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THE HIGH COURT

2009 262 P

BETWEEN

EDWARD WALSH AND CONSTANCE CASSIDY

PLAINTIFFS

AND

SLIGO COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice McMahon delivered on the 20th day of December, 2010

I. General Introduction and the Defendant's Claim

1. The "Big House" features frequently in Irish literature. The Law Reports also reflect the prominent position of the Big House in the country's social and historical landscape, recording many disputes, especially in the last two centuries, between the owners on the one hand, and trespassers, poachers and tenants on the other. From the Great Famine through the land wars of the late nineteenth century and more recently, during the rise of nationalism, the position of the Anglo-Irish families occupying these historic houses became more precarious. Local people began to speak of "good landlords" and "bad landlords"

depending on their record during the Famine, and the economic viability of these estates in the twentieth century became increasingly precarious, burdened as they were by taxes and estate duties in very difficult economic circumstances. Many of the owners lived abroad, further alienating themselves from the local population. Even those landlords who were not disliked attracted the envy of small farmers who entertained ambitions of adding to their modest holdings when the big estates were taken over and divided up by the Land Commission.

2. Lissadell, the home of the Gore-Booth family since the Elizabethan settlement, was no different from other estates in that it too, for over a century, occupied an ambiguous position in the eyes of the people of Sligo. In 1839, to aggrandise the demesne when the new mansion was built, one hundred and twenty families were evicted from the eastern part of the demesne at Ballygilgan. Their passages were paid to Canada. In contrast, according to the notes of Gabrielle Gore-Booth, who continued to live in Lissadell with her sister Aideen and her shell-shocked brother, Angus, until her death in 1993, the local parish priest in Drumcliffe wrote to Sir Robert in or around 1900, thanking him for feeding his people through five famines. In another letter dated the 16th February, 1847, the parish priest of Carney wrote to Lady Gore-Booth, thanking her for "the most extensive, indiscriminate and unostentatious charities performed by her Ladyship, and trusting that she might be consoled by the fact that "the humble prayers of God's humble creatures are offered every night, and in every house, for the spiritual and temporal welfare of every member of her ladyship's family." According to the London Times of March 7th, 1881 Sir Robert Gore-Booth was said to have spent £40,000 in feeding the starving populace at that time. By the late 1800s, however, some people coveted the 32,000 acres of Lissadell, and resented the privileged inheritance as the principles of democratic nationalism took hold. The progress of their designs was arrested, however, since at the same time Sir Robert was leading the co-operative movement in Sligo with Sir Horace Plunkett and George Russell.

3. In the history of these households, personal tragedies were common recurring themes, as the young men from these Houses enlisted for the various wars of the shrinking empire, as well as for the Great War and World War II. Lissadell was not immune to these tragedies; two nephews of Constance and Eva Gore-Booth were killed in World War II, their brother, Angus, returned in a shell-shocked condition and another brother, Michael, who succeeded to the estate in 1944, was incapable of administering the estate and remained a ward of court until his death in 1987. These facts modified the antipathy of the local people to the last of the Gore-Booths who stubbornly clung on in penury through the dying days of the millennium.

4. Lissadell was different from the typical Big House in two respects, however. First, the Gore-Booth family continued to live and occupy the estate (though diminished in size) up until its sale in 2003. Moreover, it was a vibrant commercial operation for much of the early half of the twentieth century, employing as many as two hundred people at its height in the early nineteen hundreds. A munitions factory was located there during the First World War, which further complicated local perceptions. Second, Constance Gore-Booth, was in the G.P.O. in 1916 and was condemned to death for her part in the 1916 Rising, avoiding such an end only because of her sex. Her sister, Eva, as well as being a poet, was also a social reformer in Manchester, where in the first decade

of the twentieth century she was prominent in the trade union movement, campaigning tirelessly for women's rights in the workplace and for womens' suffrage.

5. The present dispute arises out of claims made by members of the public after the last of the Gore-Booths finally sold the Big House to the plaintiffs in 2003. The dispute obliges the Court to ask what the Gore-Booths did or did not or might have done, in the past two centuries at least, in respect of permitting the public in general or local people in particular, to pass and repass over specified ways on their property. For this reason, it should be clear that these general introductory remarks are not made just for the purpose of scene-setting. As will become clear later, the issues for determination require an appreciation of the history and the general mentality of the people who occupied the Big House over the more recent centuries.

6. The plaintiffs bought Lissadell House and 410 acres in December, 2003 and in April, 2004 they locked the gates on the Main Avenue. Some locals were upset; two public meetings were organised and a petition was signed. In June, 2004 these locals went to Sligo County Council, (hereafter "the defendant" or "the council") and were told that, if they wished to make a case asserting public rights of way in Lissadell, they should gather evidence of historic use. This evidence was not presented to the council until September, 2005. The county manager assigned one of his staff to deal with the matter. The issue was raised by the elected members of the council from time to time over the next couple of years. No resolution was achieved, however, and the gate remained a matter of concern, especially for the local residents. Councillor Joe Leonard, one of the people who was directly effected by the closure, tabled various resolutions on the matter, but did not press the issue as he was informed by the relevant personnel in the council that they were hopeful of meeting with the plaintiffs with a view to reaching "an accommodation". When this did not materialise, however, Cllr. Leonard, responding to pressure from his constituents, tabled a resolution on the 1st December, 2008, which was passed by the elected members. The plaintiffs took serious offence to this resolution and saw it as an attack on their property. Even though they were reassured by the county manager on the 19th December, 2008, and by the solicitor for the defendant on the 14th January, 2009, that the resolution had no legal effect, they commenced these proceedings by civil bill dated 14th January, 2009.

7. In its counterclaim the defendant asserts rights of way over specified and identified roads on an annexed map, which it claims were dedicated to the public by the plaintiffs' predecessors in title, and it is further claimed that the public accepted that dedication. Further, or in the alternative, the defendant claims that by reason of long user and enjoyment as of right, the plaintiffs' lands are subject to local customary rights to pass and repass over the said roads. Alternatively, the defendant claims that the parishioners and inhabitants of named parishes and townlands close to Lissadell have, by virtue of custom, rights to enter on the plaintiffs' lands for the purpose of recreation at Lissadell beach. Again, these rights are, according to the defendant, to be inferred from "user as of right" throughout the period of living memory. As well as seeking declarations to the contrary, the plaintiffs claim that the defendant's resolution of the 1st December, 2008, seeking to amend the Sligo county development plan, amounts to a slander on their title to Lissadell and an improper

interference with their business interests, or alternatively amounts to an injurious falsehood. The issue of damages, if any, has been postponed until liability has been dealt with fully. These then are the principal issues for determination by the Court.

II. History of Lissadell

8. Because much of the evidence in the case is of a historic nature it is necessary to outline briefly the history of Lissadell estate and mansion. The first mansion house at Lissadell, replacing an earlier castle, was built between 1750 and 1760, virtually on the seafront on the southern boundary of the estate and near the current site of what are now known as the Alpine Gardens.

9. This was demolished shortly after the current mansion at Lissadell was constructed between 1830 and 1833. The new mansion was located about 700 metres back from the sea and on higher ground north of the old house. The demesne was also re-landscaped. The house and demesne were occupied from then until 2003 by members of the Gore-Booth family. From the 1830s onwards several other features in addition to roads were constructed within the demesne, including a sea wall, farmhouses and a slipway; a new network of internal avenues was also laid out. In 1839, after evicting 120 families, Sir Robert Gore-Booth extended the demesne at Ballygilgan, on the east side of the estate, an exercise in aggrandisement befitting the new mansion.

10. The estate, at its height, covered 32,000 acres. In 1904, Sir Josslyn Gore-Booth transferred 28,000 of the 32,000 acres of the estate to the Land Commission, under the Wyndham Land Purchase (Ireland) Act 1903. The reduced estate of approximately 3,000 acres around the house was run efficiently for much of the early part of the twentieth century with much industrial activity evident within its grounds, including a commercial tree plantation, a sawmill and timber business, various horticultural industries, poultry, dairy and livestock farming, an oyster farm, a school of needlework, private allotments, and a shop where the coach house is now located. By 1900 the estate employed two hundred staff. From the 1940s onwards, however, and probably for some time before, as was the case with many stately homes, the estate went into decline. In 1944, Sir Josslyn Gore-Booth died and Sir Michael Gore-Booth became the 7th Baronet of Lissadell, but due to incapacity was made a ward of court on the 21st July, 1944, and remained in wardship until his death in 1987.

11. From 1944, control of the estate shifted to Dublin and this contributed to its decline. Michael's sisters, Gabrielle and Aideen, as well as his brother Augus, a victim of World War II "shell-shock", continued to live in Lissadell. Gabrielle was appointed manager of the estate by the committee of the estate but was replaced in 1956 following a falling out with the committee. She continued to live there until her death in 1973. These latter years were marked by the rapid decline of the estate and the continuous struggle by the two sisters to hold it together. In 1967, during the course of the wardship, the committee of the estate was granted permission by the President of the High Court to sell much of the Lissadell estate pursuant to the Settled Land Acts 1882–1890. All that then remained of Lissadell after that was the House and the immediate demesne of 410 acres surrounding it. In the same year, the House was opened to the public who were allowed access on payment of a fee. In 1982, the committee, on

behalf of the ward, conveyed the estate to Sir Josslyn Gore-Booth (later the 9th Baronet). It was he who later sold the estate in 2003 to the plaintiffs herein.

III. The Recent Facts

12. When Susan Gilmartin, a local resident, returned in April, 2004 from a walking holiday in Spain, she was surprised and upset to see that a gate had been placed across the entrance at the Main Avenue in Lissadell and that it was locked. It affected her greatly because she used this entrance almost daily when she went on her recreational walks. She spoke to some of her immediate neighbours who also lived on the road north of the main entrance. They too became concerned. It was decided to call a meeting at Grange Sports Complex in April, 2004. Present at the meeting were Susan Gilmartin, Gráinne Dunne, Michael Carty, Michael Wann, Ita Leyden, Marie Leyden, Jim Callaghan and some others. Also present was Cllr. Joe Leonard who was the local County Councillor and who also lived nearby. The evidence was that this meeting was an informal gathering of neighbours who were concerned about the gate on the main entrance to Lissadell and the possibility of further restrictions being placed on access to Lissadell by the new owners. Cllr. Joe Leonard said that he was there as an elected member of the council as well as being a person who frequently used the main entrance. Two things were decided at that meeting:

> (i) A small delegation of three people should meet with the new owners, that is the Walsh family, to discuss the matter and to see what the new owners' attitude was. The three people selected were Susan Gilmartin, Rachel Andrews and Michael Carty
>
> (ii) A public meeting should be called to canvas the views of the people who lived around Lissadell.

13. Susan Gilmartin and some of the others advertised locally that a second meeting would be held in Maugherow hall on the 27th May. This meeting was attended by up to one hundred people. Susan Gilmartin took the chair and some of those who had been at the Grange meeting also sat at the top table. Ms. Gilmartin invited speakers to address the meeting and she gave evidence that the meeting was conducted in an orderly and respectful manner. Everyone was given an opportunity to speak. It appears that different views were advanced, some against the closing of the Main Avenue, others expressing the view that the owners should be welcomed since they had done great work in restoring Lissadell and had spent a lot of money in providing employment as well as attracting tourists to the area. A petition was placed on the table near the doorway which people could sign if they wished. The consensus seemed to have been that there was no pressure put on anyone to do so. The heading on the protest paper read as follows:-

> "We the undersigned demand the removal of the obstruction to the public right-of-way through the main entrance to Lissadell Estate to the Seafront."

14. Some people signed the petition. A newspaper report in the Sligo Champion suggested that one speaker was shouted down when he began to express the view that there were always gates on the estate. From the evidence before me, I have come to the conclusion that this was an orderly meeting and that people were given an opportunity to speak and did so freely when given the opportunity. I do not believe that there was any effort to stifle contributions but,

as in any such local meeting, different views may have been advanced in a robust manner. I have also come to the conclusion that the vast majority of the people at the meeting supported the wording of the protest document. It was also agreed that contact should be made with the council to seek its assistance in the matter. Cllr. Leonard gave evidence that he was at the back of the hall and that he indicated to the meeting that he was pursuing the matter as a councillor within the council.

15. Subsequent to this meeting, the group which had originally met at Grange wrote to the county manager requesting a meeting. On the 1st June, 2004, Mr. Declan Breen and Mr. F. O'Driscoll from the county council met with Susan Gilmartin, Michael Carty, John McElroy, Eamon McElroy, Gráinne Dunne, Michael Wann and John McCarroll. The council's minutes of that meeting reads as follows:-

> "Lissadell Action Group anxious that Sligo County Council take action to keep the access in question open and get it designated a right of way. Mr. Breen stated that local residents and interested parties should submit as much detail/evidence as possible showing the continued use of this route over the years.
>
> Should Sligo County Council have to go to court detail/evidence would be crucial.
>
> This was agreed by the residents who are to come back to Sligo County Council with this info.
>
> The meeting concluded after some discussion on what type of info was needed."

16. After this Susan Gilmartin and her friends began to suggest to people that they should commit to paper their recollections as to how the roadways and avenues of Lissadell were used in their personal experience. These letters were to be addressed to the county manager or the council or were to be sent to Susan Gilmartin for onward transmission as she saw fit. In the following twelve months many people wrote letters to the county manager and to Susan Gilmartin. These were eventually transferred to the council in September, 2005. It had been intended to do so earlier, but there was some slippage in the group's anticipated timetable.

Lissadell Action Group 1

17. When the Lissadell estate came up for auction in 2003, a group of concerned people in Sligo town, led by many political figures, set up a group which they called the Lissadell Action Group. This was a formal group whose objective was to lobby the State to purchase Lissadell for the benefit of the people. Apparently, the government considered the matter, but rejected such a proposal in the autumn of 2003 on the grounds that it would be too onerous a financial burden for the State to undertake. After this announcement, the Lissadell Action Group

held a meeting and the group was dissolved. Mrs. Ita Leyden was the secretary of this group and when giving evidence she offered the minutes of that meeting if the plaintiffs required them.

18. In early 2004, when Susan Gilmartin and her neighbours began to address the question of the Main Avenue being blocked off they adopted in their correspondence the title 'Lissadell Action Group'. It is important to appreciate that this was not the same group as the original group formed in Sligo town. The evidence from the original members and neighbours who comprised this latter group was that it was never a formal grouping as such, it was just local people getting together for a common purpose. There was no constitution, no officers, no treasurer and no funds of any sort. No minutes were kept of the meetings. Over the years these people met in various houses approximately fourteen or fifteen times in all. The attendance at any given time would vary. Frequently, a meeting was called in response to some report in the media regarding a development at Lissadell or at the council. If a decision was taken at these meetings to communicate something, a text was drafted by whoever was at the meeting and someone took it away and typed it up. Susan Gilmartin said she did not have a computer and never typed the actual letters. The signatures to such communications depended on who was available. Sometimes only two signatures would appear, on other occasions up to five signatures might be appended. As time went by, the group adopted a logo based on a picture by Mr. Wann, an artist in the group, and printed up some notepaper which was headed Lissadell Action Group. In a press release sent out from the Lissadell Action Group dated in or around June, 2005 the committee members were listed at the bottom of the notepaper and a similar list appeared in a letter which was sent to the county manager on the 17th April, 2007. When questioned about this, Susan Gilmartin confirmed that some of the people named as committee members were not requested and did not consent to having their names on the notepaper. Susan Gilmartin admitted that this was wrong and she regretted it. Others mentioned on the notepaper, however, even though their consent had not been specifically sought, indicated in evidence that they supported the sentiments in those communications.

19. This is particularly important in connection with two names who are represented as being committee members, that is, Marie Leyden and Michael Carty, both of whom it was alleged were at the time employees of the council.

20. After the meeting in Grange the deputation arranged to meet the plaintiffs at Lissadell on the 15th May, 2004, to raise their concerns. Suffice to say at this juncture, the outcome was not satisfactory as far as Susan Gilmartin and her friends were concerned. Mr. Walsh, the first named plaintiff herein, made it quite clear that his position was that there were no rights of way over Lissadell and that he had a statutory declaration from Sir Josslyn Gore-Booth to prove it. It was for this reason that Ms. Gilmartin and her friends decided to hold the public meeting at Maugherow.

IV. The Plaintiffs' Opening

21. In opening the case, counsel for the plaintiffs drew the Court's attention to several features of the case which can be summarised in the following paragraphs. In reciting these, I do so, not because I necessarily accept or agree with them, but primarily because it gives the context in which the plaintiffs

advance their case and is helpful from that point of view.

22. First, the plaintiffs argue that the defendant's assertions are difficult to accept when the nature and position of such estates is considered from a historical perspective, and when the attitude of the owners to preserving the inheritance for future generations is taken into account. Coupled with the natural desire to keep the House and the immediate environs private and to reserve the curtilage for the family and invited guests, is the matter of the security of the occupiers and their families. Even though the Gore-Booths were, by and large, well liked in the area over the years, there was also a concern or realisation that such Big Houses, given the historical origins of such estates, continued to exist in a wider political context and were always under potential threat from the various political movements that surfaced periodically, especially from the middle of the nineteenth century until the early years of independence. According to the plaintiffs, it is unlikely, given the whole *raison d'être* of the demesne and estate, that the owners would have dedicated to the public rights of way over the estate in such a manner that would have compromised the security and privacy aspects of the House.

23. Second, unlike other rights of way cases, there is an enormous volume of documentary evidence held in relation to Lissadell estate. In addition to estate records which Sir Josslyn Gore-Booth donated to the Public Records Office of Northern Ireland, Sir Josslyn's own notebooks are all available, as are the memoirs of the famous butler Kilgallon, as well as many records held by the estate's solicitors. The documentary evidence in the present case, according to the plaintiffs, supports their position and does not support any assertion that public rights of way were dedicated at anytime by owners of the fee tail male interest.

24. Third, the estate was in wardship during the period of 1944 to 1980. This, of course, meant that a great deal of official documentation was generated during that period, none of which, again according to the plaintiffs, discloses any historical dedication to the public of rights of way. On the contrary, successive Presidents of the High Court consistently refused in the context of the wardship, until 1978 when conditional assent was given, to consent to any public monies being spent on the estate roads which might suggest dedication on two grounds: first, that the tenant in tail had no legal power to make such a dedication, and second, it would not be in the best interest of the estate to allow such a dedication. The only evidence to the contrary in the documentation (two letters written by Gabrielle Gore-Booth in 1969) supporting the proposition that there was dedication in the period 1900 to 1904 by Sir Josslyn Gore-Booth, was rejected by successive Presidents of the High Court who considered the matter.

25. Fourth, the documentation and correspondence maintained by the defendant itself does not support the argument it now advances that there had been dedication.

26. Fifth, in 1982, the present Sir Josslyn Gore-Booth came into possession of the estate as owner in fee simple after a disentitlement had taken place. Sir Josslyn never supported the existence of any public rights of way over the land, and there was evidence from Mr. Nicholas Prins, the estate manager from 1987

to 2001, that Sir Josslyn made great efforts to secure the estate at that time.

27. Finally, the conduct of the defendant up until these proceedings is not consistent with its present assertion of the existence of public rights of way on the estate. The defendant never raised the possibility of the existence of such rights of way with the plaintiffs or the vendor before or after the sale in 2003. Before that, it did not challenge the earlier correspondence sent to it by the Office of Wards of Court discussing the wardship which asserted that there was no dedication. According to the plaintiffs, the defendant never itself paid for the maintenance of these roads at anytime from 1900 onwards. It was only in 2008 that it erected road signs at the entrance to Lissadell suggesting the existence of public rights of way over the estate in spite of the fact that the defendant has a statutory obligation to keep records of public roads and identify such thoroughfares.

V. The Law on Public Rights of Way

28. A public right of way can be created by use from time immemorial, by statute or by dedication by the full owner of the land. Dedication is a question of fact and can be either expressed or inferred (*Connell v. Porter (1972)* [2005] 3 I.R. 601, 605). This 'fact', however, as we shall see later, can be based on a fiction. In the present case there is no assertion that the rights of way existed from time immemorial or were created by statute or by express dedication. We are concerned, therefore, with a claim to public rights of way, the existence of which can only be inferred from indirect evidence of dedication. The onus lies on the claimant (that is the defendant in this case) to show that all of the evidence relied on leads the court to the conclusion that on the balance of probability the owner of the property dedicated a right of way across his lands to the public. In *Bruen. v. Murphy* (Unreported, High Court, McWilliams J., 11th March, 1980), McWilliams J. was not prepared to hold that the lessor of a 999 year development lease did not authorise the creation of the public rights of way such as were dedicated by the lessee. Moreover, it is also essential to show that the public have accepted the dedication. In proving such a claim, evidence of various kinds can be advanced, but the essential question for the court is to ask whether the cumulative effect of all the evidence in the specific circumstances of the case enables the court to conclude on the balance of probability that the owner had the intention to dedicate (*animus dedicandi*) and did dedicate a right of way to the public over his lands. "To establish a public right of way what has to be proved is an intent on the part of an owner to dedicate his land to the public, an actual dedication, and the acceptance by the public of the dedication" (Costello P. in *Smeltzer v. Fingal County Council* [1998] 1 I.R. 279, 287). Approved by Kearns J. in *Murphy v. County Council of Wicklow* (Unreported, Kearns J., High Court, 19th March, 1999). The court's quest, where public user is relied on, may be assisted by the availability of an inference, but in the final analysis, all the evidence placed before the court must be assessed against this single criterion: does the evidence advance or defeat the argument that the owner dedicated or must be assumed to have dedicated a right of way to the public. In this case a distinction must be made between mere permission granted by the owner to use pathways and dedication to the public in perpetuity (*Ibid*).

29. In cases such as the present, the evidence advanced by the claimant can take many forms (see Bland P., *Easements*, 2nd Ed., (Dublin, 2009) at pp. 459

et seq.) but will normally relate to some or all of the following:

> (i) The public user; there will frequently be evidence of public use of the way in question. The weight to be given to such evidence will depend, *inter alia*, on the duration of the user, though it need not be for any particular length of time (*Bruen v. Murphy* (Unreported, High Court, McWilliams J, 11th March, 1980), the frequency and the notoriety of the user, as well as the nature and purpose of the public user. For such user to have an impact on the court, it must also be shown that the user was *nec vi, nec clam, nec precario*. Clearly if the public user is based on force, or is exercised in secret, or by way of licence it will be difficult for a court to conclude that the owner dedicated the right of way in such circumstances.
>
> The evidence given in this connection will also go to proving that the public have accepted the dedication. Of all the indicators mentioned in this connection, it is my view that public user, especially where it is long user over the period of living memory, is by far the most impressive evidence and in many cases will be irresistible.
>
> (ii) That the right of way was maintained or repaired by the relevant public authority; expenditure of public money is usually done only on public highways and one can normally conclude from the legal obligations imposed on such public authorities that no public monies will be spent on ways or lands to which the public have no right of entry. Public spending, especially before the Grand Jury (Ireland) Act 1836, would be given greater weight since, before this Act, the onus lay on the parish to maintain all public rights of way. In these circumstances, where such public spending was made it is not surprising that an inference might easily be drawn that the rights of way were, in fact, public. After 1836, roads had to be taken "in charge" before a duty to maintain arose and therefore, the inference that can be drawn from public spending or the failure to make such public repairs, might not have the same force. "Coupled with evidence of user, such expenditure is strong evidence from which dedication can be inferred" (Ó Dálaigh C.J. in *Connell v. Porter (1972),* [2005] 3 I.R. 601, 606.).
>
> Failure to repair by a public authority, however, does not always suggest the opposite. There may be many reasons why the local authority does not repair. First, shortage of funds may not allow such expenditure in any given year. In modern times it is not unusual that demands exceed the funds available, so that the authority is obliged to be selective in its spends. Second, in such situations it might be sensible to seek funding from third parties who might also have an interest in repairing the roads. Third, although the public authority may be legally obliged to maintain and repair a road, there is no legal mechanism through which this obligation can be enforced. Finally, local authorities are not civilly

responsible for injuries caused by failure to repair, so there is no incentive on that front to do so (*The State (Sheehan) v. The Government of Ireland* [1987] I.R. 550). On the contrary, civil liability can arise for injuries caused by defective repairs, which can be seen as a disincentive to carry out such works.

(iii) Evidence of the subjective intent of the owner; even though there may not be evidence of express dedication, evidence may still be available as to what was the subjective intent of the owner in or around the time the dedication is alleged to have been made. Evidence may be put before the court of the owner's conduct, or of correspondence with third parties, or evidence of the owner's acquiescence in this regard. Such evidence may show that the owner intended to dedicate or, equally, that he did not intend to dedicate the way to the public. Significantly, however, evidence of the owner's intentions uncommunicated to the public is of little or no significance where there has been user by the public as of right for a long period.

(iv) The presence or absence of public termini. In many cases it is stated that to establish a public right of way there must be a *terminus ad quem* and, a *terminus a quo*. This is undoubtedly true as a general legal proposition and accordingly, the absence of a terminus may suggest that there was no dedication. Further, the general rule is that the terminus in each case must be a point to which the public have access. This, however, does not appear to be an absolute rule and while the presence of a defined route between two termini may strongly suggest a public right of way, the converse is not always true and there are cases which hold that a public right of way can exist in a cul-de-sac (see *Connell v. Porter*, *supra* para. 28) and from a public road to a public beauty amenity (See the *Giant's Causeway Co. Ltd. v A.G.* (1898) 5 N.I.J.R 301. See also O'Leary J. in *Collen v. Peters* [2007] 1 I.R. 790, 799: "…and now *terminus ad quem* does not apply where the claim is based on presumed dedication where the destination is a place of natural beauty requiring access *and probably by extension in other exceptional circumstances*" [*Emphasis added*]

(v) The nature and character of the way; in arriving at a conclusion, the court may take into account the nature of the route or track involved and the nature of the land over which the route exists. It may be easier where there is a well defined and trodden path to assume that there is a public right of way, than where the right is said to be associated with waste land or isolated land. This is because public activity of a sporadic nature which is made on waste land or scrub land in the remote part of the owner's holding may not encourage the court to conclude that the owner's acquiescence or failure to object unambiguously suggests dedication to the public.

