodate or benefit in any way the lands which he inherited from the late John McDonald. To submit that such use established the existence of a right of way is to contend for an easement in gross which the law does not permit.

24. If I were to accept that Anthony Porter in fact used the lane in every way he claimed to have used it in his evidence, this use, from an unspecified date in 1996 until June 2004, would in itself be nothing like sufficient either in duration or quality to establish the existence of a private easement of way along the lane over the lands of the plaintiff to and from lands of the first defendant. Eddie McDonald was not called as a witness nor was his evidence taken on Commission like that of Ms. Peggy Harkin. If I were to accept the secondary evidence of his using the lane again it would be insufficient to establish the existence of the right of way claimed by the defendants or either of them. The evidence established that from some date in the decade 1960 to 1970 until the end of 1995, Eddie McDonald and thereafter to the date of hearing, Anthony Porter have taken all the lands of which the first defendant is now the registered owner on the eleven months system. This gives a personal licence to the taker to use the land taken for a particular purpose only and does not give the taker any estate or interest whatsoever in the land taken. Therefore, any use of the lane by either Eddie McDonald or Anthony Porter was for their personal benefit only and could not establish or amount to evidence of the existence of a private easement of way for the benefit of the lands formerly owned by John McDonald and now owned by the first defendant.

25. In very many other respects the evidence tendered in the case for the defendants on this appeal was unreliable as lacking in depth, detail and corroboration and, at times, amounted almost to an exercise in obfuscation. The second defendant stated that from 1980 to 1995 when the first defendant inherited the lands from the late John McDonald he did not use the very much shorter access to his field gate from the northern terminus of the lane which is almost opposite his house, but travelled all the way around on the county roads to the southern terminus of the lane and then passed over the much longer length of lane to the gate. He said that he did this because he felt that McDonald's way was private and he did not want to bother McDonald while he was living in the farmhouse. It will be recalled that during the entire of this period, all the lands of the late John McDonald were taken by his nephew Eddie McDonald on the eleven months system. The first defendant told the court that he had been helping the late John McDonald from 1973 until the date of his death and the first defendant did not give evidence that the portion of the lane from its northern terminus to the farmhouse was private. All the other witnesses who were called in the case for the defence claimed that there was a right of way from the northern terminus of the lane to its southern terminus. The second defendant offered no explanation as to why he felt that approximately one third of the lane from its northern terminus to the farmhouse and yard of the late John McDonald was private, but the remaining approximately two thirds of the lane some of which also crossed part of these lands was not.

26. Mrs. Anne Doherty gave evidence that after the death of John McDonald someone had erected a gate at the northern terminus of the lane where it opened on to the county road. Neither the first defendant nor the second defendant nor any other witnesses called in the case for the defendants referred to this incident. The second defendant claimed that he had asked the late Patrick "Pakie" Harkin and the late Susan Harkin about access to the field for which he had intended to bid at public auction, because he had become worried. However, he did not give evidence that he had made any similar inquiry from the vendor, James Doherty or his solicitors or from the late John McDonald whose lands surrounded that field. He claimed in evidence that at auction, the auctioneer had announced that there was a right of way to the field. However, the auctioneer was not identified or called as a witness nor was any other participant in the auction. The second defendant did not give evidence as to the alleged right of way described at auction and did not produce a single scrap of paper relating to the auction or the purchase. No right of way over the lane from either north or south is registered as a burden on Folio 32260F, Co. Donegal, a copy of which, together with a Folio map was produced in evidence, and of which the first defendant is now the registered full owner with an absolute title.