(vi) Reputation as public right of way; the perception of the public as to the nature of the route or way will also be relevant and

> evidence will frequently be led which is to be found in public records, maps, aerial photographs, newspaper accounts, *etc*, to show the reputation. Historians and antiquarians may well be called to give oral evidence in this connection.

As already noted, however, and bearing in mind what has already been said about the significance of long user as of right, the task of the court, when it has assessed all evidence put before it, is to consider at the end of the day, whether the claimant has established the probability that the owner dedicated the way to the public for its use.

30. Two further points can be made with profit at this juncture. First, the evidence will normally also define the extent of the right of way in question *i.e.* whether it is for pedestrians only or whether it extends to vehicles (and what kind of vehicles), *etc.* Second, once a public right of way is established, it cannot be easily lost or extinguished: "Once a highway, always a highway" (See O'Hanlon J. in *Carroll v Sheridan and Sheehan* [1984] I.L.R.M. 451, 458 which quotes Byles J. in *Dawes v Hawkins* (1860) 8 CB (N.S.) 848 as authority for this statement). Normally, it can only be extinguished nowadays by invoking an elaborate procedure provided by s. 33 of the Roads Act 1993. It may, of course, also be extinguished if the highway is destroyed, where it falls into the sea, for example. The reason why it cannot be easily extinguished by presumption or inference, however, is that the right exists for every member of the public and it would be difficult to presume that each and every member of the public has agreed to relinquish his/her right. It is unnecessary to elaborate on this matter in greater detail.

VI. The Legal Principles Applicable

31. From the above, and bearing the pleadings in mind, the following are the principles to be applied in this case:

> 1. The onus is on the defendant in this case to prove the existence of public rights of way or the existence of local customary rights.
>
> 2. Public rights of way can only be created by statute or by dedication. Dedication can be expressed or inferred. It is not pleaded in this case that the public rights of way have been expressly dedicated or created by statute. Therefore, the defendant here must prove inferred dedication.
>
> 3. To find for the defendant there must be sufficient evidence to enable the Court to conclude, taking all the circumstances into account, that on the balance of probability the owner dedicated the rights to the public, and the public accepted; or that a local custom existed from time immemorial.
>
> 4. The person who is alleged to have dedicated the rights of public way must have the legal title to do so *i.e.* he must have sufficient legal interest to assign a right over the land in perpetuity. In effect, he must be the owner in fee simple or, if he has a limited estate only, he must have the authority of the owner in fee, or act

jointly with the owner in fee in dedicating. Further, he must have personal legal capacity (*i.e.* he must not be under any legal disability) at the time of the dedication. If he suffers from an incapacity, his legal representative speaks for him.

5. In considering all of the relevant circumstances, the nature and history of the estate is part of the relevant background that must be taken into account. In this connection, the plaintiffs' emphasis on the matters mentioned in their counsel's opening are relevant.

6. Although the plaintiffs seek, *inter alia*, declarations that no public rights of way exist, the defendant in its counterclaim asserts the existence of such public rights. The normal rules of proof, that he who asserts must prove, requires that the defendant should lead the evidence to establish its proposition before the plaintiffs bring their rebuttal evidence forward. Indeed, counsel for the plaintiffs invited the defendant to follow that sequence, but the defendant declined, as it was entitled to do under the rules of procedure. Nevertheless, having heard all the evidence, and in considering the issues, I prefer to follow the logical sequence in my judgment. Accordingly, I will now examine all the arguments and evidence brought forward by the defendant to support the proposition that public rights of way or rights established by custom do exist over the plaintiffs' land.

VII. The Evidence Relied Upon by the Defendant from which Dedication is Inferred

(i) User: The Law

32. Evidence of user, that is evidence from members of the public that they passed and repassed over the claimed ways for a significant period of time, is the most frequent form of evidence relied on by claimants in public rights of way cases where there is no express dedication. In *Folkestone Corporation v. Brockman* ([1914] A.C. 338, 358) it is suggested that such user creates "an almost irresistible inference…". Although long user is more likely to impact on the fact finder, it should be repeated that since the search is for dedication, long user is not essential as the dedication can be of recent origin. (See The *Queen v. Petrie* (1855) 4 El. & B. 737: eight years was *prima facie* evidence from which dedication may be inferred.) The theory is that strong user to which the owner acquiesced leads the court to the presumption, albeit rebuttable, that there was dedication. (*R. v. Oxfordshire County Council, and Another, Ex. p.. Sunningwell P.C*. [2000] 1 A.C. 335). The Irish courts frequently use the term "presumption" instead of "inference" in referring to this matter, but it is clear from the judgments that they do not treat it as irrebuttable or as a rule of law. Once this is appreciated it does not hugely matter in the present context whether one speaks of a presumption or an inference. Indeed it seems that the courts frequently use both terms as if they are interchangeable (See Lord Dunedin in *Folkestone* (*supra*) at 375 quoted below at para. 39). In this scenario, the claimant will emphasise the strength of the user and the acquiescence by the owner, whereas the owner, wishing to resist the inference, will contest both. Moreover, the owner may point to dicta in the case law which distinguishes

acquiescence from tolerance, the latter not being enough on which to found an inference of dedication. Having read the older cases, it seems to me that when the courts take refuge in the word 'tolerance', what they are really saying is that there is not sufficient overall evidence of acquiescence from which a presumption of dedication can be made. But it should be noted that widespread and notorious user over a long period suggests dedication rather than tolerance bred from a sense of neighbourliness.

33. In *Regina (Godmanchester Town Council) v. Secretary of State for the Environment, Food and Rural Affairs* [2007] 3 W.L.R. 85, Lord Hoffmann, dealing with recent English legislation, reviewed the common law on public rights of way in what is considered to be an outstanding judgment. On the origins of the concept of dedication, he had this to say at pp.88 – 89 :-

> "5. In the case of a public right of way, a lawful origin had to be found in dedication by the landowner at some unknown date in the past. Such dedication was analogous to the lost modern grant of a private easement. Juries were told that they could find such a dedication on evidence of user openly and as of right by members of the public and were often encouraged to do so. The reason for juries and judges being willing to make and accept findings that there had been a dedication or a lost modern grant was of course the unfairness of disturbing rights which had been exercised without objection for a long time…[Having referred to the Scottish position, he continued]…But in England the policy of the law was not openly acknowledged. Instead, juries were told that in order to uphold the public right, they had to find as a fact that there had been an act of dedication accompanied by the necessary *animus dedicandi* on the part of the landowner: see *Poole v Huskinson* (1843) 11 M & W 827.
>
> 6. As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly in laying out building schemes. It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of landowners over many years are more likely explanations. In *Jones v Bates* [1938] 2 All ER 237, 244 Scott LJ said that actual dedication was "often a pure legal fiction [which] put on the affirmant of the public right an artificial onus which was often fatal to his success". In *Jaques v Secretary of State for the Environment* [1995] JPL 1031, 1037 Laws J called it an "Alice in Wonderland requirement"
>
> 7. Nevertheless, juries and other tribunals of fact did frequently find that such acts of dedication had taken place, no doubt for the reason I have suggested. So much so that in *Folkestone Corpn v Brockman* [1914] AC 338 it was argued that, in the absence of evidence of facts inconsistent with such a dedication, they were

> obliged to make such a finding. But this submission was rejected by the House of Lords and it became settled that user was no more than evidence from which dedication could be inferred. It was open to the jury to ascribe the user to toleration or some other cause. Since, as I have said, some other cause was in real life more likely, it became difficult to predict when or for what reason a jury would have sufficient sympathy with the users of the highway to find that there had been a dedication."

34. Where neither force nor secrecy are in question, as here, the owner may attempt to resist the inference of dedication by showing that the user was by permission (*precario*) or more generally that he did not acquiesce in (*i.e.* that he resisted) the user.

35. If the user is of right in the above sense, it will be difficult to resist the implication of acquiescence. If the user is *nec clam*, in most cases the owner will know of the user, and failure to take action in the circumstances amounts to acquiescence. According to the Concise Oxford English Dictionary (10th Edition) the word 'acquiescence' is a derivative of acquiesce and means "to accept or consent to something without protest". It derives from the Latin *quiescere* (from *quies*, quiet) which literally translates as "to rest". If the owner, knowing of public user, remains rested, he is in fact, acquiescing. I will deal with these concepts more fully later when I consider them in the context of the facts of the case. Though user in the above sense may be strong evidence of dedication, it is no more than that. It does not raise a legal presumption which must be rebutted by the owner, but is one piece of evidence, albeit frequently important evidence, which goes into the scales when the court has to finally determine the issue. At the end of the day, the court should not determine the dedication issue definitively without assessing all the evidence before it.

36. Because of its importance in this case, I will now address more closely the presumption or inference of dedication and how a protestor can rebut it.

(ii) The Presumption/Inference of Dedication

37. In most instances, it will be practically impossible to prove animus dedicendi; the likely dedicator long being deceased. It is therefore necessary in most cases to infer dedication from the evidence.

38. Where there is evidence of long user, and persons competent to dedicate, this will give rise to such an inference. In *Farquhar v. Newbury Rural District Council* [1909] 1 Ch.12 at 16, Cozens-Hardy M.R. noted:-

> *"When you find that state of facts – long user coupled with the existence of persons competent to dedicate – I decline to look into what was or was said to be actually in the mind of the person so dedicating. I think the presumption of law follows arising from the long user that that took place which was necessary to give the public any rights at all, namely, a dedication."*

39. As already noted, however, caution should be sounded with regard to the phrases "*presumption of law*" and "*praesumptio juris*". Lord Atkinson in the

House of Lords decision in *Folkestone Corporation v. Brockman* [1914] AC 338, 362, firmly rejected that the principle went as far as a *praesumptio juris*. He observed that indeed no authority could be found for such a proposition and noted that:-

> *"On the contrary, the invariable well-established practice, followed by many of the most able and distinguished judges for many, many years, has, I think, been, no matter how strong the evidence of user, to leave all the evidence to the jury, to ask them to consider it as a whole, and determine whether the owner of the soil intended to dedicate a public highway over it."*

In the words of Lord Kinnear, also in the House of Lords in *Folkstone Corporation v. Brockman*, at p. 355, once evidence of dedication, in the form user or otherwise, exists:-

> *"It then becomes a question for the judges of fact whether the user which may have been proved is to be accounted for by presuming dedication, or whether some other conjecture may not be the more probable."*

Lord Dunedin explained at p. 375 what was meant by the expression, presumption of dedication, rather than a *praesumptio juris* in favour of dedication:-

> *"[I]n cases where express dedication is out of the question, no one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as matter for inquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication."*

40. The interpretation of the Lords, considered *supra*, was affirmed by the Court of Appeal in *Williams-Ellis v. Cobb* [1935] 1 K.B. 310, 318. Lord Wright summarised the position:-

> *"If user is established over the period within living memory that raises a prima facie presumption of dedication, the date of which may be in a period beyond living memory."*

He quoted with approval another passage, contained in the judgment of Romer J. in *Stoney v. Eastbourne Rural District Council* [1927] 1 Ch. 367 at 378, which states:-

> *"As pointed out by Buckley J. in Attorney-General v. Esher Linoleum Co. [[1901] 2 Ch. 647], it is dedication and not user that constitutes a highway. User is merely the evidence that proves the dedication. Where the only user shown is user over a period less than that covered by living memory, there may be good ground for coming to the conclusion that the dedication took place only just before the time at which the user began. But where, as here, the user took place over the whole period covered by living memory, such user is just as good evidence of a dedication made a hundred years before the first proved act of user as of one made contemporaneously with that act."*

41. In considering such evidence, Sir Montague Smith, in the Privy Council in

Turner v. Walsh (1881) 6 App. Cas. 636, 642 states that:-

> *"The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of complete dedication, coeval with the early user. …"*

And with regards to evidence of user, Sir Montague Smith stated at p. 642:-

> *"You refer the whole of the user to a lawful origin rather than a series of trespasses. …"*

42. It is thus clear that, in the absence of actual evidence of dedication, where there is evidence of long user, all of the surrounding circumstances should be taken into account in determining, on the balance of probabilities, the nature of this user and its justification. As noted by Sir Montague Smith in *Turner v. Walsh*, it should be presumed that such user, as the evidence indicates, was of a lawful, rather than unlawful, nature. If the evidence points to long, uninterrupted user by members of the public, this will then give rise to an inference that there was, at some time in the past, a dedication of the routes in question to the public – although the actual time, place and dedicator need not be determined (see *Williams-Ellis v. Cobb, supra* at 325 *per* Slesser L.J.).

(iii) The Belief Test

43. It is now well established as a matter of English and Scottish law that the subjective belief of the user is irrelevant to the question of whether the user was "*as of right*". In *R. v. Oxfordshire County Council, and Another, Ex. p.. Sunningwell P.C [supra]* the House of Lords reviewed the meaning of the phrase and its history in the law of both private and public rights of way.

Having considered the basis of the law, Lord Hoffmann concluded that the actual state of mind of the road user was plainly irrelevant, and the question was how the user would have appeared to the landowner. The public must have used the land in a way which would suggest to a reasonable landowner that they believed they were exercising a public right, Lord Hoffmann stated at p. 354:-

> *"To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant."*

There has been no Irish case in which this precise issue has been reviewed by the Superior Courts. However, the Irish law on public rights of way clearly derives from the common law in the same way as the English common law, and it now appears to be well settled by the highest authority in England that the belief of the user is irrelevant. This is of persuasive authority in this Court and I accept it as being the law for this jurisdiction also. There is a comment *en passant* by O'Leary J. in *Collen v. Petters*, [2007] 1 I.R. 790, 798 that not a single witness as to the user in that case had used the expression "public right of way" to describe their use of the pathways across the lands, but there was no review of the law, or even any statement of principle. To rely on such a phrase in the decision of O'Leary J. to suggest that the user's belief was relevant, would

be to make a mistake on a par with those cases which misinterpreted a general remark in *Hue v. Whitely* [1929] 1 Ch. 440, which misinterpretation was subsequently corrected by the House of Lords in *Sunningwell*.

(iv) Burden on the Protestor

44. Once the court has concluded that there is sufficient evidence to infer a dedication at some time in the past, how should it proceed? How can a protestor to the claim of rights of way overcome this inference? Of course, it should be noted that if evidence was brought forth which, on the balance of probability, showed that the user was not of a public or lawful nature, or that the owners of the lands had persistently shown acts inconsistent with dedication, for example, by prosecuting persons for trespass, placing signs on the lands indicating it was private, or making the lands inaccessible to members of the public, then no such inference would arise. These would go a long way towards defeating a claim that dedication in the past was probable. It is in this context that the dictum of Parke B. in *Poole v. Huskinson* 11 M. & W. 827 at 830 (quoted with approval by Lord Atkinson in *Folkestone Corporation v. Brockman* [1914] AC 338) is to be understood:-

> *"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 a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."*

This last qualification must be read with caution. Certainly, if the landowner locks the gates on one day a year with a notice communicating his opposition, this "single act of interruption" may suffice to rebut the inference. Short of this, however, such single acts must be viewed in context; sometimes they may be no more than a token gesture of resignation.

45. The strength of the inference or presumption, when there is long user, can be seen where the person who wishes to challenge it relies on inadequate title. As stated by Coleridge J. in *The Queen. v. Petrie* (1855) 4 E. & B. 737, 749 (quoted with approval in *Williams-Ellis v. Cobb* [1935] 1 K.B. 310, 325):-

> *"[w]hen such user is proved, the onus lies on the person who seeks to deny the inference from such user to show negatively that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed."*

Similarly, Fletcher Moulton L.J. stated in *Farquhar v. Newbury Rural Council* [1909] 1 Ch. 12 at 18:-

> *"The plaintiff must shew that it was impossible that dedication could have taken place, not that it was possible that it did not take place, and therefore no such answer as suggested would be sufficient."*

In that case the land had been settled upon a tenant for life with an immediate remainder to a tenant in fee. The Court found that it was possible for the tenant for life and the remainderman together to dedicate a public road over the settled land. The evidence showed that the remainderman had taken an active role in the formation of the road, and it had been created to coax members of the public along it, instead of crossing a meadow along an old church way. It was therefore the essence of the scheme that it would be public and, in fact, had

been used as such with the knowledge of both the tenant for life and the remainderman during a long period of time. The evidence that the route was created for the use of the public was therefore overwhelming. These facts were held to be consistent with a presumed dedication by both the tenant for life and remainderman, and accordingly the route was held to be a public highway. It must, of course, be remembered also that dedication need not be formal, *i.e.* by deed. It is therefore not necessary to enter into the legal fiction of some lost grant; if a person or persons together capable of dedication existed then dedication can be presumed.

46. Considering what might be used to overcome the inference in the circumstances of that case, Eve J. in *Coats v. Herefordshire County Council* [1909] 2 Ch. 579 at 595 noted that:-

> *"They fall into two categories, the one involving questions whether the land in dispute was capable of dedication, and, if so, whether there was ever in existence any person or body, or any combination of persons or bodies, capable of dedicating, and the other relating to events and conduct alleged to be inconsistent with there ever having been any dedication."*

He ultimately found that there were persons or bodies capable of dedicating the land and, taking account of the circumstances as a whole, there was insufficient conduct which would prevent a presumption that the land was dedicated.

47. Even where it would appear that dedication could not have taken place by reason of a lack of capacity on the part of the person in occupation, this will not necessarily overcome an inference of dedication at some time prior to this. Thus in *Smith v. Wilson* [1903] 2 I.R. 45, 68 Gibson J., having noted that evidence of user would infer dedication in that case *"unless the defendant has proved that the state of the title made such dedication impossible"* held that :-

> *"Where the user is ancient and its origin is not shown, the mere circumstance that the land has been continuously held under lease does not displace the inference of dedication by the owner, whoever he was, before the lease was made: Winterbottom v. Derby [L.R. 2 Ex. 316]."*

Furthermore:-

> *"Even where the user is shown to have commenced after and during a lease, the assent of the owner in fee may be inferred (notwithstanding that in most cases he is powerless to interfere) where the user has been so long and public that the owner must be taken to have been aware of it and assented: Mann v. Brodie [10 A.C. 378 at p. 386]; see Lord Blackburn's opinion: Hanks v. Cribbin [7 I.C.L.R. 489], and Deeble v. Lenihan [12 I.C.L.R. 1]."*

48. It is therefore clear that, even where it can be shown that the occupier of the lands was not in a position to dedicate, this will not rebut an inference of dedication. If the user is ancient, it will be presumed to have occurred at some time in the past, done by some unknown person who had sufficient capacity to dedicate. Even if user can only be shown to have commenced during the tenure of a tenant without capacity, if it is of a public nature and has occurred for a protracted period of time, the assent of the owner of the fee can be inferred. It is therefore clear that one would need to show that dedication was impossible;

anything less will not overcome the inference of dedication where the user is protracted and of a public nature.

49. By way of summary, a close study of the authorities enables me to state the following propositions with confidence:

> 1. Dedication is a question of fact which may be based on a legal fiction, and which is to be determined by the fact finder when all the circumstances have been taken into account.
>
> 2. User "as of right" (*nec vi, nec clam, nec precario*) by the public is an important factor which must be taken into consideration and which in appropriate cases can lead to an inference or presumption of dedication. User, however, even when enjoyed over a long time, does not compel a conclusion of dedication; it does not compel a legal result. Rather, it infers or presumes dedication, and when the user is extensive and long-enjoyed the inference will be a strong one.
>
> 3. The user does not have to be for any particular length of time; eight years was enough to warrant the inference in one case (*The Queen v. Petrie supra*), but if the user covers the period of living memory, the inference of dedication may be to a time that pre-dates the evidence of first user.
>
> 4. The inference of dedication which follows from long user does not oblige the claimant to show a particular person who dedicated or a particular time when the dedication was made.
>
> 5. To dislodge the inference, the protestor who relies on inadequate title must show that dedication was impossible during the relevant period. It is not sufficient for the protestor to show that it was unlikely or improbable. The onus is a heavier one. Where the evidence of user is for the entire period of living memory, and dedication is inferred to some unidentified date prior to the first evidence of user, if the owner wishes to rebut on the grounds of title, he must show that there was no time in the past where a person or persons were in a position to lawfully dedicate. If at any time, for however short a period, the lands were held in fee simple, the protestor's challenge to the inference of dedication will fail. Another way of showing impossibility is to show that the route or way did not exist at the time of the alleged user or at the time of the alleged dedication.
>
> 6. Although the common law insisted that a public right of way had to have a public *terminus a quo* and *terminus ad quem*, this appears to have been modified nowadays where the courts are willing to recognise that the terminus ad quem can be a place of natural beauty or of historical interest or of popular resort. This more liberal view recognises that a highway need not always end in another highway (*Williams-Ellis v. Cobb* [1935] 1 K.B. 310;

Moser v. Ambleside Urban District Council (1924) 89 J.P. 59; affirmed in C.A. (1925) 89 J.P. 118; See also *Giant's Causeway Co. Ltd. v. A.G.* (1898) 5 N.I.J.R. 301).

VIII. Evidence as to User

50. Before dealing in some detail with the evidence from the many witnesses called by the defendant to show user, it is necessary to make a few general points. First, in cross-examining these witnesses, counsel for the plaintiffs emphasised that many of the witnesses were locals and neighbours of the Gore-Booths and knew Gabrielle and Aideen by sight and, in some instances, to speak to. Furthermore, some of these witnesses had relatives including parents and grandparents who worked on the Lissadell estate at one time. The purpose of this line of questioning was to indicate that in such circumstances, when they were using the estate, it was likely that they were there by virtue of the permission extended to them by the Gore-Booths and not as of right. I will deal with this suggestion later in this judgment. Second, it must be remembered that all of these witnesses were lay people with no legal training and when they were attempting to answer questions of the legal nature put to them in cross-examination – did they think that the Main Avenue was a public road?; what did they understand to be the basis of the user?; did they know what a right of way was? – they responded as lay persons and in interpreting their answers this must be appreciated. (See *Regina (Lewis) v Redcar and Cleveland Borough Council (No. 2)* [2010] 2 WLR 653, at 683. Referring to the attitude of users in that case Lord Rogers of Earlsferry said: "The great majority know nothing about the legal character of their right to do so and never address their minds to the matter. Moreover, to draw an inference based on the premise that the inhabitants are aware of the legal position is hard to reconcile with the decision in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 355—356, that the subjective views of the inhabitants as to their right to indulge in sports and pastimes on the land are irrelevant." *Ibid.*) Third, all the witnesses, when asked, affirmed that they were put under no pressure to attend the various meetings or to sign the petition or write letters to the defendant by anyone. In the main, their evidence was that they did so voluntarily and because they wanted the ways over the estate to remain unchanged. Fourth, without exception, all the witnesses called for the defendant indicated that their presence on the estate was never challenged or questioned by any of the Gore-Booths or any of the managers of the estate over the years. Fifth, in cross-examination many of the defendant's witnesses were asked whether they knew the other witnesses called by the defendant and many of them clearly did. This, however, is not surprising since most of the witnesses were from the same locality and their families lived there for generations. Indeed, it would be surprising if they did not know each other by virtue of growing up in the same neighbourhood, going to the same school and probably attending the same church for the most part. In cases like the present where much of the evidence is obtained from locals, one should not read too much into this acquaintanceship. Those who are willing to give evidence are likely to be those who would be most affected by the closure of the estate, who in turn are likely to be those who live locally. It should cause no surprise that many of these people are neighbours and are even related to each other. Nothing sinister should be read into it. In fact, it is worth noting that Mr. Leo Leyden, who was called by the plaintiffs, was contradicted in some of his evidence by some of his

siblings who gave evidence for the defendant.

(i) Ius Spatiendi

51. Finally, for clarity I wish to indicate my attitude to the evidence of witnesses who claimed that their user was not confined to passing and repassing on the avenues. Many of the witnesses called for the defendant described that when they were young they used to wander all over the estate, into the woods, *etc.* Young boys in particular seemed to use it as an adventure park which they explored in the summertime especially. One witness spoke of the grounds as "our Phoenix Park".

52. Apart from a claim to access the beach at the Water Wall, the defendant is not claiming a right to wander over the estate and it is clear in my view that it would have no prospect of success had it chosen to do so. Its claim is confined to rights of way, that is rights to pass and return over identified ways, avenues or roads on the estate. In *Murphy v. Wicklow County Council* (Unreported, High Court, Kearns J., 19th March, 1999) Kearns J., having reviewed the authorities, affirmed the common law on this when he said:-

> "Against this background of recent case law, it seems *ius spatiendi* can no longer be regarded as a right recognised by law in the absence of express grant." (See p. 115) (See also Costello P. in *Smeltzer v. Fingal County Council* [1998] 1 I.R. 279 at 286)

53. The law is settled on this matter.

54. This does not mean, however, that witnesses who gave evidence that they sometimes wandered off the avenues, into the kitchen gardens, or to play or explore in the woods, had no relevant evidence to give in relation to using the avenues to pass and repass through the estate. Their evidence can be segregated and the weight to be given to the various parts of it is still to be assessed. If I travel over another's land to get to another destination, that evidence of user is not set at nought because, occasionally, I stop and picnic off the way if the day is fine. This dalliance will not give me a right to picnic or wander, but it does not vitiate the evidence I give in relation to the right of way, though it may effect its weight.

55. Having set out the principles of law that relate to user, I now turn to examine the evidence of the various witnesses and the other evidence to establish what are the facts in this case.

(ii) The Defendant's Evidence Relating to User

56. The defendant called twenty five witnesses to give evidence of user. Most of these, as might be expected, were from the townlands immediately surrounding Lissadell, and have lived in the area all their lives with, in many cases, strong family connections to the area (*e.g.* Mary Cadden, James Meehan, Joe Leonard). A few witnesses, however, had come more recently to the area, from Dublin and other places (*e.g*. Angela D'Arcy, Jim Callaghan, Michael Wann, James Harney, Michael Carney, Hubert Kearns) and one witness (T. Stokes) lives in Dublin, but was a regular visitor to the area while another had a holiday home there. Some had grown up in the area, had gone away for some years, and returned again to

the Sligo region (*e.g.* Peter Falla, Stafford Reynolds, John Haran, Susan Gilmartin [born in Dublin], Michael Carty, Nancy Farrell). Some had grown up in the area, had moved away, but gave evidence of what it was like when they were young around Lissadell (e.g. Ann Guiney, John Haran, Henry Stafford Reynolds, Peter Falla).

57. A separate set of witnesses called by the defendant were its employees and were called primarily to give evidence of events that occurred in the council prior to and after Cllr. Leonard's motion was passed in December, 2004; many of these witnesses also gave evidence in relation to the user, insofar as they were in a position to do so (*e.g*. Marie Leyden, Michael Carty, James Haran, P.J. Feeney).

58. Some of the locals who gave evidence were in their eighties while the vast majority were in their fifties and sixties. Younger witnesses gave evidence of recent user. I have no hesitation in saying that, in the main, the witnesses were truthful and honest and tried to answer the questions put to them honestly and to the best of their recall. When their responses were in conflict with established facts, I was prepared to attribute the inaccuracies, for the most part, to the flawed nature of memory itself and the notorious fact that many people, unless they have a specific reason to do so, do not observe accurately their everyday surroundings. Many witnesses, for example, testified that there were no gates on the estate or at particular entrances, when the undeniable evidence was that gates were erected by Nicholas Prins in the period 1989 to 1994 at the forge entrance and at the main gate. Some witnesses, who initially denied the existence of gates, when pressed conceded that they might have been there, but that they did not notice them or as one witness put it "they never came under my notice". All these witnesses, however, were adamant that the gates were never closed and never prevented them accessing or traversing the avenues. This was clearly the case, except for specific occasions noted below. Vigorous cross-examination did not undermine their evidence on this issue. This, together with the fact that gates, left open against the hedges, had become covered and partly hidden in recent years, explains why many witnesses did not observe them.

59. The picture that emerges from the evidence of these witnesses was that since the early 1950s at least, many people, who had no specific business or other reason to be there, entered and exited the estate through all four entrances – that is the entrances at Crushmore, the Burrows, the forge and the main entrance. Local people from the area tended to come in at the entrance nearest to where they lived and, depending on their destination or the purpose of their visit, used whatever exit suited them. Some came to use the avenues as through roads, others came to walk or cycle around the avenues in a loop, while others choose the internal roads as opposed to the main 347 road when going to Carney or Sligo, simply to enjoy the natural beauty and tranquillity which the internal routes offered. In more recent times, one long distance runner trained on the grounds and finally cut a 900 metre training circuit in the woods and, with members of his athletic club, used it for several years without seeking permission. Many people came to the estate to access the beach at the Water Wall. Mr. Prins, giving evidence of his time as manager of the estate from 1987 to 2001, admitted this and also admitted that some people parked their cars at or near the Water Wall, which he said he did not mind as long as they did not

cause an obstruction. The most popular area in the summer, however, was near the Coillte car park which had easy access to the beach. This, of course, is not now on the plaintiffs' property.

60. The witnesses also gave evidence that they saw many other people using the avenues in a similar fashion. They were universal in the view that all of these users came at all times of daylight hours and throughout the year; in summer and, understandably, to a lesser extent in winter. They were unanimous, subject to specific incidents addressed later, that they were never challenged or prevented from crossing the estate and that the gates were never locked against them. The majority gave evidence that they knew the Gore-Booths to see and that frequently, when using the avenues, they would greet and salute each other as they passed. They never experienced unpleasantness or resentment from the Gore-Booths or from the managers at the time. There was no obvious change in attitude to these incursions when Sir Josslyn (9th Baronet) took over in 1982. Gabrielle Gore-Booth was manager from 1944 to 1956, when she fell out with the office of the ward and was removed with some publicity. She was succeeded by Mr. Caffrey (1957 -1974) and others until Mr. Prins took charge from 1987 to 2001. She, with her sister Aideen and her brother Angus, continued to live in the House until they died in 1973, 1991 and 1996, respectively. I have no hesitation in concluding that this acceptance by successive managers amounted to acquiescence on behalf of the owners.

61. For reasons I will elaborate on below, I do not accept that the force of this evidence is weakened because the Gore-Booths in residence may have known the families of some of the users or that in previous decades some of the users' ancestors were employed or were tenants on the estate. I will examine the significance of this suggestion later in the context of the plaintiffs' argument that, for this reason, the users must be considered as permitees.

62. In view of this strong evidence of user from the defendant's witnesses, it is appropriate that I should consider in some detail the evidence of user given by witnesses called for the plaintiffs, before reaching a conclusion on user and whether an inference of dedication is warranted.

(iii) The Plaintiffs' Evidence as to User

63. One of the most important witnesses that the plaintiffs called was Mr. Nicholas Prins.

64. Mr. Nicholas Prins was manager of the estate from 1987 to 2001. When he took over the estate was very run down. He began a tree felling programme and addressed many other areas of neglect which required attention. He installed cattle grids, erected piers on the perimeters of the estate, put up gates at two locations, put up notices in 1996, blocked the forge entrance with rubble in 1993, and he installed chains at the slipway and at the sides of the House. The plaintiffs rely on all of these as manifestations by the owner, for whom Mr. Prins was agent, of an intention to regulate and control entry to the estate so as to rebut any inference of dedication that might arise from user. In his evidence, Mr. Prins acknowledged that when he came to the estate in 1987, people were using the avenues for reasons unconnected with tours of the House and that six or seven cars might be parked near the Water Wall in summertime and "if they

were out of the way I didn't mind". He also agreed that people got to the sea via the Water Wall and via Johnsport. These were some of the uses which he acknowledged.

65. Clearly, Mr. Prins is an important witness and one has to examine closely his evidence on these matters. It is also important to recall that during his stewardship, Sir Josslyn Gore-Booth for the most part resided in England.

66. Initially, Mr. Prins addressed the roads and walls throughout the estate when he arrived in 1987. Accounts he produced to the Court show that monies were spent in repairing the sea wall and in trimming and repairing the surface of the avenues. He put up cast-iron gate piers and old fashioned gates at the main entrance. The gate lodge at that entrance had been sold by then and the new gate was erected on the inside of this lodge. He erected four sets of concrete piers at the entrances to the estate. In or around 1990, he installed cattle grids also at the main entrance and at the Church Avenue. He also put in four cattle grids around the House in 1996 to enable the area around the House to be grazed and to keep cattle from straying into the estate. He repaired the slipway and put a chain across it, which was low in the middle, so that people could not drive down onto the beach. A man had been injured before 1995 at the slipway and sued Sir Josslyn claiming that he broke his wrist in the fall. In spite of his insurer's wishes, Sir Josslyn insisted that the action be resisted, and on the steps of the court, the plaintiff abandoned his claim. Because of this, however, Mr. Prins jointly with Sir Josslyn decided to erect notices on the concrete piers at the entry points to the estate. He also gave evidence that he closed the main gate on occasion especially during the woodcock shoots and tree felling.

67. He was cross-examined in relation to all of these activities and it is very significant, in my opinion, that in explaining these interventions he never suggested that their purpose was to prevent the public from coming onto the estate or that the interventions were an attempt to interrupt the clear user that was established at that time. The cattle grids, for example, were put in "to keep cattle out from grazing the long acre" and the whole point was that these would not prevent public access. The concrete piers were put up to mark the boundaries of the estate. They never carried gates and were not intended to. The chain across the slipway, low in the middle, was to discourage people "driving" down it. The chains put up at the sides of the House were to prevent people driving around the House, especially at night, to the annoyance of Ms. Aideen, and when it was put to him that they "didn't prevent access along the main avenue", he responded "Exactly". The gate erected at the forge entrance was "closed occasionally but not on a regular basis". We know, however, that when the obstruction was created at that gate in 1993, it was challenged by the local people and was removed at their behest and never reinstated. Afterwards, when this avenue was allowed to deteriorate, Mr. Prins said it was to "discourage vehicle traffic up and down it". It was not to stop such traffic and it was not aimed at non-vehicular traffic in any event. The blue signs erected in 1996 were erected to address the risk of entrants being injured on the property and the potential liability of Sir Josslyn as occupier. The notices did not forbid entry and were not worded to do so. Mr. Prins could not recall details of the confrontation at the forge gate in 1993 and was unable to dispute the evidence of Cllr. Leonard that he obtained Sir Josslyn's phone number from Mr. Prins on that occasion and spoke to Sir Josslyn at the time. He agreed, however, with the

report in the Sligo Champion as being an accurate record of his own position at that time. This report recorded that members of the public were claiming a right of way and that Mr. Prins "was anxious to stress that nobody's access to the sea [on Lissadell estate] was being blocked". When this was put to him, he replied, "That's right". When the gates at the main entrance were closed occasionally for tree felling it was for safety reasons only and, in respect of the woodcock shoots, it was "to stop people coming in and getting in the way of the guns who would be on the avenue". At such times, however, the other entrances remained open.

68. I deal with the question of the gates and the notices in more detail later in this judgment since the plaintiffs rely on them to show that the previous owner registered, in an active and positive way, his opposition to the public coming into the estate.

69. Overall, however, it is my conclusion that none of these interventions by Mr. Prins show that he opposed the public coming onto the property for reasons which were inconsistent with public user. In fact, all the interventions had independent reasons and justifications other than to keep the public out. Had that been his intention, it could have been easily done by erecting unequivocal notices which read "Keep Out" or "Private, No Entry". Had such unequivocal notices been erected in a prominent location at the entrances, they would certainly support the plaintiffs' contention in that regard. It was not done, however. When one obstruction was put there in 1993 and another obstruction, the fallen tree, occurred in 2002-2003 they were challenged and, with Sir Josslyn's knowledge and consent, were quickly removed.

70. Mr. Leo Leyden, who was born in 1950, was a brother of some of the witnesses called by the defendant. Some of his evidence was contradicted by his siblings, but I accept by and large his evidence on the existence of gates at various entrances on the estate. He recalled farmer's gates at the Johnsport Road (no longer on the plaintiffs' land now) and at the entrance to the Burrows. These gates were not locked and they were no longer necessary after Mr. Prins fenced the Burrows as, after that, cattle were not likely to stray out of the land or onto it. He could not recall any gate at the Forge entrance, where his grandmother lived, before Mr. Prins put a gate there in 1987/89 and, while he asserted that there was a gate at the main entrance, he could not say if it was opened or closed. He maintained that no one used that entrance unless they were family or had business with the Gore-Booths, but later when the other avenues deteriorated, he admitted that he also used the main entrance. He used to play on the estate as a child and continued to do so after the Land Commission bought some of the land in 1968. As a teenager, he would cycle with his friends around Lissadell avenues. He said that the estate started to become run down before the 1960s (he was only ten years of age in 1960), but it got very bad in the 1960s. He frequently went to the Water Wall *via* the forge entrance and confirmed that sometimes cars would be parked there. He confirmed that some people came to the beach by way of the main entrance.

71. Three other witnesses, all members of the same family (a mother and her two adult daughters), gave evidence of their experiences when visiting Lissadell around the 1970s. Being nature lovers and people who took a keen interest in flora and fauna, they visited the Alpine Garden and what was the walled garden at one time. They always felt that when they visited the run down gardens they

were on private property and were trespassing. Of a scrupulous nature, they were embarrassed when they admitted to having taken some plants from various parts of the estate. The mother attended the public meeting at Maugherow and, although she signed the protest document, she later felt that she was pressed into doing so and regretted it afterwards. When subsequently contacted about this, Cllr. Joe Leonard told her daughter not to worry that it was of no great significance. She and her daughters felt that Cllr. Leonard was less than candid on that occasion, although it is difficult to see what he could have done at that stage to retrieve the situation.

72. In addition to corroborating her daughter's evidence already recounted, the mother, who was born in 1931, said her ancestors lived at the western border of Lissadell and always had great respect for the Gore-Booths. Her father knew Brian and Hugh Gore-Booth, both of whom later died in World War II and took them sailing at Raghley, as Sir Josslyn was not keen for the boys to have boats of their own.

73. She recalled also the dances at the Water Wall, but did not think that a lot of people would be congregating at the Water Wall to access the beach as there were hidden channels at that time at that part of the beach. In the 1940s, there were very few cars and she and her friends did not congregate there, preferring the adventure and excitement promised by the bright lights of Sligo town. She left to train as a nurse in the 1950s and was out of the country until 1967 when she moved back to Wexford. This, it will be recalled, was when the House was opened to the public. For some years, she could only visit Sligo as work permitted. She eventually moved back to Raghley to look after her mother. Her husband, who was a doctor, practised in the area and knew the locality through his patients. She was a district nurse at that time. By then, Lissadell and its gardens had deteriorated significantly. As she was not in the area during the second half of the 1950s and most of the 1960s, she clearly was not familiar with the rapid changes that took place during the period of her absence. She gave evidence, however, that her mother told her it was going down hill in the 1930's and 40's; especially after Sir Josslyn, died in 1944 "it went downhill".

74. She testified that Ms. Aideen complained to her of "boy racers" around Lissadell at night during the 1980s. She recalled gates at the main entrance and a wooden gate at the Burrows..

75. Mr. Ted Smith, at 80 years of age, was one of the oldest witnesses to give evidence. He lived in Sligo and had a locksmith/gun shop in the town. He knew the Gore-Booths well, both Gabrielle and Aideen as well as Sir Josslyn. He recalled seeing the gate at the Crushmore entrance closed when he was on the bar of his father's bicycle when going on a fishing expedition, in the 1940s, as a boy. He could not say whether it was locked or not. His father explained to him that closing a gate one day every year was a way of maintaining one's privacy. He had no evidence on the forge entrance or the entrance at the Burrows as he rarely crossed the bridge at the Bunbrenogue River. He fondly remembered, however, like many witnesses the dances at the Water Wall on some summer evenings in the early 1950s. He never remembered parking at the Water Wall and he never used the slipway to access the beach.

76. The Reverend Noel Regan gave evidence of the period 1968 to 1977, when

he was friendly with Gabrielle and Aideen. His mother was resentful of the Gore-Booths as her people had lost land to the Gore-Booths on the west side of the estate, but he, perhaps as a man of the cloth, decided to move on and did not let this history prevent him from visiting the ladies at Lissadell House. He testified that when going to visit on one occasion, he found the gate at the Main Avenue closed and he had to detour by the Church Avenue. He never remembered the gates at Church Avenue or at the Forge entrance. He said at the Crushmore entrance it was different as people "took liberties". He was aware people used the avenues at the time, but, in his view, it was with permission: also the estate at the time was being run down and people "took liberties".

77. When he was asked to comment on Gabrielle's statement in her letters of 1969, to the effect that the avenues had been open to the public since 1900, he said he had difficulty accepting that as a fact. He said the ladies were in a difficult position and were reluctant to challenge what was happening as they did not, in his opinion, want to antagonise the locals. In his words, they were naïve and did not think people would abuse them.

78. Maura McTighe is a retired teacher who grew up near Drumcliffe. She recalled driving through Lissadell during World War II in her father's car. He was in the Army and was fortunate to have a car at the time. They drove in through the Crushmore entrance. She was very familiar with the estate and recalled the dances at the Water Wall. She did not park at the Water Wall. Since the 1960s, she used to walk through the estate all year round, but did not believe that the roads were dedicated; she said she considered that she was there as a "permitted trespasser". She recalled the House being open to the public in 1967 and commented that during the 1980s and 1990s the estate became a shambles. As far as she recalled, there were never problems regarding the beach; in the 1950s where very few people parked at the Water Wall area. Her husband would drive out through the forge entrance without any permission and no one ever stopped him. There were no notices as far as she was concerned and "everyone did it". She was concerned with the recent closure in 2003 as the Yeats Society, of which she was chairperson, was not facilitated in entertaining visiting academics at the summer school. She was afraid that they might not be permitted into the grounds and into the House if it closed. She complimented the plaintiffs on the good work they had done since they had taken it over.

79. Ms. Moffatt who was born in 1930 gave evidence on commission. She said that in her younger days the Main Avenue was mainly closed and was only used by the staff and servants. It was never open to the public. She used the Crushmore entrance which was seldom closed. When she was a teenager, with her friends, people entered that way if they wanted to go to the beach and they might exit the same way on out by the Church Avenue (at the Forge) to the west. She recalled with warmth the dances at the Water Wall. Although, not as sure, she said that people probably came in by the Burrows also. She said the ladies gave up on the estate in the 1950s and the decline of the estate was due to bad management. After that there was a change "because there was no one to look after it or do anything". She never heard people talking about rights of way in the 1940s or 50s. At that time as far as she was concerned the estate was "closed" and was tightly controlled. It was quite clear from this witness that since the "fifties" at least there was little control.

(iv) Conclusions on User

80. From a close examination of the evidence given by the many witnesses, I have come to the following conclusions on the facts:

(i) There was a gate at the main entrance prior to 1944 which may have been regularly closed at that time. There was no evidence that it was regularly locked, however. This entrance, before 1944, was principally for members of the family and for servants and invited guests. From the 1950s onwards, the gates were rarely locked and members of the public, especially persons who lived to the north of the main entrance, but not exclusively this group, accessed the estate freely, to cross the estate and also to go to the beach at the Water Wall. Mr. Prins reinstated a gate inside the lodge on the Main Avenue in or around 1987 when he arrived. This remained increasingly open and was closed only occasionally for specific purposes after that. Mr. Barton S.C., gave evidence that when he was attending Lissadell for a shoot in 1996 or thereabouts he found that the gate at the main entrance was locked and there was a notice directing them to use the Crushmore entrance. He vividly recalled it as it made him late for the shoot and he had friends travelling in different cars and had no phone with him. This coincided with Mr. Prins' evidence that very occasionally the main gate would be closed during the woodcock shoots, but that the other entrances would remain open on those occasions.

(ii) Although there was a gate at one time at the Crushmore entrance (as well as a lodge), there was none there in recent decades. Although one witness testified that it was closed on one occasion in the early 1940s, there was no evidence that it was locked and since the mid 1940s there was little evidence of any gate being there. There was overwhelming evidence that the public had access at this point, first to the car park area (which subsequently became the Coillte car park), second to the Water Wall, and third to the forge entrance. There was also evidence that some witnesses exited after visiting the Water Wall at the main gate and to a lesser extent through the Burrows out to Johnsport.

(iii) I find that there was no gate at the forge, prior to that which was erected by Mr. Prins in or around 1987/89. After that the gate was rarely, if ever, closed and never locked. Members of the public accessed and exited the estate freely at this point for many decades since 1940 and probably before that.

(iv) There was some evidence that there was a wooden farm type gate at the end of the Burrows before the arrival of Mr. Prins in 1987. This gate was never locked, however, and it never prevented people passing over and back through the estate from that point. The use of this road was limited and what traffic it generated was to a large extent generated by the fact that it was beside the football grounds at the west end of the estate. The

football grounds were used under licence from the Gore-Booths. Nevertheless, there was evidence that it was also used as a way to access or leave the estate by some witnesses. In more recent times, the surface being sand based, this avenue presented difficulties for motor vehicles. There was also evidence of a gate near the farm buildings (more recently the fish farm) which again could always be opened. When Mr. Prins fenced the Burrows' football field in 1987–1989, he put the fence on the landside of the roadway leaving the passage over the Burrows clear for traffic. The need for the farm gate at the entrance lessened after this fence was erected, and in recent times it disappeared.

81. The user I spoke of in the previous paragraphs through the four entrances, was a user as of right, that is, it was *nec vi, nec clam, nec precario*. Further, the evidence is that this user existed from the early 1950s at least.

82. From these findings of fact, an inference of dedication to the public over these routes, *i.e.* A to B to C, A to B to D and A to B to E is clearly warranted. I would also like to say, however, that the inference might be stronger with respect to some of the routes than others. I will deal with this difference later. Moreover, I would repeat what I have already said that this inference is no more than one piece of evidence, although in my opinion very strong evidence, which the Court must take into account in considering whether there was dedication.

83. I find that I am able to reach the above conclusions on the oral evidence given by the witnesses in this case as it tends to show open, consistent user by the public at large for the entire period of living memory. The Court, however, also has the comfort of contemporaneous documentary records of user during this period. In this connection, I refer specifically to the following:

(i) The affidavit of Gabrielle Gore-Booth sworn on the 25th May, 1966, at para. 7 where she swears:-

"For upwards of 60 years Lissadell has been a popular social meeting place".

This cannot be a reference to the dances at the Water Wall organised by the Gore-Booth sisters, which only commenced in the 1940s.

(ii) The letter of the 12th May, 1969, from Mr. Caffrey (estate manager, appointed in 1957), to Mr. Daniel A. Coghlan, solicitor for the ward, where Mr. Caffrey states that the level of public access enjoyed up to 1957 was such as to be a cause of concern to Mr. Maguire, the previous solicitor for the ward, when he was originally appointed by the committee. He said "…in plain words [the estate] was gone into a "Commons"."

(iii) The letter dated the 13th June, 1969, from Mr. Caffrey to Mr. Coghlan, solicitor for the ward, where it was stated that in the

summer, "the beaches in Lissadell are crowded with people".

(iv) The letter dated the 10th November, 1969, from Ms. Gabrielle Gore-Booth to Mr. Coghlan, where she stated that, even in the early 1950s, seventy five percent of the traffic over the avenues was the general public.

(v) A report from an Inspector of the Land Commission dated the 19th November, 1951, which is based on a visit to the estate, and referring to the roads states:- "Furthermore, there are roads through the Estate (possibly as much as five miles in all) maintained by the owners, over which the public appear to have free access for all kinds of traffic."(Given in evidence by Mr. Winston on day 45 of the trial.)

(vi) Mr. Thomas Kilgallon who started as a cabin boy to Sir Henry Gore-Booth and ended as a private butler to him wrote a memoir of his time in Lissadell. Commenting on the roads and avenues on the estate, as they were *circa* 1900, he wrote:-

"The grounds, carriageways, avenues, and walks were beautifully kept. There were no carts allowed on the avenues, or in the woods. All timber cut had to be carried out of (*sic*) mens' shoulders to the carriageway. All around the house and glens were cut by the garden men with scythes. There were no lawnmowers then. The grounds, as now, were open to the public."

He mentioned then that there was "an old man kept on the carriageway all the year round, as well as several pensioners on the avenues". The carriageway may refer to the way in by the Main entrance, whereas the avenues were elsewhere on the estate. He goes on to specifically refer to "[t]he four mile private avenue (or drive) to Drumcliffe [which] was kept in good repair". "It had its drawbacks owing to the number of gates to be opened and closed". This might suggest that the other avenues were not private and had no gates. There was evidence also of a "Ladies Walk" which, presumably was reserved exclusively for the ladies. These two avenues are difficult to locate at this remove and they do not appear to refer to the routes at issue in these proceedings. Too much must not be read into these references, but it is fair to conclude:-

(i) The memoir does not say that all the avenues were private;

(ii) As the grounds were "open to the public" it is fair to assume that some avenues were also "open to the public";

(iii) It is not clear whether "open to the public" means that the users were permitted to be there or were there as of right.

84. The defendant also argues that there is significant other evidence which

supports an inference of dedication. First, it alleges that there was expenditure of public funds on the roadways in question. Second, it states that there is no evidence of any actual interruption of the public user at any time and, significantly, there is direct evidence of the assertion of public rights of way made explicitly to the plaintiffs' predecessors in title which assertions were accepted by those predecessors in title. Third, the defendant argues that the coast road, that is A to B to E, was recognised as a public highway in 1814 by members of the grand jury and the plaintiffs' predecessor in title, and the avenue A to B to E was again recognised by the plaintiffs' predecessor in title in 1967 as being an existing right of way when part at least was included as an objective in the Development Plan of that year. These additional matters will be addressed further below.

85. In the light of this evidence, it is now appropriate to examine in more detail the arguments advanced by the plaintiffs that the entrants to the estate were there by permission and that that there was no acquiescence by the owners.

IX. Permission?

86. In this context it is appropriate to distinguish permission from acquiescence. At the outset it should be noted that permission is a positive concept whereas acquiescence connotes a passive attitude. When a person comes onto my premises, he is permitted when I say or imply "You are permitted to enter". It involves knowledge of his impending presence at least and a positive decision on my part. Where I expressly voice my consent little ambiguity will arise as to the status of the entrant, provided I use unambiguous language. Permission, of course, may also be implied from my conduct. A gesture or a previous invitation may warrant such a conclusion. Since permission, however, involves a positive notion, silence without more on the part of the owner will rarely justify an inference of permission. This is because it is difficult to interpret silence *per se*, absent a further context, as amounting to an unspoken invitation such as "I permit you to come". This is especially so when there is an onus on the owner to object to the presence of the uninvited entrant. In this case silence is more likely to be construed as acquiescence.