27. The second defendant stated in evidence that he had let part of the field for the benefit of which the private right of way is now claimed by him, to his brother and kept a donkey and a horse on the other part of the field. His brother was not called as a witness and the second defendant did not give any information whatsoever to the court about the use his brother had made of the part of the field let to him or how he had gained access to the field. Evidence was given that the field is registered in Folio 32345F, Co. Donegal, a copy of which but without a Folio map, was produced in evidence. The devolution of title appearing on the face of the Folio is from Raymond Hartin, who became registered as full owner on the 2nd July, 1980, to the second defendant who became registered as full owner on the 15th December, 2008, at which date the possessory title of the property was converted to absolute. It will be recalled that the Equity Civil Bill was issued in these proceedings on the 11th July, 2008. Therefore, during all the period when the second defendant claims he was using the lane from its southern terminus at the county road on the south as a right of way to accommodate the lands in Folio 32345F, Co. Donegal, he had no legal estate or interest whatsoever in those lands. In the course of cross examination he referred to what he claimed was an "arrangement" with his brother that he would purchase this field and that his brother would then purchase it from him over an unspecified period and for an unspecified sum. As his brother was unable to raise the necessary finance, the field was transferred into the name of the second defendant. This only arose in cross examination and no evidence in chief was given by the plaintiff about such an agreement or arrangement. No note or memorandum of any such agreement was produced by him in evidence, nor was any evidence put before the court which might lead the court to consider that the brother of the second defendant in the period the 2nd July, 1980 to the 15th December, 2008, held the lands in Folio 32345F, Co. Donegal as a constructive trustee for the second defendant.

28. The second defendant failed to explain the existence of what I am satisfied on the evidence of the High Flown Orthophotography Print of 2000 is probably a made or metalled strip or road running at right angles from just inside the bank and drain at the side of the county road on the north for half the length of the field travelling north to south. This is on the opposite side of the field from the residence of the first defendant and adjoins a field which I was told in evidence was owned by a son of the first defendant. The construction of a culvert over the roadside drain and the opening of a gateway in the boundary bank would allow access from this made or metalled road or strip on to the county road. The second defendant professed to know nothing at all about this object, what it might be, (though he wondered if it might be a drain or a large bank), how it had come to be on his lands, by whom it was made, by how entry on to the land was achieved in order to make it. I find this entirely incredible and I am reluctantly obliged to consider that I can place little reliance on the evidence of the second defendant. Photographs taken in July 2012 and during the course of the hearing of this appeal for a position on the county road are altogether inadequate to enable this object to be identified, particularly as it may have become overgrown with vegetation in the course of the past twelve years. No documentary or other evidence sufficient to enable me to conclude, even on a *prima facie* basis, that turbary rights over the alleged moss or bog in the general Gortkeeran area were held by them, was given by the first defendant or the second defendant or by any witnesses called in the case for the defendants, nor was any documentary evidence produced in relation to lands alleged to have been taken on the eleven months system in that general area by any of these persons or by any member of their respective families.

29. The first defendant and the second defendant gave evidence that in 2004 the plaintiff had prevented them from using the alleged right of way and had obstructed the lane with large boulders, piles of sand and goal posts. By a letter admitted into evidence dated the 7th March, 2006, addressed to the first defendant, "and/or any company and/or operational vehicle and/or development entity which you are in control of and/or give instructions to", the plaintiff *inter alia*, stated that he disputed that there was any right of way over his land. The less than edifying events which occurred between 2004 and the 11th July, 2008, are of no assistance in the determination of this appeal. Suffice it to state that the first defendant and the second defendant continued to maintain that they were entitled to a private right of way over the lane through the plaintiff's lands and the plaintiff continued to deny the existence of any such right of way. An Equity Civil Bill was issued by the plaintiff on the 11th July, 2008, and a full defence together with a counterclaim was delivered by the defendants.

30. I find that no right of way for the benefit of the lands identified in the pleadings and in this judgment or any part of them and held by the defendants or either of them exists on or over the lands of the plaintiff or any part of those lands. I therefore dismiss the counterclaim of the defendants with costs to the plaintiff on this appeal and in the court below. I find for the plaintiff in his claim endorsed on the Equity Civil Bill and grant a permanent injunction restraining the defendants and each of them, their servants and agents and any person or persons whomsoever acting on behalf of them or either of them, from entering or trespassing upon or in any manner interfering with the lands of the plaintiff in Folio 22454F, Co. Donegal, or any part of those lands. No evidence of special damage was given by the plaintiff. I award the plaintiff in addition to the costs already awarded his costs in respect of the claim in the said Equity Civil Bill in this court and in the court below, together with any, if any, reserved costs.