87. In cases of long user creating a presumption, the concept of permission is addressed when the court is examining the *nec precario* element of the user. In the present case the defendant's witnesses have testified consistently that their user was not based on express (or implied) permission. It is only when *precario* (permission) is proven that the presumption of dedication will fail. In the case before the Court the plaintiffs cannot show express permission to such a large and disparate group and they are obliged to rely on implied permission. This is no light burden in the circumstances where there was no overt act to suggest a positive state of mind on the part of the owners. Apart from the objection that "general permission" is not what is at issue when the "*nec precario*" requirement is in question, it is difficult to see how, in such a situation, silence (passivity) justifies a conclusion of the active mindset required for "permission". I will deal in more detail below with the suggestion that because there were many permitted persons on the estate at the time, other entrants must be classified as being permitted also, as if the latter must necessarily take the colour of their status from the former.

88. The matter is made more difficult for the plaintiffs when the incursions onto

their property are so notorious and so frequent, that a prudent owner would be expected to take some positive action to repel the entrants by way of protection to his property in the circumstances. Failure to respond in such circumstances is a much more serious lapse since, in effect, the frequent incursions can be seen as a positive challenge which requires positive rejection. Silence in the teeth of that challenge is much more likely to be acquiescence, where no positive response is required, than permission where a positive mindset is necessary.

89. Acquiescence, on the other hand, is essentially a passive notion. As noted at para. 35 *supra*, the origin of the word is the Latin "*quiescere*" which means to rest. This, in turn, is derived from "*quies*" which means quiet. To remain quiet, therefore, when a response is required amounts to acceptance of the situation, and will have legal consequences.

90. In making a distinction, therefore, between "permission" and "acquiescence" in the context of a case like the present, what becomes critical in a determination is first, the nature of the user and second, the knowledge of the owner and finally, what the law would expect the owner to do to protect his property in the circumstances.

91. A word should be said about the word "tolerance" which sometimes features in the case law on this topic. It is sometimes said that abstention by the owner does not constitute acquiescence, but amounts only to "tolerance" or "neighbourliness", that is, something short of acquiescence. I do not find that the introduction of this additional concept facilitates clear analysis of the situation. In my view, one is either talking about permission or acquiescence and there is nothing in between. Tolerance is another way of saying that the owner's conduct is not acquiescence, but amounts to permission only. (See Lord Kinnear in *Folkestone Corporation v. Brockman* [1914] A.C. 338 where he equates "tolerance" with permission. Lord Roger in *R. (Beresford) v. Sunderland City Council* [2003] 3 W.L.R. 1306 stated quite clearly that failure to act on the owner's part to regulate the activities on the land justified an inference that the owners had acquiesced in the user and the same result followed if the owners had encouraged the incursions.) For this reason I eschew the word.

92. The above analysis is supported by the case law. The House of Lords has closely examined the *precario* element in user as of right in recent years in *R. v. Oxfordshire County Council, and Another, Ex. p.. Sunningwell P.C* [2000] 1 A.C. 335. Although concerned primarily with English statutory provisions, Lord Hoffmann, in particular, explained that these provisions were based on the original English theory of prescription (inherited by Irish law) and are based on acquiescence. Where the presumption of dedication based on acquiescence is to be dislodged by a claim of permission, this must be done by actual proof of overt acts which communicate that what is involved is permission, whether express or implied. In *R (Beresford) v. Sunderland City Council supra* at p. 1309 the House of Lords (per Lord Bingham of Cornhill), again addressing the concept of *precario* in the user as of right context, acknowledging that there could be an implied licence or permission, stressed that for such an implication to prevail, the owner must conduct himself in such a way as to make it clear to the inhabitants that he wishes to use the land for himself, or, must exclude, members of the public on occasional days (at p. 1309, per Lord Bingham of Cornhill). Lord Walker in the same case emphasises that the court must have regard to the overt conduct of

all parties involved, including the landowners, and stated that, where a piece of his land was being used as a footpath by the whole village and the land owner suffered in silence, he would be treated as having acquiesced in the activity. He confirmed that the basis of "user as of right" was acquiescence and this denoted passive inactivity, stating at p. 1329, that:-

> "In this area of the law it would be quite wrong, in my opinion, to treat a landowner's silent passive acquiescence in persons using his land as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct) to those persons."

93. The House of Lords in Beresford relied (at 1310) on its earlier decision in *Cumbernuald and Kilsyth E.C. v. Dollar Land (Cumbernauld (Ltd))* [1992] S.L.T. 1035 where it held that a landowner who remains silent in these situations cannot expect that his inaction will be ascribed to his good nature or to his tolerance.

94. Although *Beresford* and *Cumbernauld* were judgments relating to modern English legislation or Scottish law on prescriptive acquiescence, both are concerned with the concept of "user as of right" which is the type of user required to establish a public right of way in this jurisdiction.

95. Moreover, earlier case law clearly establishes that for "*precario*" or permission to be established, an overt act communicated to the public is required. Accordingly, in light of the user established by the defendant in this case, one cannot support a claim that "in the absence of resistance, the user resulted from the "goodwill" or "neighbourliness" of the owners of the day." (See *R. v. Broke* [1859] 1 F. and F. 513; *The Trustees of the British Museum v. Finnis & Ors.* [1833] 5 C. and P. 460, 465; *Barraclough v. Johnston* [1838] 8 Ad. & E. 99, 105). In *Trustees of the British Museum*, Patterson J. directed the jury as follows at p. 465:-

> "If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, would be entitled to pass over it, and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a lisence, he should do some act to shew that he gives a license only. The common course is, to shut it up one day in every year …" (at p. 465).

96. In *Barraclough* Little J. stated at p. 105:-

> "A man may say that he does not mean to dedicate a way to the public, and yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not. The facts may warrant them in believing that the way was dedicated, though he has said that he did not so intend: and, if his intention be insisted upon, it may be answered that he should have shewn it by putting up a gate, or by some other act."

97. These three authorities were relied on by Lord Hoffmann in *R. (Godmanchester T.C.) v. Environment Secretary* [2007] 3 W.L.R. 85 where it was held that even at common law an overt act which was brought to the attention of the users was required.

98. Courtesy and deference by the user, or respect for the owners as was evidenced in this Court, will not always weaken the claim that the user was "as of right". In *R. (Lewis) v. Redcar and Cleveland B.C. (No. 2)* [2010] 2 W.L.R. 653 where local residents using the disputed lands for recreational purposes stood back for golfers or waited to be waved through, it was held that this deference was not inconsistent with the user being as of right.

99. *Murphy v. Wicklow County Council* (Unreported, High Court, Kearns J., March 19th, 1999) was a case where there were facts which showed that what was involved was permission. In that case, however, there was direct and contemporaneous evidence of the actual intention of the State, since the Minister had publicly given consent in 1970 pursuant to s. 10 of the State Property Act 1954. In the circumstances, where the Minister had opened a trail to the public, at a public ceremony, it is not surprising that Kearns J., as he then was, found that consent and not dedication is what was involved. There is nothing in the learned judge's *ratio* to undermine the principle that where there is no such overt act, dedication will be presumed rather than permission. In his analysis, Kearns J. referred to *Director of Public Prosecutions v. Jones* [1999] 2 A.C. 240 where this principle was approved, but formed the opinion on the facts before him that there was in his case a public overt act communicated clearly to the users.

100. Most of the witnesses called by the defendant, however, stated that in all the time they were using the avenues at Lissadell, they were never challenged or prevented from doing so. Moreover, many witnesses said they met various members of the Gore-Booth family from time to time who acknowledged their presence and frequently exchanged pleasantries with them. There was never any question of resentment or hostility from the owners. One witness recalled being warned by one of the ladies not to pick the daffodils around the House while another said on one occasion, when he was near the House, it was indicated to him that the estate was private. It is significant, however, in relation to this last remark, that the defendant never claimed that the estate was anything other than private. The defendant's claim is that identified public rights of way exist over the private estate. In these circumstances, it is difficult to assume that permission was what was involved in all of these cases. The conduct of the users was so varied and the routes so many that to suggest that permission is all that was involved, is unconvincing. To cover the many and varied routes taken by the users would require such a general implicit act of consent that such "permission" would indeed be tantamount to dedication (See *R.(Beresford) v Sunderland City Council* [2003] 3 W.L.R. 1036, especially Lord Rodger at 1323 *et seq*. and Lord Scott at 1318-1320). In situations such as we have here, where permission is in question, it is normally communicated (expressly or impliedly) specifically to the persons benefiting and the purpose is normally clearly defined. In the facts of the present case, if as is suggested by the plaintiffs, permission is what was given, one might legitimately ask: who were the beneficiaries and what was being permitted? The notable lack of specifics in this regard scarcely suggests permission.

101. This point is illustrated by the plaintiffs' references to clear instances where permission was given by them at various times. The playing of football at the Burrows was by licence; access to the House since 1967 was permitted on

payment of a fee; the annual "shoots" held in January were clearly by invitation, as was attendance at the platform dances near the Water Wall held during the 1950s and organised by Aideen Gore-Booth. Permission was given for buses to travel down on the Forge avenue to the sawmills with employees for a trial period of one year in the 1940s. This permission was revoked after one year as Sir Josslyn concluded that the wear and tear on the avenue was too great. Scouts were permitted to camp during some summers in the 1950/60s, as were the army. Finally, and more formally, when Mr. Kelly leased buildings for the fish farm, he was specifically given a right of way to the oyster beds near the Coillte car park. These were all clear examples of permission: they related to specific activities and the beneficiaries were a clearly identifiable individual or group. To also suggest that the full range of conduct and various routes testified to by the defendant's witnesses could be described by the same word, is not convincing. In my view, if the owners allowed this conduct to such a broad range of unidentified persons, it could not be described as permission; rather does it justifiably attract the description of dedication. The plaintiffs have not, in my opinion, produced any specific evidence that general permission was given to the public during the relevant period. Had they done so, it is also likely that it would be construed as dedication. This is especially so when one recognises that they could so easily have clarified at any time to the public, by notice or by the closure of the gates one day a year for that purpose, that the public were there by permission only.

102. Interestingly, this distinction seems to have been appreciated by Mr. Wann, the artist who was a member of the so-called Lissadell Action Group who, when the plaintiffs took up residence, wrote to them seeking permission to continue to enter the premises to paint some of the nature scenes on the estate as he had been known to do by the previous owner Sir Josslyn. He appreciated that the consent given by Sir Josslyn was specific and not something granted to him in perpetuity. On the other hand, his user of the avenues, in his opinion, was of right. I mention this not to show that I am influenced by his subjective view of what he was doing, but to confirm that this view accurately reflects a distinction recognised by the law.

103. There can be little doubt, especially during the high point of the commercial activity on the estate at the beginning of twentieth century and until the death of Sir Josslyn (6th Baronet) in 1944 when approximately two hundred people were employed, that many people were on the property on lawful business. Tenants, employees, customers and other persons with business interests were not only permitted onto the property, but were invited to be there in furtherance of the owner's economic interests. All of these came for a specific purpose, but it is important to note that they too would be trespassing if they wandered off to picnic in the woods and fish in the streams without specific authority to do so. Mary Moffatt was warned, when on errands to the estate to buy vegetables, that she was not to go into the fields as it was a working estate. The customer who was permitted to go to the hardware shop on the estate at that time was not permitted to pick daffodils or enter the House. The workmen may have permission to attend the estate during work hours, but were they permitted to be there after work hours? Were members of their families permitted onto the estate during or after work hours? Were they permitted to picnic on the estate? There was no evidence before the Court that they were. On Sundays when the commercial activities were for the most part closed, there was no evidence that

anyone was permitted on the estate. Persons using the avenues at weekends must have been recognised by the owners as members of the public using the estate openly and without permission. When the plaintiffs suggest that the defendant's witnesses who testified as to user must take their classification from the many people permitted on the estate, they base their argument on the notion that such permittees suffer no limit on their licence and that their permission is general. It would be difficult to assume that persons with a limited licence (*e.g.* tenants) were permitted to use the estate as they saw fit and at all times. If a person comes to sunbathe at the Water Wall on a Sunday why should he be classified as being there by permission because the person alongside him is employed behind the counter in the hardware store from 9 a.m. to 6 p.m. on weekdays? There is no evidence before the Court that such an employee had additional permission to attend at the Water Wall, perhaps with his family, on Sundays.

104. I am satisfied to hold on the evidence that over the decades in certain specific cases noted above, the user may well have been by permission. But the evidence of user is much wider and relates to many uses other than these. The evidence was that many entered by Crushmore and walked, cycled and drove past point B and past the House, exiting at the main entrance at point C (See for example evidence of Susan Gilmartin, Cllr. Joe Leonard, Michael Carty, Mary Cadden); or that they turned at point B and exited through the Burrows or at the Forge entrance (See for example Martin Leonard, Susan Gilmartin, Ita Leyden, Michael Carty, Angela D'Arcy) There was similar evidence that some entered by the main entrance and proceeded past the House and went to the beach at the Water Wall (evidence of numerous witnesses) or exited at the Burrows (point E) (See for example evidence of Ita Leyden, Marie Leyden, Michael Carty, Peter Falla). Still others said that they entered at the forge entrance to go to the Water Wall (*e.g*. Marie Leyden, Mary Cadden, Pater Falla) or exited at the Burrows (*e.g*. Marie Leyden, Angela D'Arcy). This user was conducted at all times of the day and openly. The users frequently encountered various members of the Gore-Booth family, whom they saluted and with whom they exchanged pleasantries. Their presence was never challenged, they were never obstructed or prevented, and they were never told to leave the premises. They were not on these occasions there because they had specific permission.

105. In relation to these activities, since the plaintiffs have not shown that these entrants were covered by specific permission, they attempt to argue in a general fashion that all of these occasions, given that many entrants were from the locality were known to the Gore-Booths and had relatives or ancestors who previously worked on the estate, could be explained away as being consistent with permission. I am not impressed by this argument as many of the defendant's witnesses as to user were not contaminated by such familiarities, and further, the argument is based on an assumption that there can be some kind of permission which is general in nature covering all the activities described by the defendant's witnesses and which is extended to a broad, unidentified and unidentifiable class of entrant. In the present context, I am of the view that the *precario* required to undermine "user as of right" must be more specific than that, it must relate to a particular activity and be confined to a limited and identified group of people. Apart from some vague suggestions that the familiarities referred to above might in some cases suggest that there was

permission, the plaintiffs have not made out this argument to my satisfaction.

106. Further, if there was such general permission, why was it not publicised? From all the documentary evidence available, the plaintiffs have not been able to identify any such evidence from either the considerable volume of estate archives or from contemporaneous newspapers or commentaries. This is an argument which the plaintiffs advance when they urge the Court not to infer dedication, but if it has any force, and I am not certain it has, surely it applies equally to an inference of permission. I do not place much credence in a tourist leaflet published in 1952, which stated that "a pleasant walk may be taken by the curtesy of the owners". This was a tourist document and the authors were merely boasting of the charms of the county. The phrase used, in any event, is ambiguous: it could mean "permission" or "dedication".

107. Neither am I impressed by the objection advanced on behalf of the plaintiffs that because the owners could not readily distinguish those who were permitted onto the estate (employees, tenants and their families, customers, *etc.*) from those who had no such permission, that the latter, because they had mingled with permitted entrants, must be considered as being also covered by the permission extended to lawful entrants. As if, to avoid being covered by the permission given to lawful entrants, non-permitted visitors should wear some distinguishing cloak to identify themselves to the owner. This does not commend itself to me as an argument, not least because if it were accepted, any owner could resist an inference of dedication by merely showing that, at the same time as the non-permitted users were there, there were also some permitted users on the premises. Moreover, the logic of the plaintiffs' argument would mean that even trespassers, persons who came to burgle the House, for example, could claim respectability and permission, because they too mingled, effectively, with those entitled to be there. If an owner of land, allows large numbers of people to resort to his premises, some of whom are not permitted, the onus remains on him to disabuse them of any entitlement they might reasonably assume they have, by communicating that they are there with his permission or licence only, or that they have no right to be there at all.

X. Acquiescence?

108. The second way the owner can defeat an inference of dedication in these circumstances is to show that he has not acquiesced in (*i.e.* that is, that he has resisted), the user. Resistance in this instance indicates opposition and objection to the user, which if effective, means the user is not as of right. The acts of resistance, however, as already noted, must be overt acts which are communicated to the user. Secret or private acts of resistance will not suffice. It has been stated that the acquisition of public rights of way through user is a conversation between the public and the owner of the land. The public start the conversation by open user which asserts a right. The claim is only valid if it is openly claimed (*nec clam*). If the owner makes no response (acquiesces) the claim stands unchallenged. If the owner wishes to challenge the inference, he must also do so *nec clam*, that is in a manner that is externalised and communicated to the user. It does not suffice for the owner in the secrecy of his own heart to say to himself: "I am not dedicating a right of way to the members of the public who are traversing my land, however it may appear to the outside world". Neither is it sufficient to record his resolve (intention) in a private document which is only revealed many years afterwards. Equally, it will not be

sufficient to indicate his resistance to members of his family in private or to some other closed group of acquaintances or associates. The conversation demands that the challenge is made overtly and communicated to the public, so that the public, in turn, may challenge by way of reply or response, the owner's opposition (See Lord President Hope in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd.* 1992 SLT 1035, 1041; expressly approved by the House of Lords SC (HL) 44, 47). Nor should this be seen as a very onerous imposition on the owner, since his resistance can adequately be made by direct communication with the users, by placing unequivocal notices on the property or by locking the gates in the well recognised manner for one day a year. Unequivocal acts of resistance such as these are not only sufficient, but necessary to show that the owner has not acquiesced.

109. It is my view, therefore, that if the owner is to rebut the inference of dedication, he must do so in an explicit, unambiguous and overt way.

110. Whether the acts of resistance or interruption relied on by the owner are sufficient in law depends on the circumstances of the individual case. What is clear, however, is for such acts of interruption to rebut the presumption, the acts must be intended to prevent the users from coming onto the property, and must be effective in achieving their aim. Further, a failed attempt to prevent access, may be construed as a failed challenge which favours the persons asserting the claim. I must now consider in this context, the evidence relating to (a) the gates, (b) the erected notices and (c) the "obstruction" of two of the avenues by the owner. In addition, I must also consider certain statements attributed to the plaintiffs' predecessor in title, when responding to claims that such rights of way exist.

(i) Gates and Other Obstacles

111. There was conflicting evidence as to the existence of gates at the entrances to the estate. The vast majority of witnesses called on behalf of the defendant (more than twenty) gave evidence that they never saw any gates. A few said that there were no gates. They were unanimous, however, in stating that in recent decades if there were gates, the gates were rarely if ever closed or prevented access. Exceptionally, Aloysius Crawley, who at the age of 88 years was the oldest witness to give evidence for the defendant, said he remembered gates at the Crushmore entrance and at the main entrance, but added that they were also open at the time. Tom Stokes, a regular visitor from Dublin in more recent years, also remembered a gate at the Main Avenue, but did not recall gates at other entrances.

112. Several witnesses called on behalf of the plaintiffs recalled that there were gates at the Main Avenue (Nancy Farrell, her recollections stretching back to the 1930s and 1940s; Mrs. Florence Moffatt whose evidence related to the period "prior to the 1950s"; Noel Regan; Anne Farrell; Margaret Farrell; Charles Kelly; Leo Leyden and Bernard Barton S.C.).

113. Florence Moffatt also recalled a gate at the Crushmore entrance as did Ted Smith who, as already noted at para. 75, said he saw it closed in the mid 1940s when his father was taking him fishing. His father explained to him at the time that it was closed one day a year to maintain the owner's privacy. This was the

way owners restricted the public from acquiring rights.

114. Gates (and gate lodges) were also recorded at the Main Avenue and at the Crushmore entrance in the ordnance survey map of 1885. The ordnance survey map of 1910 revealed gates erected at the Burrows entrance and where the Burrows approached the old creamery, now the fish farm. Mr. Clarkin, from the boundary section of the Ordnance Survey, gave evidence to this effect and it was not challenged. These gates are further noted in the traces for the ordnance survey map in 1940 and on the map itself, when finally published.

115. From a review of all this evidence, I have reached the conclusion that there were gates at the main entrance and at the Crushmore entrance for a period prior to 1885. I also accept Mr. Nicholas Prins' evidence that he erected new gates south of the gate lodge at the main entrance in 1992 after the gate lodge was sold and that, some time prior to that, he also erected a gate at the Forge entrance. From his evidence also, it is clear that when he arrived in 1987 there were no gates at the Bunbrenogue river, at the Burrows or at the Forge entrance. Mr. Prins at that time erected four pairs of concrete piers: at the Coillte entrance (near the Water Wall), at the Forge entrance, at the Burrows entrance and between the fish farm and the Burrows entrance. These, however, did not have gates attached and Mr. Prins gave evidence that they were merely erected to define the boundaries of the estate, and not to support gates or other barriers. The evidence from the plaintiffs' witnesses, Nancy Farrell, Leo Leyden and Ita McMurrow Leyden, relating to the Burrows, was that there were what appeared to be farm gates on the Johnsport Avenue, after one passes the cottages towards the sea, which do not appear to be on the plaintiffs' land now, and also at the west end of the Burrows. The failure by the defendant's witnesses to notice these gates is, in my view, explained by the fact that for many decades, perhaps from the late 1950s, what gates were there were rarely closed. Remaining open against the hedges, in an estate that was rapidly being run down, they had become somewhat covered and partly concealed. There was no dispute that there was never a gate at the boundary between the plaintiffs' lands and the lands owned by Coillte, that is at the Bunbrenogue river.

116. I also accept, however, that there was evidence from many witnesses called for the defence, that their passage in and out of the estate was never obstructed by any such gates which were, in their experience (subject to what is said below), rarely closed and never locked. It appears to me that what is significant in the present case is not the fact that gates existed at one time at various entry points to the estate, but the fact that these gates were rarely closed since the 1950s and perhaps earlier, when it was known to all concerned that many unauthorised persons were coming onto the land. In this situation, where gates were left open, it is easier to infer dedication than if there were no gates.

117. I accept also, however, from the evidence given to the Court that there were a few occasions when some of the gates were closed and the plaintiffs rely on these occasional closures to show that the owners were asserting their right to do so and denying the right of the public to pass and repass at will.

118. This, according to the plaintiffs, is sufficient action on the part of the owner to show that there was no *animus dedicandi*. They cite the common law practice

of closing a road one day a year as a recognised method frequently used by landowners to prevent the acquisition by the public of a right of way. But for such an interruption to have this legal effect, the nature and purpose of the single act must be examined. The plaintiffs rely on *Poole v. Huskinson* [1843] 11 M. & W. 827, 828- 830 where it was indicated that, in seeking to ascertain the owners' intention, a single act of interruption by the owner should be given much more weight than years of enjoyment. On the facts of *Poole v. Huskinson,* however, an interruption was proven because, not only was there a notice specifically directing the public not to use the road as a highway, but also that a gate had existed so as to block access to the public way and that gate had stayed in position for several years.

119. When examining the legal effect of an occasional act of interruption, the clearest case is one where the owner erects a total obstruction (locks a gate, for example) and places a notice to the effect that the reason he is doing so for one day is to manifest his intention of interrupting the user to prevent an entitlement arising. To have such effect, however, the intention must be clear and the interruption must be total and effective. If the obstruction fails to prevent entry it will not be deemed to be sufficient. Likewise, if the intention to exclude the public is not clear and unambiguous, the inference that there was no *animus dedicandi*, may not be warranted. (See *Eyre v. New Forrest Highway Board* [1892] 56 J.P. 517).

120. The closure of gates so as to prevent cattle straying is not evidence of any interruption of public user. (See *Davies v. Stephens* [1836] 7 Car. & P. 570, *R. v. Bliss,* 2 Nev. P. 464 and *Carsons Conveyancing Statutes* at p. 54). In *Williams-Ellis v. Cobb* [1935] 1 K.B. 310, 327 Slesser L.J. stated at p. 327 that a fence placed for the purpose of preventing the straying of cattle did not constitute any interruption and, similarly, the placing of a bar across a way was not conclusive as it might also be there to keep cattle from straying. Likewise, in *Giant's Causeway Co. Ltd. v. A.G*. ([1898] 5 N.I.J.R. 301) in holding an obstruction insufficient, it was noted that a landowner who had erected a gate to prevent sheep from straying had left a wicket gate through which the public could walk. The court was also impressed by the fact that the gate itself had never in fact been locked.

121. From these and other authorities, it is clear that the provision of a gate in itself is not sufficient. To be effective there must be evidence that it was locked. On this reasoning it would also follow that the installation of cattle grids by Mr. Prins in the early 1990s, or the erecting of two white moveable barriers in 2003 to deter joyriders, which could be opened at will by any member of the public, could not amount to interruption of user.

122. For the same reasons, the closing of the gate at the Main Avenue to facilitate the woodcock shoots in January during the 1990s, or the occasional closure to allow felling of timber, both done for safety reasons, with alternative accesses remaining open, do not constitute an interruption of enjoyment by the public of their rights of way over the avenue. In the case of the shoots, it is also significant to note that the closure of the main gate was accompanied by a notice urging visitors to use the alternative entrances during the shoot. Similarly, when Ms. Gabrielle Gore-Booth closed some of the gates in 1956, her purpose was not to exclude the public, but rather to prevent a replacement

manager appointed by the wards of court office from taking up his duties.

123. That these isolated obstructions were not intended to prevent the public from using the avenues is supported by the fact that there is no evidence of any occasion, prior to the sale of the land to the plaintiffs, of a single person being turned off the lands or challenged as to their presence on the roads. One witness (Leo Leyden) called on behalf of the plaintiffs, did give evidence of having been stopped by Aideen Gore-Booth when he drove around the House, a practice of which she disapproved. The defendant, however, makes no claim of any public entitlement to drive around the House as distinct from driving past it.

124. My conclusion on this aspect of the case, therefore, is that while historically, there were gates at some of the entrances to the estate, since the late 1950s at least, many of these no longer exist; other entrances had no gates (*e.g.* the road at the Water Wall); the Forge entrance had no gates before 1989 *circa;* Mr. Prins erected new gates at the main entrance and at the Forge entrance only in 1989 and, further, the evidence was that the gate at the Forge was rarely, if ever, closed even after that. What occasional attempts were made to stop access was done not for the specific purpose of interrupting the user, but rather for other purposes of a temporary nature. Indeed, there was some evidence that when the Burrows was fenced off by Mr. Prins, the farm type gates that had been at the entrance were removed, presumably because the danger of cattle wandering was eliminated. It is also significant to remark that when this fencing was erected the fence was placed on the landward side of the Burrows so that the Burrows passageway remained open to the public. This fencing was clearly not intended to exclude the public from the estate, but to keep cattle in.

(ii) Notices

125. There was evidence that notices were put up on the estate in 1957 and more in 1996. The three notices erected in 1996 at the Burrows entrance, the Forge entrance and near to the Water Wall were worded as follows:-

Lissadell

Visitors should note

that this is a private

working estate. As such

we will not accept

responsibility for any

bodily injury or

damage to their

property sustained

on the estate.

Children should be

in the care of

a responsible adult.

126. In his evidence, Mr. Prins stated that these were erected in the wake of the Occupiers Liability Act 1995. This Act had been introduced to reverse the Supreme Court decision in *McNamara v. Electricity Supply Board* ([1975] I.R. 1) which recognised a duty of care on the occupiers of premises towards reasonably foreseeable trespassers. The farming lobby had been campaigning for an amendment to the law in this respect and, when the Act of 1995 was passed, it resulted in an easing of the law as far as occupiers were concerned. Even though the Act provided some comfort for occupiers, there was still the possibility of liability arising, and since notices were a possible defence for the occupier, the Irish Farmers Association (IFA) circulated a recommended wording for such notices. Sir Josslyn, when consulted, thought that the original wording in the notices was unneighbourly and only approved of them when the wording was considerably modified.

127. A close reading of the notice warrants some comment. First, it is clear that the notice is primarily concerned with the possible liability of the occupier for injuries which entrants to the property might suffer while on the premises. Second, while the description of "private working estate" is used in the notice, this is not at issue in these proceedings. The defendant is not alleging otherwise. Third, the notices do not say that the occupiers object to or prohibit entry onto their land. If that was the object, this could have been achieved by the use of unequivocal and direct language such as "Private Property. Keep Out." or "Do not trespass". Such a prohibition was not employed, however, and one must conclude that these notices were not concerned with keeping people out, but rather with trying to minimise the potential liability for any injuries incurred by such persons while on the property. As noted elsewhere, a member of the public had sued Sir Josslyn around this time for injuries sustained when he fell on the slipway. Contrary to what the plaintiffs argue, it is my view that these notices were erected in full recognition that many people were in fact coming onto the property in an uncontrolled manner at the time.

128. In a recent English case, *R. (Lewis) v. Red Car & Cleveland Borough Council* [2008] EWHC 1813 (Admin), the High Court considered a warning notice erected by a golf club in 1998, which was put forward by the golf club as evidence of lack of intention to dedicate. The High Court found that the warning notice to the users of the danger of being hit would not deprive the user of the requisite quality to make it user "as of right". It was prudent of the golf course in the circumstances to issue such a warning. Moreover, it was sufficient to note that the notice had no effect in deterring users and in these circumstances, the landowner might well be in a weaker position, since if interruption was the

objective, he had failed to do so. (By the time the matter came to the U.K. Supreme Court the focus had shifted to the issue of whether deference or civility by the user weakened their claim; see [2010] 2 W.L.R. 653. See also *obiter dictum* of Lord Walker in *R. (Beresford) v. Sunderland City Council* [2003] 3 W.L.R. 1306). Further, in *Moser v. Ambleside Urban District Council* (1924) 89 J.P. 59, affirmed in C.A. (1925) 89 J.P. 118, the landowner's tenant gave evidence that he had been in occupation for twenty years and that during that period the fastenings put on gates leading to the right of way were systematically broken. The freeholder had never taken steps to stop the trespass, and had never objected to user by the public. The user was found not to be permissive and, as the attempts to stop the user had failed, it was indicative of a public right of way. (See also *Eyre v. New Forest Highway Board* [1892] 56 J.P. 517).

129. The wording of the earlier notices erected in 1957 in Lissadell was not available to the Court, and, in the absence of such detail, it is difficult to draw any conclusions as to their purpose. In any event, the evidence is that they clearly did not have any effect on the users after their erection. The source of this information is a letter written on the 12th May, 1969, on behalf of the manager of the estate (Charles Caffrey) to Mr. Coghlan, solicitor for the ward. Denying that he had obstructed or discouraged tourists coming to Lissadell (the House was open to the public since 1967), he went on to describe Lissadell when he took over in 1957:-

> "To put you in 'Focus' I think I better start at the beginning. Just twelve years ago when I took over at Lissadell the late Mr. G. McGuire was a bit worried over the estate losing its privacy, in plain words it was gone into a 'Commons'. We agreed for a start that the best thing to do was to put up Notices giving the public leave to reach the Beach by the Front Avenue only, the rest of the avenues had notices, no admission except on business, two of the notices are still there. The late Mr. G. McGuire thought it better to take some precaution against trespass in case the Ladies would build up an excuse that the place was neglected and overrun. I was to report to him of any unnecessary trespass."

130. Clearly from this, it can be gleaned that in 1957 the estate had "gone into a 'Commons'" and there is a suggestion that what the solicitor for the ward was doing was attempting to close the stable door after the horse had bolted. Secondly, one notice purported to allow "the public" to access the beach *via* the Main Avenue. It was suggested that this was an attempt to sanction a user already established. The other notices seemingly were an attempt to prohibit "admission except on business".

131. Although two of these notices were apparently still there in 1969 when the letter was written, they did not survive and there is no other evidence as to the exact wording used in these notices or where they were located. Given the evidence from many witnesses, however, of the user throughout the 1950s up to 2003, it would seem that these notices had little effect in any event and for this reason should also be interpreted as a failed attempt by the owners to interrupt the user. In any event, if the 1996 notices, already mentioned were intended to replace the earlier notices, it might reasonably be suggested that they were also concerned with limiting the potential liability of the owners for injuries to users

while on the premises, rather than with prohibiting access; or, even if phrased as Mr. Caffrey suggested, they were replaced in 1996 by a more benign attitude to entrants. Mr. Prins' evidence, it will be recalled, suggested that Sir Josslyn asked that the original wording be toned down as it was "too aggressive".

132. Moreover, it is significant to mention that Dr. Costello, who researched exhaustively the papers relating to Lissadell and who gave evidence of the many legal threats and actions taken on behalf of the owners against the tenants and other people during the course of the nineteenth century, failed to find one single example of an action brought for simple trespass during that entire period. Most of the actions brought during that period were brought against poachers or other persons trying to remove material (*e.g.* turf) from the estate. The defendant sought in its discovery any evidence of obstructions or interruptions to the user, but the plaintiffs produced no documentation in relation to same.

133. Evidence of continued user after these notices were erected includes correspondence which suggests that Mr. Caffrey, manager of the estate, attempted to stop C.I.E. buses accessing the beach in 1969 and that the bus drivers defied him. Similarly, when Mr. Caffrey attempted to stop the Yeats Society from entering on the avenues after the House opened to the public in 1967, the chairman of the society also ignored him. Mr. Coghlan, solicitor for the ward, did not seem to be unduly concerned about this and his concern at the time was to secure the necessary funding to maintain the avenues from public funds, thereby protecting the limited assets of the estate for the ward.

134. My conclusions on the notices are therefore as follows. The notices erected in 1957 were put up because the place had "gone into Commons". The wording of the notices is not available, but it is suggested that they provided that there was no admission except on business. No witness gave evidence of having seen these notices or of the exact wording used. They may not have survived for long and certainly they were not there when Mr. Prins took over in 1987. The evidence is that they had little or no effect on stemming the flow of persons coming onto the estate and that those who entered in spite of the notices were never challenged. The notices erected in 1996, in the wake of the Occupiers Liability Act 1995, and after Sir Josslyn had been sued by an entrant for injuries suffered at the slipway near the Water Wall, suggest acquiescence to my mind and, in any event, do not seem to have had any effect in reducing the numbers resorting to the estate.

(iii) Removal of Obstructions

135. The defendant claims that on two occasions, when obstructions were placed on the avenues, members of the public objected and caused them to be removed. There were two separate incidents which the plaintiffs rely on to indicate the owner's intention to interrupt the user and I will now deal with these separately. One was when Mr. Prins placed builder's rubble at the Forge entrance in 1993 and the second was when a tree fell in the Main Avenue and lay there for some considerable time in or around 2002.

(a) 1993 – Rubble at Forge

136. The first incident occurred in 1993. Mr. Nicholas Prins, who was managing

the estate at the time, dumped some building rubble and concrete slabs at the Forge entrance, thereby obstructing entry to the estate at that point. Some "hippies" or "new age travellers" had been camping further down towards the sea on the public road and he wanted to ensure that they would not trespass onto the estate. Local residents objected to the obstruction and gathered with shovels and machinery to remove the rubble by force. Cllr. Leonard advised against confrontation and requested Mr. Prins to give him Sir Josslyn's phone number in England so that he could speak directly with him. On telephoning Sir Josslyn, he explained the situation and told him how upset the local people were at this development. Cllr. Leonard's evidence was that Sir Josslyn said, "he would speak with Mr. Prins". Counsel for the plaintiffs objected to the admissibility of this evidence on the grounds of the "hearsay" rule. I will deal with the admissibility issue below.

137. Mr. Prins could not recall the details of the incident and so was not in a position to contradict Cllr. Leonard's version of events, which I accept. In any event, the rubble was removed shortly thereafter without incident and access was restored. Mr. Prins said that the Forge Avenue was allowed deteriorate afterwards to discourage access. The evidence of the witnesses called by the defendant on this issue indicates that, although the obstruction was not put there to obstruct normal access but to prevent squatters, when challenged, the obstruction was removed promptly. The incident was fully reported in the Sligo Champion at the time and Mr. Prins accepted that it was an accurate account as to what transpired. I refer, in that regard, in particular to the following extracts:-

> "Residents living near the Lissadell estate…are set to wage a battle in order to have a right of way re-established….Residents say the route through the Lissadell estate has existed for as long as they can remember. It is a convenient road for them to take to the sea and onwards to Carney… 'That right of way has been open for at least one hundred years and this was a very quiet area until all this started' said one resident…. 'All the residents are seeking is the right to pass and re-pass. They want unimpeded access that was there traditionally. They do not want trouble.' said Councillor Leonard."

The report, which Mr. Prins said in evidence was accurate, continued:-

> "Lissadell Estate Manager, Nicholas Prins told 'The Sligo Champion' that he had received no complaints in relation to the placing of the obstacles on the avenue and would be willing to discuss the situation with locals. He said the main reason the avenue was blocked was because of concern about the new age travellers…Mr. Prins said there were three avenues into Lissadell and he wasn't attempting to block anyone's access to the sea. 'I would be quite happy to discuss the situation with anyone. I'm not trying to close the place up at all. At the time I thought it was prudent to do what I did."

(b) 2002/03 – Removal of Tree by Sir Josslyn

138. The second obstruction occurred in 2002 to 2003, when a large tree near the House fell across the Main Avenue and remained there for many months (various witnesses testified to periods of between two and eighteen months). Cllr. Leonard said he recalled the tree, but said that one could drive around it by

going onto the grass and it never prevented him from driving through. Some locals, who live near the main entrance (*i.e.* near Palmers Lodge) and who were concerned, called a meeting at which Cllr. Leonard was asked to speak to Sir Josslyn, who resided in the House at that time. He agreed to do so, and he took Mr. Carney with him as a witness. When they called by appointment, they were received with courtesy, and after hospitable pleasantries, the conversation turned to the tree. An employee of Sir Josslyn outlined some of the problems they were having on the estate and complained, in particular, of late night visitors and some joyriders. Cllr. Leonard offered to convey the complaints to the gardaí the next time he was in Sligo. After more discussion, when Cllr. Leonard emphasised the inconvenience for neighbours passing through the estate from the main gate to the sea and the interruption of their right of way, Sir Josslyn, according to Cllr. Leonard, said, "I'll see what I can do". Mr. Carney corroborated Cllr. Leonard's evidence in this regard and he said, in addition to saying that "He would see what he could", Sir Josslyn added that he did not wish to fall out with neighbours. In any event, the tree was removed some days later, and the avenue was cleared for free passage.

139. How is one to interpret these two incidents? Even without the evidence of Sir Josslyn's comments, the admissibility of which is dealt with below, the defendant argues that the removal of both obstacles subsequent to representations clearly indicates that Sir Josslyn recognised the rights of the public in both cases. The plaintiffs, however, argue that the conduct of Sir Josslyn in acceding to the request merely suggests courtesy and neighbourliness and no more. Clearly, when the Forge entrance was blocked, the local people were willing to assert what they considered to be their rights, by force if necessary. The owner capitulated when confronted. On Mr. Prins' own evidence, the obstruction was never intended to prevent people getting to the sea at Lissadell in the first place and, in any event, the owner conceded to their demands when confronted with their claim. I cannot accept that the obstruction was removed as a gesture of neighbourliness only. It was either a clear acknowledgement of the claim to a right of way being made by the locals or a failed attempt to interrupt.

140. In relation to the tree, this was not an intentional obstruction put there by the owner to prevent access to the estate. At most it was a failure by the owner to remove it once it fell. Once more, however, when an issue was made of it and rights of way were mentioned, it was quickly removed. The alacrity of the response might also have been prompted by memories of the events at the Forge entrance some ten years earlier.

141. In my view, neither of these events support the plaintiffs' case; rather they are supportive of the defendant's claim that rights of way existed, and these were acknowledged by the owner when asserted. This conclusion is justified even if the statements of Sir Josslyn are not admissible as evidence. As will be seen later, I have concluded that these statements are admissible as evidence, not only of what Sir Josslyn said, but also evidence of the *gestae* and, although not without ambiguity, I have formed the view that they are more supportive of the defendant's case than of the plaintiffs' claim. That the exchanges were conducted with courtesy does not weaken this as a legal conclusion. In my view, both of these incidents must be seen as a positive assertion by members of the public of a right to pass over the avenues in question and an insistence that the

obstacles be removed. In the case of the first challenge in 1993, the local response was immediate and force was contemplated. Perhaps this was because the rubble was deliberately put there and passage was very difficult, if not totally prevented. In the second incident, the obstruction was unintentional and was not total. The earlier experience reassured those affected that it would be removed when requested. This is in fact what happened. I do not accept that in either case the owner's response can be interpreted as a gesture which, since it was preceded by a courteous request, amounted to nothing more than permission. From any view, what occurred in both cases must be seen as a direct challenge to the owner's title, and his response, involving positive action in both cases, can only be interpreted as an acknowledgement of the claims asserted. It certainly did not amount to interruption of user; it was undoubtedly acquiescence.

142. Finally, the remarks of Sir Josslyn on these occasions (which I am prepared to admit), though somewhat ambiguous in the language used, are significant since rights of way were specifically claimed in both cases and Sir. Josslyn did not challenge the claims in either case, something which one would expect him to have done, if he believed that no such rights existed. I will now examine the admissibility of these statements of Sir Josslyn.

(iv) Admissibility of Statements of the Present Sir Josslyn

143. Cllr. Leonard gave evidence that when he spoke to Sir Josslyn on the phone in 1993 when rubble was placed at the Forge entrance, he explained that the local people were concerned that the rubble and some boulders "had blocked what was their right of way". He told Sir Josslyn that the local people wanted the obstacles removed and if it was not done, it was their intention to remove it themselves. In reply to a question from counsel, Cllr. Leonard stated:- "Sir Josslyn said he would talk to Nicholas [that is Nicholas Prins – his manager] about the matter."

144. Cllr. Leonard gave evidence that he also contacted the gardaí and the local newspaper because he felt that it should be done in "full knowledge of Nicholas and that [he] had spoken to Sir Josslyn Gore-Booth and it was important that the gardaí and the local press should know". In any event, the rubble was removed "a very short number of days after that". No subsequent effort was made to block this entrance and it remained open until very recent times after Sir Josslyn had sold the property to the plaintiffs in 2003.

145. A second incident occurred in 2003 when Cllr. Leonard and Mr. Carney went as a deputation to see Sir Josslyn in Lissadell House. Cllr. Leonard told Sir Josslyn that the locals were concerned "that their right of way was being blocked and that they asked that this tree would be removed so that they could again use the road as they had always done". Sir Josslyn's response, according to Cllr. Leonard, was that "he would see what he could do". The meeting was amicable. At some stage, Sir Josslyn requested his manager to join the meeting. The tree was removed two days later. The Main Avenue remained open until the plaintiffs blocked it in the early part of 2004.

146. Mr. Michael Carney, who accompanied Cllr. Leonard to this meeting, corroborated what Cllr. Leonard said. He also specifically said that "people were annoyed that their right of way was blocked". He concluded:- "The meeting finished on a pleasant note. We asked Sir Jossyln if he could remove the tree. We were very anxious that the tree be removed. And Sir Josslyn said he would see what he could do. He said he didn't want to fall out with his neighbours. He said he always had good relations with his neighbours." He also said that the tree was cut up and removed within a few days.

147. The evidence of these two witnesses was not, in my view, seriously undermined in cross-examination and, since they were the only witnesses called who could give evidence on these events, I accept the evidence as a true account of what happened.

148. I note, in particular, that both witnesses gave evidence that "rights of way" were mentioned to Sir Josslyn, that he in no way took umbrage at the claim and that the obstacles were removed very shortly thereafter. This, in my view, is significant evidence in itself.

149. The question then arises as to whether Sir Josslyn's responses in each case are admissible as evidence given that they are hearsay. Before diverting to the legal question of admissibility, it is appropriate that I should also refer to the evidence of the county manager, Mr. Kearns, which is also challenged in part on hearsay grounds. Sometime in the autumn of 2003, Sir Josslyn invited the county manager to Lissadell to inform him of his decision to sell and to enlist the manager's support for a purchase by the State. Present at the meeting also was Hugh Hamilton who was Sir Josslyn's auctioneer and/or agent. At the end of the meeting, the manager said he asked, to the best of his recollection, "What about the rights of way?." When asked what happened then, Mr. Kearns responded:- "I recollect the two gentlemen looking at each other and I recollect Sir Josslyn saying something to me and again I can't recollect the exact formula of words but it was something such as "we are not making any assertion or any statement about rights of way"". Immediately after that Mr. Kearns said, "I can't recollect the exact words but certainly my clear recollection leaving the meeting was that he was leaving the position open. And he certainly wasn't saying that there were no rights of way." The admissibility of Sir Josslyn's statements on that occasion is also challenged.

150. It is appropriate to mention that Sir Josslyn is alive but did not give evidence; he lives outside the jurisdiction. The other witnesses to these conversations were not called by the plaintiffs.

XI. Exceptions to the Hearsay Rule

151. There are two commonly accepted exceptions to the hearsay rule. These are:

(i) admissions; and

(ii) statements by deceased.

Only the first of these categories concerns us in this case.

152. An admission is a statement made by a party which is adverse to his or her case. As stated by Ó Dálaigh C.J. in *Bord na gCon v. Murphy* [1970] I.R. 301, 310, although in the context of criminal proceedings and ultimately finding that the statements in question were not in fact admissions:-

> *"[T]he only admissions which are admissible in evidence as exceptions to the rule rejecting hearsay are such admissions as are declarations against interest or, as these are sometimes called, disserving statements."*

Classically, admissions are admitted on the basis that, at least in the context of criminal proceedings:-

> *"[I]t is fairly presumed that no man would make such a confession against himself if the facts confessed were not true." (per* Goose J. in *The King v. Lambe* (1791) 2 Leach 552, 555)

153. There are essentially three species of admissions: (a) express admissions; (b) admissions by conduct; and (c) vicarious admissions. The first of these is where a party, orally or in writing, makes a statement which is adverse to his or her case. Whether a statement is in fact an admission is a matter for the court to decide, having regard to the words used, the context in which the statement was made, and all of the surrounding circumstances (see *Vandeleur v. Glynn* [1905] 1 I.R. 483, 506-507). Again in a criminal context, this can be demonstrated by the accepted admission in *People (D.P.P.) v. Pringle* (1981) 1 Frewen 57, 76, where the accused stated:-"*I know that you know I was involved, but on advice of my solicitor I am saying nothing and you will have to prove it all the way*." From the context of the statement, the Court considered that this amounted to an admission on the part of the accused. Moreover, the whole statement of which the admission forms part may be adduced in evidence, including those parts which are favourable to the party making the statement. As stated by Abbott C.J. in *The Queen's Case* (1820) 2 Bro. & Bing. 397:-

> *"The conversations of a party to the suit relative to the subject matter of the suit are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole of which was said in the same conversation: not only so much as may explain or qualify the matter introduced by previous examination but even matters not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion."*

(See also, in the context of civil proceedings, *Smith v. Blandy* (1825) Ry. & Mood. 257; *Capital Trust Co. v. Fowler* (1921) 64 D.L.R. 289; *Albert v. Tremblay* (1963) 49 M.P.R. 407.)

154. Admissions may also be made by conduct, both in the form of actions or omissions. In *Morrissey v. Boyle* [1942] I.R. 514, the Supreme Court considered circumstances where, following the birth of the applicant's child, a paternity issue arose. Sullivan C.J. noted at p. 523:-

> *"[T]he only reasonable interpretation of the appellant's evidence is that in the interview in question she charged the respondent with the paternity of her child… If such a charge was made, then the fact that the respondent did not repudiate it in the presence of the appellant's father, but made an appointment to meet him on the following night, obviously with the object of discussing the matter, is to my mind a most material circumstance from which the more probable inference is that the charge was well founded."*

The majority of the Supreme Court thus felt that the conduct of the defendant was capable of providing corroboration of the evidence of the mother.

155. The rationale behind this can be seen in the maxim *qui tacet consentire videtur, ubi tractatur de ejus commodo:* he who is silent is deemed to consent, when his interest is at stake. This principle proceeds on the basis that where an innocent person is accused the natural reaction should be to protest. As stated by Cave J. in *R. v. Mitchell* (1892) 17 Cox C.C. 503, 508:-

> *"[W]hen persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."*

156. Of course in criminal proceedings different considerations apply given the constitutional right to silence enjoyed by suspects (see *Heaney v. Ireland* [1994] 3 I.R. 593; *People (Director of Public Prosecutions) v. Finnerty* [1999] 4 I.R. 364) and even in civil proceedings not all silence will amount to an admission; the circumstances must be such that the party accused would reasonably be expected to deny the accusation (*Cleeland v. M'Cune* (1908) 42 I.L.T.R. 202, 203). Thus, for example, in *Wiedemann v. Walpole* [1891] 2 Q.B. 534, failure to reply to an accusatory letter did not constitute an admission (see also *Thomas v. Jones* [1921] 1 K.B. 22). Nonetheless, where a person's right is put in issue, especially where third parties are aware and they do not reply to such accusations and their conduct in fact supports the accusations, this is an admission which may be admitted in evidence. That of course is not to say that it is conclusive evidence, merely that it is admissible and may be taken into account as part of the overall evidence in determining whether the accusation as put and later litigated is correct.

157. Up to this point, I have focussed on the concept of admissions as made by a party to proceedings. This is not the case here, however, nor is it in fact alleged to be. In general, a party will not be bound by an admission made by another person (see *Foster v. McMahon* (1847) 11 Irish Equity Reports 287, 299; *Tucker v. Oldbury UDC* [1912] 2 K.B. 317). Where, however, there is some privity of interest between the party and the person who made the statement, the admission of the latter may, in some circumstances, bind the former. There are essentially three categories of person who have been considered to have the requisite privity to make such attribution: (i) predecessors in title; (ii) agents; and (iii) partners. Only the first of these need concern us here.

158. A statement against proprietary interest made by a predecessor in title of a party is admissible against the latter provided it was made at a time when the declarant had an interest in the property (see *Woolway v. Rowe* (1834) 1 Ad. & El. 114; *M'Kenna v. Earl of Howth* (1893) 27 I.L.T.R. 48; *Evans v. Merthyr Tydfil*

UDC [1899] 1 Ch. 241; and more recently in relation to declarations concerning planning permission *South Dublin County Council v. Balfe* (Unreported, High Court, Costello J., 3rd November, 1995)). In *Falcon v. Famous Players Film Co. Ltd.* [1926] 2 K.B. 474, 488, a case involving a claim to the copyright of a play and certain letters written in relation thereto, Bankes L.J. stated:-

> *"The question then arises whether that letter is admissible. I should like to take the rule of law from Wills on Evidence [fn. 2nd ed., p. 173], where it is said: "The same principle" – that is as to the admissibility in evidence of admissions – "has also been extended to statements affecting property, made by predecessors in title of the parties. Any statement made by the possessor of property of any description tending to limit in any way the complete and unfettered ownership thereof by him is deemed an admission, which may be given in evidence against any party who subsequently becomes entitled to it.""*

159. Thus it is clear that where a predecessor in title makes statements which, if that predecessor was a party to the action, could be considered to be admissions, these will bind those with subsequent title in the property and may be admitted as evidence in an action against him or her.

160. In the present case, there were a number of alleged admissions made by Sir Josslyn. There is no doubt that if these amount to admissions they may be entered in evidence as inferences against the current plaintiffs' proprietary interests. The question is thus whether each statement and the conduct surrounding it can be considered to be admissions.

161. I must now consider these principles in the context of the three "admissions" made by Sir Josslyn. In relation to the discussion between Cllr. Leonard and Sir Josslyn in respect of the rubble at the Forge entrance, it is clear that Sir Josslyn did not take issue with the description of the route as a "right of way" made in a public context. Furthermore, it is not disputed that following this discussion the rubble was quickly removed and the route again made passable. In my view, this gives rise to an inference that Sir Josslyn, when he said he would speak to Mr. Prins, admitted the existence of a right of way. This is, therefore, an admission by a predecessor in title which is admissible as evidence inferring the existence of rights of way along the Forge entrance.

162. The second incident, when Cllr. Leonard and Mr. Carney went to see Sir Josslyn to have the tree removed from the Main Avenue, also involved mention of the local's "right of way … being blocked". Again Sir Josslyn did not appear to take issue with such a description, and again the route was cleared forthwith. These events and the statement that he would see what he could do are also admissions made by the plaintiffs' predecessor in title and are admissible as evidence in this case in relation to the Main Avenue.

163. The final incident, where Mr. Kearns asked Sir Josslyn and his auctioneer "What about the rights of way?", and Sir Josslyn replied with words to the effect that "We are not making any assertion or any statement about rights of way", although certainly weaker that the previous incidents, is nonetheless a situation in which, a denial by Sir Josslyn might reasonably have been expected. It is, therefore, in my opinion, an admission that gives rise to an inference that Sir

Josslyn at least had some concerns as to rights of way over the estate and it is admissible in this regard.

164. In the final analysis, it is incontrovertible that Sir Josslyn, the plaintiffs' immediate predecessor in title, when it was put to him that there were public rights of way on the estate, failed to assert that no such rights existed. In two of these incidents, the incident at the Forge in 1993 and the removal of the tree in 2003, the assertions could only be seen as direct challenges and yet, not only was there no denial, but the response in each case could only be seen as acquiescence. In the third instance, when the county manager raised the question of rights of way in late 2003, again Sir Josslyn's response did not amount to a denial. This response was not a casual one and was made to a person of political significance and whose assistance Sir Josslyn thought prudent to enlist in trying to persuade the Government to purchase the estate. It was also made in a confidential setting where the only other person present was Sir Josslyn's estate agent/auctioneer.

165. Finally, the statutory declaration, given by Sir. Josslyn at the closing of the sale to the plaintiffs, was carefully crafted by his lawyers and cannot be interpreted under any circumstances as a clean bill of health. It did not deny the existence of public rights of way; all the vendor was prepared to say by way of comfort to the purchasers was the following:-

> "The vendor is not aware of any public dedicated right of way over the property which is registered with Sligo County Council and/or any specific right of way over the property which serves any adjoining property save those already disclosed".

166. We can only assume that in accepting such a limited assurance, the plaintiffs' were prepared to take the risk.

167. As stated above, however, the mere admission of the above statements is not determinative evidence as to the existence of rights of way over any of the aforementioned routes or the estate in general. Instead, they create further inferences which form part of the overall tapestry of the evidence in this case, which must be weighed up and measured against all other circumstances and evidence as presented *in toto.*

XII. Inclusion in Sligo Development Plan 1967

The County Development Plans

168. The defendant pleads that a right of way was mentioned in the draft development plan of 1967 and also featured in the development plan when passed in December, 1967. Such a record, it is argued, is evidence that goes to reputation of the route as a highway.

169. The development plan was provided for in the Local Government (Planning and Development Act) 1963 ("the Act of 1963"), and its purpose was to enable the council, as planning authority, to set out the principles and objectives that governed planning in its area for the period of its existence, usually five years. (The Act of 1963 has been repealed by the Planning and Development Act

2000.)

170. The draft development plan of 1967 specified a public right of way in Lissadell as an objective, under the heading the "Creation and Preservation" of public rights of way. The route was marked on a map which accompanied the development plan.

171. The council served, in accordance with s. 21(1)(d) of the Act of 1963, notice on the committee of the ward on the 15th June, 1967, that the draft development plan included as an objective the "preservation of the public right of way from county road 239 at Lissadell to beach at Lissadell, as shown in red on the attached map". Apparently, the heavy line shown ran from Crushmore Lodge on the east of the map from road 239 (now county road no. 347) westwards along the sea, past the Alpine Gardens and stopped abruptly on Lissadell land at no obvious terminus close to the point B on the map used in evidence. Much of the line passes over what, since 1968, is now Coillte land. The general solicitor, on behalf of the ward, questioned whether the route shown on the map was a public right of way and, in response, the official dealing with the matter on behalf of the council stated that the way was open to the public for twenty years without hindrance and that such a right of way included vehicular use, and further, that the Gore-Booths had unsuccessfully attempted to prevent the public use of the "lane." The response, however, did not address the question also raised as to whether the council assumed responsibility for upkeep of the way.

From the oral and documentary evidence I can make the following findings:

(i) From the official public documents, it is clear that the statutory notice to the committee of the estate of the ward of court specifically referred to the "preservation" of the public right of way;

(ii) The notice also referred to a right of appeal to the Circuit Court. This is provided for in section 48 of the legislation for cases where the objective is the preservation of public rights of way. Where the object is the creation of a public right of way, the appeal is to the Minister for Local Government.

(iii) The statutory notice was accompanied by a map which showed the right of way as starting at the Crushmore entrance and ending at a point west of the Alpine Garden; the map is also clearly headed "preservation of right of way to Lissadell beach";

(iv) The draft development plan was adopted by a resolution of the council at its meeting of the 18th December, 1967, without any amendment regarding the preservation of the right of way to the beach at Lissadell. The right of way was marked 'G1' on the accompanying map;

(v) A two month period was afforded, prior to adoption, so that the draft development plan could be considered at local level in

the four electoral areas in the county. Several amendments were suggested as a result of these deliberations and the draft development plan was modified accordingly. There were, however, no amendments relating to Lissadell or to the Lissadell right of way in the final development plan;

(vi) There were no objections lodged in relation to the right of way at Lissadell, even though, the general solicitor for the ward was specifically notified of the draft development plan. He did raise some queries in correspondence to which he received an unsatisfactory reply, but he accepted the response and never objected to the proposal as he was entitled to do;

(vii) As the committee of the ward, having received authorisation from the High Court on the 31st July, 1967, was negotiating at the time with the Land Commission for the sale of a portion of Lissadell estate, the general solicitor properly forwarded the statutory notice to the Forestry Department as purchasers. Much of the right of way to be preserved in the draft development plan was over land that was to be transferred to the Forestry Department (the Land Commission section). They confirmed that they had no objection, and that they would not in fact wish to interfere with a public right of way which was already in existence; and

(viii) The trustees of Lissadell estate, having consulted with the members of the Gore-Booth family living in the House, explicitly consented to the inclusion of the public right of way in the development plan.

172. The plaintiffs challenge the reputational value of the inclusion of the Lissadell right of way in the development plan of 1967 on a number of grounds. They do so primarily by forensically examining the reasons why Mr. Harney decided to include the right of way in the draft development plan at the time. Mr. Harney was the official in the council principally responsible for drafting and steering the first development plan under the Act of 1963 to completion. By undermining the process leading up to the inclusion of the Lissadell right of way, the plaintiffs hope to show that the reputation that such a right of way existed was false and unmerited.

173. The plaintiffs suggest in the first place that Mr. Harney was a relatively junior officer in the council in 1967 and that his knowledge and appreciation of the legal nature of rights of way was limited, as was his personal knowledge of what was happening at Lissadell. It must be acknowledged, however, that the Act of 1963 was a novel and radical departure at the time and the development plans of 1967 were the first to be introduced throughout the country. To facilitate the process, the responsible government department held seminars and conferences throughout the country for local government officers and distributed templates of standard notices and letters to be used in the process. Mr. Harney was also very conscious of a circular letter dated the 29th March, 1966, from Minister Neil Blayney, which said "he [the Minister] was seriously concerned about reports of interference with established public facilities or

access to or use of beaches or other seaside amenities". Mr. Harney said this "was hammered home to us at the time".

174. In addition to his personal use and observations of Lissadell, Mr. Harney also relied on information gleaned from two road overseers who worked with him and who accompanied him when driving through Lissadell. These were men who knew the locality well and who would have said to him that he was not allowed to go in there, if that was the case. The plaintiffs suggest that this is consistent with permissive user and also point out that Mr. Harney did not make further independent inquiries or carry out research of the council's archives which, had he done so, might have caused him to investigate the matter further.

175. The plaintiffs also emphasised the level of confusion that is evident in the internal correspondence of the council at the time. There appears to be no appreciation that the statutory notice to be served under s. 21(1)(d) of the Act of 1963 was necessary only where the draft development plan contained an objective to preserve a public right of way; moreover, it was not intended to be notice of "a provision for the preservation of a public right of way," as the notice stated. In reply to an inquiry from the general solicitor, a member of staff in the council suggested incorrectly that user for over twenty years without hindrance was what was required to create a public right of way. In fact user for a lesser period could suffice in some cases. Moreover, the plaintiffs argued that the council's contemporaneous file suggested that what was intended in the development plan was the *creation* of a public right of way and not the preservation of a public right of way. This is clearly contradicted by the wording of the first notice and the map attached thereto, as well as by the reference to an appeal being available to the Circuit Court. As already noted where the creation of a public right of way was involved, the appeal was to the Minister for Local Government.

176. There was also an internal memorandum in which the assistant county engineer mistakenly located the right of way in question at a point near the football pitch and the handball alley to the west.

177. The solicitor for the council at the time doubted that there was sufficient evidence to assert the existence of a right of way and suggested that, in the absence of further evidence, it might be more appropriate to have such a way "created" instead. Because of the wording used in the draft development plan, this might not have involved any change in the text, and no notice was required under the legislation when the question was the creation of a public right of way. In spite of this, however, this does not appear to be what happened. In a note to the chief assistant county engineer dated 16th November, 1967, one month before the draft development plan was adopted by the council, Mr. Harney, presumably aware of all this correspondence, made the decision when he said that all the rights of way referred to in the draft development plan "can be included for preservation," except for one, which was not the Lissadell right of way. In spite of this, and in spite of the making of the development plan in December, 1967, the right of way to Lissadell beach was marked on the final map attached to the plan in a manner which, according to the legend of the map, indicated it as a "right of way establish".

178. The plaintiffs also argue that the council has not spent any money on this

road as it would be obliged to do were a public right of way to exist, but this is not in accordance with the evidence given by Mr. Crawley, who worked for the council for about ten years from 1977 to 1987. He testified that he and two others worked for about three weeks around 1979/80, restoring not only the curved section of the Water Wall which had been seriously damaged by the sea, but also the straight part of the Wall. Mr. Crawley clearly identified that the wall he worked on was on the property now belonging to the plaintiffs. When he was asked in cross-examination whether the Gore-Booths paid the council for the work, the witness said he did not know. The plaintiffs did not furnish any evidence that they did.

179. In spite of all the uncertainty evident in the correspondence of the council prior to the adoption or making of the plan, the fact remains that Mr. Harney's evidence was that he intended to preserve the right of way and that everyone involved knew that is what was at issue was the preservation of a right of way. I have no reason to reject his evidence on this aspect of the matter. Moreover, although the plaintiffs' predecessor in title and the general solicitor were fully alerted, they made no objection and did not appeal when the plan was adopted. Neither was any objection made by the Department of Forestry (the Land Commission) or by any other person. This must be interpreted as something tantamount to acquiescence in the circumstances. I say this because the arguments put forward now by the plaintiffs were not apparent to the plaintiffs' predecessors in title or to others including the Gore-Booths living in the House at the time, who nevertheless accepted on reputational grounds alone the existence of the right of way.

180. One must also say that the task of the plaintiffs in attempting to challenge the reputational value of the development plan, some forty three years later on the grounds advanced, is a formidable one, not least because after four decades, I cannot be confident that all the relevant evidence is before me on the matter, or that some assumptions being made are warranted. It is clear that it would not be open to the plaintiffs to now challenge the adoption of the development plan directly at this remove since the plaintiffs' predecessor in title did not avail of the appeal opportunity and the time for judicial review has long since passed. To attempt to weaken its reputational force at this remove is also problematic given the attitude of the plaintiffs' predecessor in title at the time. The making of the development plan was a formal decision taken by elected councillors with all relevant parties on notice and after a consultation process which did not yield any objections.

181. All I need to say at this point is that the inclusion of an objective to preserve the Lissadell right of way in the development plan at the time is significant evidence of reputation which might be weakened somewhat by the arguments advanced at this remove by the plaintiffs, but these arguments, in my view, do not wholly negative it as evidence favouring the defendant's position, which I should take into account. It is one further piece of evidence, weakened as it may be, which I must consider when I make my final determination taking all the circumstances into account.

182. One must take notice also of s. 49(2)(c) of the Local Government (Planning and Development) Act 1963 ("the Act of 1963") which provides:-

> "In a prosecution for an offence under this subsection in relation to a right of way with respect to which a provision for its preservation is included in the development plan, it shall not be necessary for the prosecution to show, and it shall be assumed until the contrary is shown by the defendant, that the right of way subsists"

Accordingly, after the route was included in the Development Plan of 1967 the onus would seem in a prosecution in any event, to be on the defendant to rebut the assumption of the existence of the right of way. Presumably, this assumption would also apply in proceedings for damages to the right of way under s. 49(3) of the Act of 1963. It would be strange if the same assumption did not apply in a civil dispute on the same matter after 1967. It should be noted that the Local Government (Planning and Development) Act 1963 has been repealed by the Planning and Development Act 2000, see provisions to similar effect now in the Act of 2000 at s. 14(7) and s. 208.

XIII. Expenditure of Public Monies on Estate Roadways

(i) General Liability for the Maintenance of Highways at Common Law

183. The defendant advanced arguments to the effect that Lissadell estate was in receipt of public monies for the maintenance of various estate roads from time to time and these payments were evidence that the roads were not private roads. There were two periods in particular where, according to the defendant, such payments were made: first, between 1813 and 1896, and second, during the wardship years *i.e.* 1944 – 1982. I will examine the evidence relating to each of these periods in turn.

184. Prior to considering the significance of a presentment by the grand jury in the nineteenth century, one must have regard to the common law position which preceded and then coexisted with the presentment system. As a general rule of common law, the inhabitants of the parish at large were bound to repair the highways; the *prima facie* liability of the parish, subject only to well defined exceptions, is to repair *ex necessitate*. Later, a succession of statutes provided a mechanism (a system of "presentments") by which the performance of the public obligation was enforced and regulated, but the liability of the parish remained the underlying principle of the law in England until abrogated by s.38 of the Highways Act 1959. Thereafter, liability to repair such highways became the liability of the highway authority. Since the defendant relies on payment of specific presentments in the early part of the nineteenth century as evidence that the ways were public, I will be obliged to examine the system established by the presentment legislation in more detail later in this judgment. The common law liability of the parish was implicitly abrogated in Ireland pursuant to s. 24 of the Local Government Act 1925 which imposed a duty to maintain and construct all county and main roads on county councils and, where appropriate, urban district councils. There is no equivalent provision in any Irish legislation to the English Highways Act 1959. Furthermore, there is no authority for the proposition that the parish remained liable to maintain highways which were not

county or main roads.

185. It is in this context that the absence of repair by the parish at common law has been held admissible as a fact tending to show that there is no public right. Lord Denman C.J. in *Davies v Stevens* (1836) 7 C. & P. 570, 571 stated that:-

> "The fact of no repairs having been ever known to be done to the road by the parish, is a circumstance from which you may infer that it is not a public road, inasmuch as the parish is bound to repair all public roads."

186. Equally, the existence of public expenditure on the maintenance of a way supports an inference that it is a public right of way, but it is not of conclusive effect. For instance, evidence as to the repair by the parish may be outweighed by any evidence which explains such repairs in a manner inconsistent with the inference of the public right (See *e.g. R v Hawkhurst* (1862) 7 L.T. (N.S.) 268.)

187. As mentioned above, a parallel statutory system developed alongside the common law system which obliged the parish to repair and maintain all highways. The system of levying the cost of constructing, repairing and maintaining highways developed from the statutory base of the Presentment for Roads Act 1765, as amended. Evidence of expenditure pursuant to a presentment under the Act of 1765, the subsequent Highways Acts of 1817 and 1818, the Grand Jury (Ireland) Act 1836 or the Local Government (Ireland) Act 1898 has a historic relevance to the existence of a highway, being evidence of reputation as a highway and inferring acquiescence in acts indicating a public character to the route.

188. The record of a presentment, however, does not create a highway and is merely evidence which may support the existence of a highway. This is illustrated in *R. (Hewson) v Wicklow County Council* (1908) 2 I.R. 101 which concerned a track from the public road serving a number of houses. This was supported by the dicta of Holmes L.J. in *Giants Causeway Co. Ltd. v A.G.* (1898) 5 N.I.J.R 301, 320, which noted that the value of a presentment might be great or small depending on the circumstances.

189. The plaintiffs contend that none of the presentments relied upon by the defendant concerned the avenues of Lissadell. The defendant's thesis is that "significant public money was spent in maintaining, repairing and building the roadway from Carney (Farnicarney) by way of Ballygilgan and Lissadell to Jones Port." The plaintiffs' response is that, first, evidence of presentments in respect of lands outside the demesne must be of little evidential worth in a claim that the avenues going in different directions are highways; second, the defendant does not appear to have had regard to the stopping and relocation of the coastal road around the demesne from 1813 onwards; and third, even if one or more of the presentments did refer to the avenues (which is denied), such evidence is not conclusive and, in the circumstances of the history of the next two centuries, it does not provide convincing evidence of a highway.

(ii) Presentments of Grand Jury : Presentments 1813 – 1896

190. Grand juries, which were composed of local landowners, controlled the

presentment sessions during the nineteenth century. The Act of George III 1796 provides the legal basis for these presentments. The Act is entitled:-

> "An Act for the Amendment of Publik Roads, for directing the Power of Grand Juries respecting Presentments, and for repealing several Laws heretofore made for those purposes."

191. At that time the grand juries performed many functions of present day local authorities, where apparently force of personality in some cases may have been a relevant, if not a determining factor, in granting or withholding the grants. Presentment sessions were held in spring (Lent) and summer each year and were responsible, *inter alia*, for road construction, maintenance and bridge building. A person wishing to repair or construct a road was required to have a survey carried out by two engineers and have an affidavit sworn before a Justice of the Peace in the prescribed form. The affidavit required the road to be identified as being: "the road from … to …between … and … all in the barony or half barony of…", the spaces being filled in by the applicant. If the work was approved, payment was made only after another affidavit of completion was sworn, again before a Justice of the Peace. The grand jury also, of its own motion, could present a road for repair or construction, subject to similar affidavits being sworn.

192. Section 46 of the Act of 1796 provides that "it shall be lawful for any Grand Jury… to present any old road to be stopped up…if it shall appear to them that the said road is no longer necessary to be kept open, for the convenience of travellers, or that a new road has been made, which answers all the purposes of the old one, to every which Presentment it shall be lawful for any person to enter a traverse…and if such traverse shall not be tried within a year…the Presentment shall stand good and valid, to all intents and purposes."

193. In the present case, the dispute relates primarily to locating the various nineteenth century presentments relied on by the defendant as showing that since public monies were spent, it is evidence of public rights. The plaintiffs argue that none of the presentments relied on by the defendant relate to Lissadell. The plaintiff called Dr. Vandra Costello B.L., an expert on landscape architecture and design as well as having a degree in history, who, in a report given to the Court, identified two problems in interpreting these presentments:-

> "Firstly, the references are generally vague as to location, and the names and spellings of the various townlands are inconsistent. Secondly, there are no maps to accompany the Presentments, which makes locating the site of the works more imprecise."

194. Having examined in detail the presentments raised by the parties, Dr. Costello made the following statement in her report, which was relied on in her evidence to the same effect:-

> "As the Presentments which I have reviewed in relation to the barony of Carbury as specific as to townlands, it is fair to deduce that none of the roads under the responsibility of the Grand Jury of Carbury ran through Lissadell. On the majority of occasions on which Lissadell is mentioned is when (*sic*) works are to go as far as "the demesne wall" of Lissadell; or (in two Presentments) where the work is to be carried out "between Lissadill" and another specified location – by definition this excludes the town of Lissadill. Of these two, there is no record that the first was

granted (1813, No. 17); and it is almost impossible to establish the exact location of the works of the second (1814, No. 35) because the Coast Road from Carney to Ballygilgan was completely removed between 1834 and 1840. The works could not have been carried out at any location on the old coast road removed by Sir Robert in 1840, or on that part of the old coast road in the townland of Ballygilgan closed by Presentment in 1813.

A further two Presentments which mentioned the town of Lissadill would appear to refer to the part of the Ballinphull Road which runs along the north of the demesne. There are no specific or even vague mentions of any roads within the grand jury road system running through the demesne, which is what one would expect. Demesnes tended to be private pleasure grounds and pastoral areas for the sole use of the landlord. What is also interesting is that none of the present avenues on the Lissadell domain are of the dimensions specified for a public road."

195. As Dr. Costello rightly points out the defendant cites several presentments from the period 1813 to 1834 as evidence that public monies were spent on Lissadell roads and bridges, *etc.* Some of these are very general and unspecified as to location. A couple of these presentments relied on by the defendant are reproduced here to illustrate how difficult it is to make any firm conclusions in relation to the location of said presentments at this remove in time and, in particular, prevent the conclusion that public monies were expended on some of the avenues and roads the subject of these proceedings.

Presentment No. 1

1813, Entry No. 15, [No name given for grantee]: "*to build a battery wall along the High Road leading from Sligo to the sea at Ballygilgan. Rejected – new road substituted instead."*

Presentment No. 2

1813, Entry No. 17, Lent assizes. [Grantee was Sir Robt. Gore-Booth Bart, John Jones Esq.]: "*to build five arches and twelve flag pipes on the road from Manorhamilton to the sea between Clonmull and Lissadill in the barony of Carbury* (Not recorded that the Presentment was "granted" or "rejected". The relevant space was blank).

Presentment No. 3

1814, No. 35, Assizes. Grantee: Sir Robert G Booth, Abraham Martin and John Jones, "*to build a battery wall on the sea side of the road leading from Sligo by Farnicarney to the sea between Farnicarney and Lissadill. £84.17.4. granted*."

196. The defendant argued that some presentments of the grand jury were applied to parts of the coast road as far back as 1814 and this indicated that the

road was a public road at the time. In particular, it said that presentment No. 35 of 1814 (*supra*) related to expenditure on the Water Wall.

197. The plaintiffs disputed this arguing (i) that the presentment in question was too vague to be identified with the Water Wall, as it is known today; and (ii) that the land feature at the Water Wall, a semi-circular protuberance of land into the sea, did not exist in 1814. In support of this last argument, the plaintiffs rely on the first ordnance survey map in 1837 where no such land feature is shown. This feature does appear, however, in the ordnance survey map of 1885, which the plaintiffs say, shows it was only built between 1837 and 1885. At the trial, this last point was contested at length and evidence was produced of documents and preparatory sketches and maps which clearly show this land feature was noted at times prior to 1837.

198. To resolve this factual dispute, the Court has to engage, not only with the mapping evidence, but also with the evidence of various witnesses who have expertise in this area (including Dr. Vandra Costello, called by the plaintiffs and Mr. Rob Goodbody, the expert called by the defendants) and some witnesses who tried to relate the presentment with what is on the ground today at that location.

(iii) The Boundaries Act 1825 and the Methodology used to fix the Boundaries

199. The Boundaries Act 1825 (6 Geo. IV 1825) envisaged that when the high constables returned the names of the parishes, *etc.*, to the local grand jury indicating the number of acres and the proportion in which such parish had been previously assessed, the Lord Lieutenant could then appoint surveyors to ascertain the boundaries of the baronies, town lands and parishes.

200. The first boundary surveyors to be sent out (the Griffith survey) were sometimes accompanied by the collectors of the county cess and by the landowners, and the boundaries were to be marked out "in such substantial and durable manner as [the surveyor] shall think fit" (Section XI of the Act of 1825). This exercise was followed by a boundary sketch map being drawn up, which recorded the boundaries as found by the survey. This map was based on earlier non-credited maps (in this case possibly the Larkin and Nimo maps) but was not scaled and as a result was unreliable as to accurate measurements and exact locations. As its name indicated, its focus was primarily on boundaries and must be read with this in mind. The procedure and system was explained by J.H. Andrews, "History in the Ordnance Map: an introduction for Irish readers", (Kerry: David Archer, 1993). At p. 12 he explains:-

> "Among the earliest maps connected with the Ordnance Survey Ireland are the manuscript boundary sketches of 1826-41. These were produced not by the Ordnance surveyors themselves but by a separate boundary department under the direction of the eminent geologist Richard Griffith. The duty of Griffith's field staff was to precede the Ordnance parties across the country demarcating the boundaries of the counties, baronies, parishes and townlands which it was intended to show on the published maps. Their chief source of information was the grand jury records of the various counties. Use was also made of local estate maps,

> and although there was no direct legal connection between townland boundaries and property boundaries Griffith's policy was as far as possible to keep the two from clashing. As well as resolving the doubtful cases his surveyors had to lay out completely new boundaries in certain tracts of bog and mountain that had not previously formed part of any townland.
>
> After some early difficulties in Londonderry (the first county to be perambulated) Griffith decided to supply the Ordnance officers with sketch maps of the boundaries they were to measure. A large collection of these sketches, representing thirty-one counties, is preserved at the Public Record Office of Ireland; a few for Dublin and Donegal are still at the Ordnance Survey office in Phoenix Park.
>
> The sketches are drawn with surprising accuracy on the Irish estate surveyor's traditional scale of forty plantation perches to the inch (1:10,0800). Some of them are effective topographical maps in their own right- the sketch of Rathlin, for example, appears to show every house on the island but in most cases their choice of landscape detail is naturally concentrated in the neighbourhood of the boundaries being defined."

201. In the present case the official ordnance survey map of 1837 does not show the land feature at the Water Wall although it is clearly marked on the sketch map that preceded it. I am satisfied from the evidence given by Mr. Owens and Mr. Goodbody, who saw the original sketch map in the National Archives, that this map was drawn up in 1829. When a subsequent team of surveyors were sent out to survey what was on the ground, it produced what were referred to as boundary remark books. These comprised of handwritten notebooks which contained sketches drawn of the land and the main features such as rivers, bridges, roads, the coastline, *etc.* The relevant boundary remark books, dated June, 1836 relating to Lissadell, were located and examined by the experts. Copies were before the Court. I accept the evidence of Mr. Clarkin, from the Ordnance Survey Office called by the plaintiffs, that these books, in general, enabled a boundary register to be drawn up, which in a narrative form, and quoting its sources of information (*e.g.* the Griffith trace maps *etc.*), provided a narrative of the boundaries as one moved across the landscape. Unfortunately, in the case of Lissadell, the Griffith trace maps and the boundary register could not be found, but a copy of the 1829 boundary sketch map with handwritten annotations with the date September, 1836 imposed thereon, has survived and was before the Court. There are significant differences between the two maps especially in relation to the location of boundaries. Mr. Clarkin attributed this to some missing documents, which for whatever reason probably modified the 1829 boundary sketch map with the 1836 annotations, before final decisions were made in respect of the final official ordnance survey map of 1837. Furthermore, it is perhaps not surprising that differences should occur between the two maps as certain editorial decisions would have been made before the official ordnance map of 1837 was finally settled.

202. The version of the 1829 boundary sketch map that was produced to the Court also recorded that "the whole of Ballyvoneen and part of Ballinafull is

added to the domain for Lissnadill". The old mansion is also marked on the coast road, but is crossed out in the same ink as the other superimposed handwritten notes. This corresponds to the historical facts that the old mansion was in existence in 1829 when the first sketch map was made, but had been demolished by September, 1836 by which time the new House had been built.

203. From the point of view of the presentments, what is important is that the semicircular bulge of land near the Water Wall is clearly evident in this map which strongly indicates that it existed in 1829 at least. Furthermore, the letters 'FW' appear twice on the sketch map at the Water Wall and again some short distance to the east of it. Similar letters appear much further to the east at a point in Ballygilgan near what was referred to as the 'Priest's Quay'. 'FW' is an abbreviation for "face of wall" and indicates the existence of a wall protecting the land from the sea at that point.

204. An examination of the extracts from the boundary remark books relevant to Lissadell opened to the Court, clearly discloses that the semicircular protuberance in the front of the old mansion at what is now the Water Wall was in existence when the books were written up by the field survey team on the 16th June, 1836. Moreover, the letters 'FW' appear on the sea side of this feature (the Water Wall) and again just east of the Bunbrenogue river. It must be emphasised that these handwritten notes and sketches were made by named teams of surveyors in the field. They were making notes from what they saw and measured on the ground. Moreover, the sketch at p. 28 of the relevant boundary remark book clearly identifies the bathing house, which is not represented in any other map before the Court, but the remains of which are clearly visible on the ground at that location to this day. In this instance the sketch map records a feature, which still exists today, although it is not shown on the final ordnance survey map of 1837, showing that the sketch map was in this respect more comprehensive than the 1837 map.

205. The reliability of these boundary remark books is for these reasons very persuasive. Moreover, Mr. Owens, senior engineer for the council, having studied these books, has tried to relate the information in them to what is on the ground in the area today. On the sea side of the relevant sketches, there is a series of numbers marked for which no explanation or purpose is given in the notebooks themselves. Mr. Owens, with considerable ingenuity, has established to my satisfaction that these numbers are measurements of distances from each other. When Mr. Owens totalled these figures and made the necessary conversions from chains to meters, he discovered that the map distance between the Water Wall and what is now the Priest's Quay, and this is exactly the same when the distance is measured today on the ground. Although Mr. Owens may not have been an expert in these matters, his evidence in interpreting the sketch books, as an engineer, is impressive.

206. For these reasons, even though this semicircular feature does not appear on the final ordnance survey map published in 1837 or on the fair plan map that preceded it, maps which in ordinary circumstances are wholly reliable, I have come to the conclusion that the sketch map of 1829 and the boundary remark books of 1836, both of which clearly show this feature, are more reliable in this instance. As Mr. Clarkin from the Ordnance Survey Office indicated to the Court that absolute accuracy can never be guaranteed even in the best of maps, I

agree with Mr. Goodbody's conclusion on this matter:-

> "What is not clear is why it [the semi-circular protuberance] is not shown on the published Ordnance Survey [of 1837] six inch map, nor on the fair plan that preceded the published map. The only apparent conclusion is that there is an error on the maps. The claim that the maps are always totally correct is to impose a level of perfection that is not sustainable, as any system will produce some kind of error, no matter how sophisticated the methods of quality control. In addition, for the published map to be correct we must face the scenario whereby the curved wall to the front of the site of the old Lissadell House [*i.e.* the Water Wall] was there in 1829, when it is clearly shown on the boundary sketch map, and in 1836, when it was surveyed in the boundary remark book…following which it disappeared by early 1837 when the fair plan was drawn, only to reappear again later." (*i.e.* in the ordnance survey map of 1885)

207. I reject for these reasons the plaintiffs' argument, that because this land feature did not appear on the ordnance survey map of 1837, it did not exist in 1814 when the relevant presentment was made. I have reached this conclusion even though this bulge of land into the sea is not shown in the Larkin map 1819, the Nimo map 1821 or the ordnance survey maps of 1837. Moreover, a watercolour of the old mansion dated variously between 1800–1830 does not show it. The omission from the ordnance survey maps 1885 and 1910 can be explained by the fact that these maps probably used the 1837 map as their reference point and did not go behind it. With regard to the land bulge not featuring in the watercolour, two things can be said: first, the date of this picture, *i.e.* 1820, is an approximate date only, and according to Mr. Goodbody it could have been painted as far back as 1800 or earlier. Second, the painting does not clearly show any defensive wall in front of the old mansion, an unlikely event. Given that the painting was probably done, on the basis of an earlier note/sketch by the artist, the feature may not have been noted in the artist's earlier note, or may have been omitted by the artist simply on aesthetic grounds, since it would have appeared directly in front of the main door of the mansion. Moreover, the foreground of the picture does not correspond with the reality of the existing landscape.

208. It is clear that the existence of the semicircular land feature at the Water Wall is of no significance unless it can be linked to some presentment or more particularly to the presentment in question Presentment 1814, no. 35 (*supra*). The question then remains whether the relevant presentment was as a matter of probability referable to the Water Wall. The defendant's focus in this regard shifted to presentment no. 35 of 1814, which has already been quoted. The theory advanced by the defendant is that between Carney and Lissadell, historically, there were only two battery walls that might fit the description in the presentment of 1814: the semicircular feature (now part of the Water Wall) and a wall at the Priest's Quay that is at a location, long since gone, on the sea front east of Crushmore. Traces of this latter wall were excavated and uncovered before the trial and both Mr. O'Keeffe and Mr. Owens, the engineers on both sides, gave evidence, as did Dr. Costello, of its existence and its location. Both the 1829 sketch map and the ordnance survey maps of 1837 also show clear markings of 'FW' (*i.e.* face of wall) and 'BW' (*i.e.* boundary wall) at these two

locations, and only at these locations, between Carney and Johnsport. Mr. Goodbody, for the defendant, suggested that since there were two presentments for battery wall repairs, one in 1814 and one in 1818, the likelihood was that both did not represent expenditure on the same wall; since the presentments were so close together in time, the likelihood is that there was a presentment for each. Dr. Costello, referring to the 1818 presentment, concludes:-

> "Here a demand is made for a second 'battery wall' on the sea road between Farnicarney and Ballygilgan. The last demand was made in 1814, just four years earlier. The exact location of the work is not specified, but as there is no mention of Lissadill, it is likely that the wall was located on the old road between Carney and Ballygilgan, on the town land of Ballygilgan."

209. This would mean that the 1814 presentment related to the Water Wall, which was for £84.17.4, as opposed to £16.0.11 for the 1818 presentment, something that would make sense because of the much bigger dimensions in height and length of the Water Wall directly in front of the mansion. At this time too, it will be recalled that the lower road at Ballygilgan to Carney was going out of favour with the Gore-Booths.

210. The plaintiffs argue that the use of the word "between" in the presentment in question "between Carney and Lissadill" suggests that the expenditure was not in Lissadill. I am not convinced by this linguistic argument. In many cases, the language of the presentments is vague and imprecise. In any event, part of the Water Wall now in question is on the east side of the Bunbrenogue river, and the first part of the wall is "between Farnicarney and Lissadill". Dr. Costello, who first emphasised the literal meaning of the word "between", significantly, does not say that the use of the word "between" is a knockout blow, being content to say that "[i]t is very difficult today some one hundred and ninety years later, to identify with any precision the locations of these works." Dr. Costello also points out that much of the old Coast Road, the part towards the Carney side, which apparently was stopped in 1813 by a presentment and does not appear in the later maps, is difficult to discern today. The rest of the old road from Carney to Ballygilgan was removed between 1834 and 1840 by Sir Robert Gore-Booth who paid more than £3,000 for the new road which replaced it. We have seen, however, that the engineers have located traces of a retaining wall which was located at Priest's Quay in the townland of Ballygilgan which clearly fits the description, and Dr. Costello confirms its existence from historical documents. There can be no doubt from the evidence that the road at the Water Wall is very exposed to the sea at that point and it would be unthinkable, in my view, given its close proximity to the old Lissadell mansion at the time, that the occupants would not be concerned about coastal erosion so close to their front door. It should also be recalled that we are speaking of a time which is twenty years before the new House was constructed further inland in 1836. Contemporaneously with this new building, the old Larkin Road disappears, but the rerouting of a new road away from the Priest's Quay area, up to what is now the Crushmore exit, indicates that the Coast Road remains very much part of the plans.

211. The wider historical context also suggests that the Coast Road existed prior to the Larkin map of 1819. (I omit reliance on the Down survey map of 1655 which indicates a road east of Ardtarmon towards Lissadell, as the plaintiffs

argued it was outside the agreement reached between the parties, namely, that no documentary evidence prior to 1775 would be introduced). Ardtarmon was, however, known as a major medieval settlement and, in his will of 1801, Sir Gore-Booth is described as "of Ardtarmon" and "now residing in Russell Place, Fitzroy Square, Parish of St. Pancras, Middlesex." Later maps, including the ordnance survey map of 1837, clearly show that there was a substantial castle on the coast between Ardtarmon and Lissadell which predates any house of the Gore-Booths. Johnsport, a substantial development is also located on the coast between Ardtarmon and the present Water Wall at Lissadell. Finally, the plaintiffs introduced unproven documentary evidence of what purported to be notes made by persons involved in the preparation of the ordnance survey maps of 1837. Referring to the Bunbrenogue chapel, noted as in ruins in the 1837 map, just west of the river of the same name, the author states:-

> "There was about 80 or 90 years ago a Mass House *i.e.* Chapel – Teach Aifrinn – at Bunbreunoige, on the site of which stables belonging to Sir Robert Gore now stand, hence the saying Poball Bunbreanoige. The congregation of Bunbreanoige is still common among the people, preserving the name (Bunbreanoige) whilst it (the saying), be remembered. When the ancestor of the present Robert got his estate there, he banished the congregation and pulled down the chapel."

212. From this it is clear that the chapel was there in or around 1750, and for an unknown period before that. This is significant because, although some of the routes may have only come into existence when the present Lissadell House was constructed in 1833–1836, the Coast Road clearly predates this. Given the existence of this functioning chapel, it is highly likely that there was public access on the Coast Road to it. Such churches are referred to in Irish as Teach an Phobail (literally House of the Public) and the right of public access to such churches was well known in the law.

213. From the above, I conclude that the presentment no. 35 of 1814 refers to works carried out on what is now the Water Wall in Lissadell.

214. In an attempt to locate bridges, culverts, *etc.* mentioned in some presentments about that time, Mr. Owens, an engineer with the council, engaged in some investigations where he identified these features (*i.e.* bridges, culverts) as they appeared on the older maps and compared their location with what he found in a perambulation of the ground today. He presented these findings to the Court, but drew no conclusions from the exercise. Indeed, his evidence was that he could not connect any of these locations with any of the presentments in question. Mr. Goodbody, referring to the incomplete nature of map evidence before the nineteenth century, goes on to say:-

> "Where there were places that would generate any type of traffic, there generally were roads to serve them. This was not always the case…in the case of Lissadell, it is evident that there would have been a road leading from Sligo town to the area around Ardtarmon and Lissadell from the medieval or early modern period, given the existence of a fortified house at Ardtarmon and a castle at Lissadell, together with the fishing community at Raghly. The logical alignment for this road is driven by the topography as the

area around Lissadell has a strong series of north – south ridges and valleys. Of the two roads known to have existed leading from Ballygilgan to Ardtarmon in the early years of the 19th century, shown on Larkin's map of 1819, the coastal route is the more likely to have been the original and this is confirmed by the Down survey map…" (I have already indicated that I am not basing any of my conclusions on the evidence from the Down survey map)

215. Referring to the topography of the area, Mr. Goodbody concludes:-

> "The conclusion drawn from this is that the natural route from Carney to Ardtarmon is the one that runs close to the shore. It would appear that the most likely reasons the construction of the more northerly route would be to encourage traffic away from the original Big House on the shoreline at Lissadell, as this would be a more direct route to Maugherow Church and the settlements at Cloughboley and Kilmacannon for those that could manage the steep hill.
>
> The need for a public road along the shoreline is also demonstrated by the various occupiers of land along the route."

216. He refers in particular to a mill on the Ballygilgan/Lissadell road and to a memorial of a deed transferring the mill which significantly, in Mr. Goodbody's eyes, does not raise any question of rights of access to the mill, suggesting that there was a public right of access at that time. He also refers to the public's access to the Roman Catholic Chapel near Lissadell House which has already been noted. This evidence was not seriously undermined in cross-examination or by evidence to the contrary from the plaintiffs. The plaintiffs did put to Mr. Goodbody items from the records of payments made between the 23rd March, 1819, and the 24th March, 1820, on behalf of Sir Robert (4th Baronet (a minor at that time)) in respect of building costs and materials incurred at that time. The purpose of this line of questioning was to show that the estate was making the expenditure in respect of these works. Of course, this is not inconsistent with a presentment in respect of the same works as the system was, as already noted, that when a presentment was approved, the grantee first spent the money from his own resources, and was only reimbursed when an affidavit of completion was presented later. This is clearly seen in a record dated the 16th February, 1819, when John McKim was paid £12.0.0 "…the Grand Jury having granted a Presentment conditionally that Lady Booth would contribute so much towards said works on minor's account". No accounts of expenditure for the years 1814–1815 were produced to the Court, even though the 3rd Baronet had died in 1814 and Sir Robert, though still a minor, had succeeded at that time.

217. Two additional arguments were advanced by the plaintiffs to indicate that the roads in Lissadell in the nineteenth century (in particular the Coast Road) were private routes. In this regard, they rely especially on two legal documents that have survived.

218. The first document is a legal opinion from counsel to Sir Robert Newcommen Gore-Booth (3rd Baronet) dated the 4th March, 1814 and the second, is a release dated 1828 by John Jones of Rockley and John Gore-Jones of lower Shannon, of a right to pass and repass "through the gates of Lissadell then lately erected on the road from Johnsport to Carney" which they had under

lease from Sir Robert Gore-Booth dated 1796.

219. The plaintiffs' thesis is based on an assumption that both documents relate to the same right of way and that this right of way was the pathway (now part of the Crushmore Avenue) that first appears on the maps in 1829 as a track (see *e.g.* sketch map 1829). I have difficulty in accepting this as probable for the following reasons. From reading the legal opinion of 1814, it is clear that Sir Robert at that time was contemplating making a new avenue somewhere on his estate. It appears that he had two possible routes in mind. He raised the question with counsel whether the existing tenants would be entitled to use these new avenues. Counsel's opinion was that the tenant would have no right over these new avenues without Sir Robert's consent. There was, however, no question of preventing the tenant using existing rights of way. We do not know where the existing rights of way ran or whether they were public or private under the lease. Moreover, the questions were raised hypothetically and we do not know if these proposals to construct a new avenue ever came to fruition. The opinion was sought by Sir Robert a year before he died and it is possible that the decision to make a new avenue was never taken. His successor Sir Robert (4th Baronet) was a minor in 1814, and only reached his majority in 1826.

220. The principal query which was raised with counsel was as follows:-

> "Can Mr. Jones or his servants insist upon the privilege of travelling thro' such new avenue if Sir Robert should make it, or if Sir Robert should agree for a new lease of Ballygilgan, and should make a new avenue thro' Ballygilgan. Would Mr. Jones be entitled in like manner to the use of it, in as much as said old road had been stopped by presentment as aforesaid."

Counsel indicated that Mr. Jones would have no right in those circumstances.

221. There are some problems in interpreting both the query and the answer in counsel's opinion. First, there is no context given in which the queries and answers can be properly understood. Second, from the questions and answers in the opinion, trying to locate the areas or avenues referred to involves a certain amount of speculation and guesswork. Third, it is difficult to assume, as the plaintiffs urged the Court to do, that the reference to the new avenue which Sir Robert proposed to construct is that which subsequently became the Crushmore Avenue, given the date of the opinion *i.e.* 1814. This, it will be recalled, is a full twenty years before the new House was built at Lissadell and some fifteen years before the track at Crushmore appears on the sketch map of 1829; the Crushmore Avenue does not appear on the Larkin map of 1819.

222. In the 1814 legal opinion, counsel states:-

> "If Mr. Jones should attempt to force a passage by breaking Door Gates (sic) or by passing on the new avenue against the will of Sir Robert, he would be subjecting himself to an action of trespass".

223. The use of the words "door gates" by counsel suggests that the rights to pass and repass was close to the old mansion and probably into the landlord's lands in the opening in the wall attached to the mansion. The watercolour relied upon by the plaintiffs of the old mansion (dated variously between 1800 and

1830) shows a gate and a garden door that could well fit the description of counsel and would locate the entry point at the old mansion rather than at Crushmore.

224. The reference to the old road having "been stopped by presentment" could apply to either the Larkin Road or the Coast Road. We know that there were grand jury presentments funding the new road (now the R347) around Lissadell from 1817 and that this road effectively replaced the Larkin Road. A refusal in 1813, by the grand jury of an application, *inter alia*, by Sir Robert (3rd Baronet), for repairs to the "high road" (*i.e.* presumably the Larkin Road) also indicated that the owner's focus was shifting from the Larkin Road to the new road at that time. If there was a presentment stopping "the old road" at that time, it could more likely refer to the Larkin Road than to the Coast Road at Ballygilgan, where the substituted avenue at Crushmore was not commenced for many years later.

225. The release document of 1828, the second document relied on by the plaintiffs, records a release by John Jones and John Gore-Jones of a right to pass and repass to the landlord, Sir Robert Gore-Booth. The release document recites the original lease under which this right of way was given, but the original lease, itself dated 1796, was not available to the Court. The following points are worth noting in this context:

> (i) The lease creating the right of way, the subject of the release in 1828, was made in 1796, some thirty-three years before the avenue at Crushmore appears on the maps, it was some forty-four years before the clearance at Ballygilgan and some thirty-seven to forty years before the main House was constructed. Accordingly, it is unlikely that the right of way in question referred to the Crushmore Avenue exit;
>
> (ii) The lease in question, related to "lands at Dunfore and that part of the lands of Lissadell in parish of Drumcliffe". We know Dunfore was to the northwest of Lissadell, a long way from Ballygilgan and that the main lands at Ballygilgan were acquired by the Gore-Booths only in 1835-1836. The right of way being released, therefore, could well refer to a right to the Dunfore lands rather than to the Ballygilgan area;
>
> (iii) One of the main public roads at that time from Carney to Johnsport was the Larkin Road. Bearing in mind the location of Johnsport, Dunfore and Ballygilgan, it is not unreasonable to suggest that Jones, as a tenant living in Johnsport would require access to the lands leased at Dunfore from the coast road, through Lissadell lands near the old mansion. This would mean using either of the two connecting roads running south to north from the coast road through Lissadell that is from 5 to 4 or from 6 to 3, using the map reference points used in Court, and beyond into Dunfore. The right of way granted to John Jones under "the said demise [was] to pass and repass through the gates of Lissadell then lately erected on the road from Johnsport to Carney". The only gates we know of at Lissadell in 1796 were the gates at the old mansion from the watercolour (1800–1830) and

given the date of construction of this house, these are likely to be the gates in question. The gates and gate lodges at Crushmore and at the main entrance (Palmer's Lodge) did not appear until later and first appeared on the ordnance survey maps only in 1885. The watercolour of the old mansion, variously dated between 1800 and 1830, shows not only gates on the Johnsport side of the old mansion, but also a doorway, both opening onto the sea road, and directly south of Dunfore.

226. I accept the interpretation of Mr. Goodbody that "erected on the road from Johnsport to Carney" could well mean *alongside* rather than <u>across</u> the road as contended for by Dr. Costello and the plaintiffs. Finally, the third query put to counsel in 1814 indicated that Mr. Jones had a right under the lease to cut turf on the bog of Ballinful. This again places the location to the northwest of Lissadell and away from the Crushmore side.

227. Because of the uncertainties, the ambiguities and the lack of context involved in the two documents referred to, as well as the lapse of time between the dates of the documents, and the lease itself, I am not satisfied that the plaintiffs have shown as a matter of probability that the two documents referred to the Crushmore Avenue, or that what they disclose shows that the Coast Road was a private road at that time.

228. It should also be added that even if it were so, as the plaintiffs contend, and that the "old road has been stopped by presentment as aforesaid" and also that the reference in the first query to counsel in 1814, referred to the Crushmore side, this in itself shows that the road was public at that time, otherwise it would not have to be stopped by a presentment. Moreover, the legislation for closure only allows such a road to be stopped if it has become unnecessary because of the presence of an alternative route for travellers and users. We do not have the presentment in question, but it is reasonable to assume that if it did relate to the Coast Road at that point, the alternative in question would be the Crushmore Avenue. This would, of course, mean that the right to use the Crushmore Avenue would be based on the presentment and not on the will of the owners. In either event, the fact that a presentment was necessary to stop or close the road indicates that it was a public road at the time.

229. The narrative which best interprets the evidence of the presentments and of the maps presented to the Court and the witnesses most relevant thereto, that is Mr. Clarkin from the Ordnance Survey Office, Dr. Costello, the plaintiffs' expert, and Mr. Goodbody for the defendant, in my view, is as follows: Sir Robert (4th Baronet), after the new House was built in 1836, demolished the old house by the seafront and refocused the demesne around the new House. This meant that a new network of avenues/roads was developed which was designed to service the work areas and to provide appropriate access to the House and its immediate environs and preserve, not only the privacy and security for those living in the House, but also to respect the imperatives of a landscape design which guaranteed minimum visual intrusion by those (servants and tradesmen mainly) whose business brought them within the vicinity of the House. This is borne out by the elevated site on which the new House was built, by the servants' access tunnel to the House itself and by the "ha-ha wall" to the south

of the House which ensured an unimpeded view to the sea.

230. As the new network of avenues developed, most of the Larkin Road disappeared. The Sea Road, no longer visible from the drawing rooms, became less important for the House itself and it was sufficiently removed from the House that it no longer represented a great security risk. Steps taken immediately after 1837, especially the acquisition of lands to the south east of the estate, were taken to enhance the House and led to a reconfiguration of the roads at that part of the map near, and south west of, the present Crushmore Lodge. This reconfiguration can explain some of the presentments relied on by the defendant and help locate the expenditure and the purpose thereof. It also indicates that some presentments related to areas outside the estate *e.g.,* the old Sea Road to Carney which was discontinued in 1813. It explains also that "the demesne wall" on the eastern side of the demesne, which I accept was most probably built at the same time as the present main R347 road was constructed, *i.e.* between 1818 and 1828, and marked the boundary of the demesne as it then was. This is borne out by the later presentments (1853 onwards) which frequently refer to expenditure being only "as far as the demesne wall". Like Dr. Costello, I accept that this meant that the expenditure was not inside the demesne.

231. My conclusion, therefore, on the nineteenth century presentments is that it is probable that Presentment No. 35 of 1814 refers to expenditure at what is now the Water Wall on the plaintiffs' property. I am not, however, prepared to find that any of the other presentments mentioned in the evidence, applied to any part of the property now owned by the plaintiffs.

(iv) Expenditure of Public Monies on Estate Roadways especially since 1954

232. In 1944, Sir Michel Gore-Booth succeeded to the estate, but was made a ward of court in the same year and remained a ward of court until his death in 1987. During this period the estate was in decline. Gabrielle, Aideen and Angus continued to live in the House, initially in some discomfort, but progressing over the years to penury. Gabrielle who had been appointed manager of the estate in 1944 was replaced in 1956 after a serious dispute with the wardship committee, which culminated in a court decision against her. She continuously sought funds for the upkeep of the roads after that and was in regular communication with the council in this context. The council tried to source funds from various agencies and was successful on occasion. It was the defendant's contention that the expenditure of such public monies indicated that the roads were roads over which there were public rights of way. The plaintiffs argued that since these monies were not paid by the council as road authority, no such inference is warranted; on the contrary, as the expenditure came from third parties with no obligation to repair or maintain the roads, the inference should be that they were not public or that there were no public rights of way.

233. Before examining these payments, I should outline the legal position relating to maintenance of public roads as far as the council was concerned since the Local Government Act 1925 was introduced. Under s. 24 of the Act of 1925, a local authority became responsible for the maintenance and construction of all county and main roads within its functional area. A "road" is defined in s. 1 as meaning "any public road" and there was provision for the declaration of certain

roads to be public roads under s. 25. Section 24(4) provided, however, that s. 24, which pertained to the maintenance and construction of roads, "shall not apply to any road or portion of a road which under the provisions of any enactment it is the duty of any person other than a local authority to construct or maintain." Local authorities in general, it appears, including the council, interpreted these provisions as imposing a duty to construct and maintain public roads, but that they had no statutory entitlement to construct or maintain a road that was not a public road. Later correspondence from the council, during the period we are now concerned with, reflects this interpretation, when it said that the council were precluded from repairing the Lissadell roads directly because they were not public roads taken in charge by the local authority.

234. We must note, therefore, the distinction between a public road and a road over which there is a public right of way. The latter has the potential to become a public road, but until it has been so declared under s. 25 of the Act of 1925, it is not a public road. That it is not a public road, however, in this sense, does not mean that the public do not have rights to travel over it. Public rights of way can exist outside these statutory provisions.

235. This position was modified by s. 49(1) of the Local Government Planning and Development Act 1963 which provided that where a public right of way was created under the Act or where its preservation was included as an objective in the development plan "the way shall be maintained by the planning authority". Unless this was done, however, it would appear that such rights of way were, *prima facie* at least, not maintainable by a local authority.

236. By way of summary, therefore, under this legislation the council does not have an obligation to repair the roads at Lissadell as (a) they are not public roads and certainly not public roads "taken in charge" and (b) they are not roads over which public rights of way were created pursuant to the Act of 1963 or were identified as public rights of way to be preserved in the development plan, except perhaps, the Coast Road after the development plan of 1967 was adopted.

237. This legislative background is necessary to understand why the council, on more than one occasion during this period, wrote that it was not responsible for maintaining the roads at Lissadell.

238. The following is the list of the main works carried out with the assistance of some public funding from 1944 onwards. In the main, there is no dispute between the parties with regard to the facts that these public monies were spent.

> (I) In 1954, following correspondence with the council in relation to the repair of internal avenues at Lissadell, it was indicated that the President of the High Court had no objection to Bord Fáilte paying for repairs to the avenues and for the council carrying out these repairs on its behalf, on the proviso that the council acknowledged that such repairs would give, neither it nor the general public, any rights of way over the lands. Access was to be allowed to the seashore via the main avenue, but the gate would be closed on one day per year, in order to assert the private

nature of the avenue. The county manager's responding letter of the 5th March, 1954, however, strictly construed, may not amount to an acceptance of the President's conditions and there was no evidence that the gate was subsequently closed on one day a year. Following this in 1954, the council carried out repairs to the avenues and constructed a car park on estate lands now owned by Coillte. It is significant also to note that under the Tourist Traffic Act 1952, Bord Fáilte had statutory powers which would have entitled it to carry out the works even without the consent of the ward. In any event, consent was forthcoming and there was no need for the council to determine the status of the road at that time.

(II) Throughout 1969 and 1970, the council sought further funding through Bord Fáilte for repairs to portions of the demesne's avenues. The committee of the ward continued to be reluctant. Gabrielle wrote, in 1969, to the general solicitor claiming that her father had opened the estate to the public in 1900, and around the same time she wrote to the President of Ireland (Éamon de Valera) making the same claim and asking him to intervene with the President of the High Court in the matter. After Lissadell House was opened to the public with consent from the committee of the ward in 1967, permission had been expressly granted to CIÉ to use buses on the middle road or the main avenue to bring visitors to the House. Because of this extra traffic, the wear and tear on the surface was significant. In 1970, the council sought to have the roads dedicated to the public, but the President of the High Court refused to agree to this as, in his view, it would have diminished significantly the value of the estate and the entail would have to be barred. The council accepted that this was the legal reality. In documents prepared by the council at the time it was admitted that:-

"Sligo County Council cannot allocate funds for the road as it is not a public road within the terms of the Local Government Acts."

And:-

"The Council is inhibited from declaring the road a public road due to the fact that the consent of the High Court would be required."

Ultimately, in 1971, works on the roads from Crushmore Lodge, in the east, through the estate to Foster's Lodge in the north, were carried out on behalf of the Gore-Booths by the council with the consent of the President of the High Court with funds from the Special Regional Development Fund, in the sum of £2,500; Gabrielle Gore-Booth undertook to pay the rates on the House and to be responsible for maintenance of the roads thereafter. Notably, the President of the High Court did not insist on the conditions he sought to impose in 1954. This money came directly from the Department of Finance and was given on condition that

the works were executed by the council.

(III) In 1972 monies were provided by the Land Commission for the repair of the road running along the estate boundary on the eastern side, *i.e.* the Church Avenue. This road, however, did not run over any of the lands of the demesne at that time, or indeed now. It was only declared public in 1980 and before that, the council insisted the Land Commission (Coillte) was responsible since it purchased the lands in 1968. There was a conflict of evidence as to the extent of these repairs. The written report of the Land Commission stated that the repairs were to cover a road some 1,100m in length and the line is marked on an accompanying map. According to the defendant's witnesses, the map indicates that the resurfacing extended to a distance of 1,523m which would bring the works into the estate. This claim was subsequently withdrawn by the defendant and it is clear from the defendant's own records that these monies were not spent on lands now in the plaintiffs' estate.

(IV) In 1974, a grant of £400 was given from the Amenity Grant Scheme administered by the Minister for Local Government which required that the projects so funded would be ones which would enable the local authority to carry out schemes of general amenities in their area or to assist voluntary groups in doing so. The works carried out are described as of the 11th November, 1974, as "rebuilding of sea wall to retain roadway". The total cost of these works is given as £800 for which the grant scheme provided half. The works are described in a letter dated the 19th September, 1974, from the council to the Department of Local Government as:- "Repair of sea wall and retaining wall at Lissadell. This is an amenity area along the seashore much frequented during the summer months". The application form submitted by the council included a question asking whether the amenity would "*be available free of charge for the use and enjoyment of the public generally*?" to which the answer "yes" was given. It is clear that whilst the amenity grant schemes were centrally funded by the Department of Local Government, it was in effect entirely within the discretion of a local authority to make an application under this scheme and any other body could only make an application through the local authority. Further, because the grant scheme only provided half of the funding necessary, the balance presumably had to be provided by the local authority, in this instance the council. There is no evidence before this Court that any request was made of the committee of the ward to provide the balance of the funding.

(V) The issue of public dedication of the roads also arose again about this time. Before this could be done, however, it would have to be established that public rights of way existed on the avenues. The President of the High Court again refused such a declaration. Nonetheless, in 1975 further repairs were carried out, in the amount of £120 for finger posts which were erected by the

council. These were paid partly (£60) by Aideen Gore-Booth with a grant from Bord Fáilte, and the remainder (£60) by the ward. There was also a discussion around this time of erecting a retaining wall on the road to Lissadell beach at a cost of IR£250. It is unclear, however, whether these works were to have been on the plaintiffs' or on Coillte's lands, and it is further unclear if this work was ever undertaken.

(VI) In July, 1978 the President of the High Court made the order disentailing the estate and stated that the roads on the estate could be taken in charge by the council with the consent of Sir Josslyn, Aideen and Angus Gore-Booth. Rights of residence were granted to Aideen and Angus, with the fee being vested in Sir Josslyn Gore-Booth, although due to tax complications the conveyance did not take place until 1982. The council noted in a memorandum of the 5th May, 1980, that it was then in a position to take the roads in charge subject to the consent of the identified parties. No such consent, however, was ever forthcoming. Discussions took place between Sir Josslyn and the council with regard to obtaining funds for repairs to the roads, and the possible dedication of those roads to the public. Works were carried out on the seaside road, the sea wall and the car park with funds from the Regional Tourism Organisation at that time, and the possible dedication of those roads to the public was again discussed. Works were carried out on the estate from the Bunbrenogue river, past the House and out at the main entrance (Palmer's Lodge) and also on a section from the main avenue to the coach house and to the sea wall. This was funded by the Regional Tourism Organisation/Bord Fáilte, in the sum of IR£10,000, but again it was on the condition that such works granted no rights of way to the council or the public. That such works were carried out at the sea wall was supported by Mr. Crawley's evidence as well as evidence from Mr. McHugh's (the area engineer) notes at the time. In 1980, the Land Commission road known as Church Avenue was declared public, and is now known as County Road 347.1, or 347A.

239. The overall picture of this period would lead one to the following conclusions: The Office of the Ward of Court in Dublin held the view that the avenues in Lissadell were private roads over which there were no public rights and were unwilling to accept any public money, if, in doing so, it would give rights either to the council or to the public. The President of the High Court (to whom the Office of the Ward was answerable), indicated, more than once, that he was of the same view, and the council seemed to accept this for the most part, except when it proposed the inclusion of part of the coast road for preservation, as an objective in the county development plan of 1967. In this regard, when the wardship was formally notified of the council's proposal neither the general solicitor nor the trustees of the estate objected, as they were entitled to do, nor did they appeal after the development plan was adopted. The Land Commission's position at the time was that they had no objection to the inclusion in the development plan of "existing rights of way".

240. During all this period, the evidence was that user was continuing unabated and at an increasing rate. This was to the knowledge and with the consent of Gabrielle Gore-Booth who was the manager for the estate from 1944–1956. It was equally appreciated by subsequent managers of the estate (*supra* para. 83). The level of user was noted by the Land Commission Inspector in 1951, as already stated, who remarked that the public appeared to have free access for all kinds of traffic. Knowledge of this user and acquiescence must be attributed to the estate through its managers. In fact, as Gabrielle Gore-Booth subsequently made known in 1969 in letters to the President of the High Court and to the President of Ireland, she was of the view that her father had "opened up" the estate to the public as far back as 1900.

241. A few comments are warranted. First, the attitude of both the council and the ward is contained in private correspondence. This correspondence was not available to the public at the time and the public had no opportunity to challenge it. Second, the council is not the agent of the public in this matter. It is true that in the present case the council is advancing arguments in favour of public rights of way, but its views do not bind the public, and statements made in earlier correspondence, although they may go to reputation, may not reflect the view or the attitude of the public. Third, the Attorney General was invited to join in this litigation, to represent the public interest, but declined to do so, being of the view that it was a private dispute. Fourth, if the public rights of way predated this period, the correspondence adverted to cannot alter the legal position: "Once a highway always a highway". There is little evidence that the ward investigated in any depth the legal impact of historic public user at that time. Both the council and the ward appeared to have proceeded on general assumptions and the council accessed public monies for the repairs of the roads without bringing the legal issues to a head. When the issue was directly raised in the proposal to include as an objective in the development plan, the preservation of the right of way from the coast road to beyond the Water Wall, neither the general solicitor nor the trustees challenged the decision as they were entitled to do and did not appeal the decision to include it once it was made.

242. The money given during this period was given from various public sources, via the council who in the main executed the works, but it did not come directly from the council's road fund. According to the defendant there were some exceptions to this: payments in respect of the Water Wall in 1979 and the earlier evidence of payments in 1905 and in the 1930s, where a document indicating a record of defaulting contractors who had failed to carry out work at Lissadell, was mentioned. The plaintiffs objected to the introduction of these last records as having been only introduced at the legal submissions stage.

243. From the point of view of reputation, however, the public's perception must have differed greatly from that held by officialdom.

244. The defendant argues that the plaintiffs' contention that no inference in favour of public rights of way can be derived from public monies spent on the roads which were not spent by the council as a road authority, is too narrow and rigid. The rationale of the plaintiffs' position is that the expenditure is only of relevance in determining the nature of the road or way, and only warrants an

inference that it is a public road, when the expenditure is made because of the duty of the public authority to maintain public roads. Historically, the parish was obliged to maintain public roads, therefore payments by the parish could be attributed to this obligation and the conclusion could be drawn that it was made in respect of a public road. Conversely, payments by persons or bodies (including the owner) with no such obligation indicated that there was no public obligation, and so no public road. In most of the older cases, however, the issue arose where the private expenditure was made by the owner of the property and not by another public body. In these cases the owner argued that he would not have spent money on repairs unless the property was his. Where, as here, the expenditure is from public funds, albeit not from the road authority directly, the inference that the road is private and that there are no public rights of way, may not be so readily inferred. It would seem to me that nowadays the analogy with the parish's common law obligation is too simplistic. Nowadays, the council, as successor to the parish, has a much more expanded role in local government and this may include assisting such tourist attractions as Lissadell in various ways, which might include accessing funds from other public sources to enable it to do the required work. If, for example, as here, the council persuades Bord Fáilte (another publicly funded agency) to provide some resources to pay for the work, why should this not justify an inference that there is some public interest in the road so repaired? The council might conclude that to spend money directly, certain legal issues would have to be determined and if it can achieve the same result by an easier route, it is better to proceed that way. Does it matter much to the public that the funds do not come from the road authority's budget but from another public fund? In either event, it is the public who pays, not, perhaps, as a cess levied on the parishioner as in the olden days, but as a tax raised by central government which is subsequently distributed to fund various activities nowadays entrusted to local authorities or other State agencies.

245. Nor is the argument advanced that payments by the Tourist Board were made for the advancement of tourism and not for the repair of roads, convincing. First, from the facts in the present case, the Tourist Board/Bord Fáilte payments were clearly and unequivocally made for road improvement in Lissadell. Second, that the payment specifically to improve the roads was motivated and justified in terms of its overall statutory brief to advance tourism, does not alter the fact that it was made to improve the roads; even though it was not mandated by a specific roads obligation, it was still a legitimate discretionary spend of public money. Why in such a case, should not the object of the spend, in appropriate cases, attract an inference of a public interest? Third, we must assume that the Tourist Board/Bord Fáilte fully appreciated what was going on in Lissadell over the years. Its first payment was in 1954, and it must have been fully aware of the usage of the avenues, not only by tourists, but also by other members of the public at that time.

246. In these circumstances, I am not prepared to interpret these events negatively against the council in a way which suggests that no public rights of way existed in the avenues of Lissadell at that time. In seeking to achieve its ends in a non-confrontational way, it should not be concluded that it was accepting the position adopted by the Office of the Ward of Court or by the President of the High Court, who presumably were proceeding on the basis of legal title without taking into account the effect of user over the years. I repeat

also the point that the public, in any event, is not identified with the position taken by the council for reasons already stated.

XIV. The Plaintiffs' Case

(i) Estate Held in Tail 1804-1982 and the Wardship 1944-1987

247. The defendant argues that once it has established long user during the course of living memory, it will be presumed or inferred at law that there was dedication by an owner capable of dedicating. Moreover, it is not necessary for the defendant to identify when the dedication took place and, once user is established over the period of living memory, the presumed date of dedication may be long before the first proved act of user (*Williams-Ellis v Cobb* (1935) 1 K.B. 310). It will be open to the plaintiffs, however, to rebut this presumption or inference by showing that dedication could not have taken place because there was no one who had the proper legal title to dedicate during the relevant period. It is not sufficient, in an effort to rebut, for the plaintiffs to bring forward evidence which shows that it is unlikely or, indeed, very unlikely that dedication took place during particular periods. The presumption or inference will only be defeated by proof that dedication was not possible during the relevant period (*The Queen. v. Petrie* (1855) 4 El. & B. 737,749).

248. In this context the distinction must be made between the Coast Road and the other internal ways on the estate. The latter were only laid out in or around 1833 to 1837 when the present Lissadell House was constructed, whereas the Coast Road dates from a much earlier period. It is clear from this that it is not possible to presume or infer dedication in respect of the internal avenues prior to 1833/1837, since the avenues as a historical fact did not exist prior to that date. The same, however, cannot be said about the Coast Road, which I have found predates the new House.

249. In their efforts to defeat the presumption or inference of dedication, the plaintiffs claim that because the estate, since the relevant date of 1777 (see *infra*) was always held in fee tail and was subject to mortgages for long periods during the nineteenth and twentieth centuries, there was no one capable of dedicating during this time, and accordingly, no dedication being legally possible, the defendant's claim must fail. At its simplest, the plaintiffs argue that an estate tail is a limited estate of inheritance and, comparable to the position of a life tenant, the tenant in tail in possession cannot legally give away (or dedicate in perpetuity) something that he does not own; the general rule *nemo dat quod non habet* is applicable. The nature of the entail is such that dedication by all persons with an interest in the estate, including remaindermen in tail, is impossible in normal circumstances since those who will eventually succeed will or may not be known when the dedication is deemed to take place. Second, the plaintiffs for the same reason advance the argument that where the lands are mortgaged at the time, no dedication can take place without the mortgagees' consent, as dedication necessarily diminishes the value of the security.

250. The defendant responded by stating, *inter alia*, that to succeed in this, the plaintiffs must prove that there was no opportunity, in the history of the plaintiffs' title , however brief, within which it was possible to dedicate. In the present context, the defendant challenges, in the first instance, the proposition

that Lissadell was held in fee tail for the entire of the relevant period, or that mortgages existed for the same period. These are factual challenges. It also challenges the legal propositions that while the estate is entailed or while it is mortgaged there can be no dedication.

251. To test the validity of this argument advanced by the plaintiffs, one must examine, *inter alia*, the title documents of the plaintiffs' predecessors in title over the relevant period. Before embarking on this task, however, a further word of explanation must be given now about "the relevant period".

252. As already mentioned, shortly after this case was opened in October, 2009 the case had to be adjourned, because the plaintiffs alleged that they, on the basis of the original pleadings, understood that the defendant's claim was based on a dedication made in or around 1900. On the second day of the trial, the plaintiffs learned, however, that the defendant was relying on historical documents dating from 1800 or thereabouts. Prior to a motion on this matter being heard by the Court, the parties reached an agreement that, after an adjournment, the plaintiffs would meet the defendant's claim, but that no documentation prior to 1777 would be relied on by either party at the hearing. According to the plaintiffs, therefore, the defendant could not in the present context of capacity, argue that user within living memory, could be relied on to raise a presumption or inference that there was dedication prior to 1777, as in such a case the plaintiffs would be at an unfair disadvantage since they could not, by virtue of a procedural agreement between the parties, bring forward documentary evidence to rebut such dedication before 1777. The defendant argued that the agreement between the parties, limiting documentary evidence to those which came into being after 1777, could not be used to limit a legal presumption that might arise from evidence of long user within living memory; an inference that might point to dedication prior to 1777.

253. This dispute, in my view, is premature, since it seems at least that the presumption or inference that arises from long user obliges the plaintiffs to prove that there was incapacity since 1777, that is, "the relevant date". If they cannot prove that, then dedication will be presumed or inferred at some point since that date. The plaintiffs' argument in this regard is only valid if they can first show that dedication was impossible at anytime since 1777; failure to do this means that the Court could presume dedication since 1777 and there would be no need to go behind 1777. The question of possible unfairness to the plaintiffs, in not being allowed by the agreement to refer to documents prior to 1777 in that event, will be irrelevant. I will, therefore, examine the plaintiffs' argument that, since the title to the estate was at all times since 1777 entailed and/or mortgaged, there could have been no dedication during that time. As can be seen the argument is premised on a factual assertion that the estate was at all times an entailed one since 1777 at least, and this is challenged by the defendant.

254. The legal arguments need not be addressed if, as the defendant contends, as a matter of fact there were times during the relevant period when the land was held in fee simple (and not entailed) and was not mortgaged at the same time. It is fair to say that the defendant was, in any event, prepared to challenge the legal proposition (and did so) advanced by the plaintiffs, that while the estate was held in fee tail there could never be dedication of a public right of

way, noting the absence of any express authority supporting this proposition.

255. I now turn to an examination of the title of the plaintiffs' predecessors to see if, as they assert, the land in question was at all relevant times held in fee tail and/or subject to mortgages.

(ii) The Period 1777-1830

256. The documentary evidence before the Court commences with an abstract of the will of Sir Gore-Booth of Ardtarmon (2nd Baronet) of 1801 and a codicil of 1802. The plaintiffs allege that by virtue of these, the Lissadell estate was held in tail from 1804 (when Sir Gore-Booth died) until 1830. The problem with the documents relied on, apart from the fact that it is only an abstract of the will and accordingly only hearsay evidence, is first that the residence of the testator is given as Ardtarmon and not Lissadell and second, the abstract does not identify the land devised or bequeathed by the will other than by general description:-

> "My manors, advowsons, capital and other messuages, arms, lands, tenements, and heridments in Great Briton and Ireland to my friends Charles Earl of Harrington…to hold in trust to the use of my friends…[E.C.] and…[J.B.]…for 99 years; to the use of my brother Robert Gore of Lissadill, County Sligo, Esquire for life. He, and after his death his sons in order of age, to have the rents and profits of the premises to their own use. Remainder successively…to Arthur Gore;…Viscount Petersham and to…Viscount Petersham…eldest son of…Earl of Harrington to [the second, third, fourth, fifth, and sixth son of the Earl of Harrington] and their respective heirs."

257. There is no evidence from this that the lands of Lissadell were ever held under the settlement created thereby. It is also clear from this, as the defendant points out, that what is set up by the will is not an estate tail, but a series of life interests.

258. The abstract of the will is also deficient in another respect. It is recited in the marriage settlement of 1830 (*infra*) that the conveyance under the will was made subject to powers reserved to Sir Robert. These powers, however, are not detailed in the abstract of the will before the Court. Accordingly, we do not know what powers were reserved to Sir Robert, and we cannot say that there was no power to dedicate for this reason after the death of the testator, in 1804.

259. Moreover, and perhaps more significantly, in a later recital in the abstract of the marriage settlement of Sir Robert Gore-Booth (4th Baronet) of the 1st April, 1830, it becomes clear that Sir Robert owned the fee simple in 1828, and this remained the case until the marriage settlement was made in 1830. The relevant recital in the abstract reads:-

> "Reciting that said Sir Robert Gore-Booth was then seised in fee of certain estates in said County of Sligo known by the name of Lissadill Estate comprising the lands and hereditaments thereinafter mentioned…"

260. It is clear from this that there is a gap in the documents between the will of 1801/02 and the marriage settlement of 1830, as there is no evidence as to how Sir Robert got the fee simple which he undoubtedly had in 1828. Earlier

mortgages disclosed by the plaintiffs, however, show a mortgage by conveyance of a fee simple in possession in 1777 and 1778, together with a release of the very same mortgaged lands which include, *inter alia*, Lisscornegark, but not Lissadell to Sir Robert Gore-Booth in 1828 so that from that date, Sir Robert held those lands in fee simple. Furthermore, the grant of the lease for lives of 1796, which had been granted by Sir Gore-Booth to Mr. John Jones, also suggests that Sir Gore-Booth held lands at Dunfore and Lissadell in fee simple as of 1796.

261. I conclude from this that Sir Robert Gore-Booth was owner in fee simple at least for some period prior to 1830, and probably from 1828 to 1830, as well as for long periods between 1777 and 1828 also. It is further to be noted that neither Lissadell nor Ballygilgan are mentioned in the listed lands in the mortgage of 1777, although Lisscornegark is. Subsequent documents show that Lisscornegark is not the same as Lissadell, although, later still, the notation "Lisnadell alias Liscurnagark" appears in the sketch map of 1829 made preparatory to the first ordnance survey map of 1837. Insofar as the plaintiffs rely on the mortgage, however, it shows that whatever lands were included, the reconveyance was of the fee simple in 1828. Further, the plaintiffs cannot show from the abstract of the will of 1801 that the lands of Lissadell were entailed for the entire period of 1800 to 1830 or indeed, any part thereof. Finally, the plaintiffs have not shown, nor was there any other evidence on the matter before the Court, what powers were reserved to Sir Robert under the will or codicil of 1801/02. The defendant also draws attention in closing its case to another document of 1826 which the plaintiffs had submitted to the Court in a book of documents on which they relied to show incapacity. The 1826 deed does not, according to the plaintiffs, effect a disentailment, but describes what should follow if and when an action for recovery was brought. It clearly shows, however, that the lands were entailed on that date. Disentailment, however, would not again, according to the plaintiffs, take place unless and until the action contemplated was taken, the decree made and the steps envisaged in the 1826 deed taken. How the lands came to be entailed in 1826 is not clear from the documents before the Court. What is clear, however, is that by 1830 the lands were held in fee simple, which means that disentailment did take place between 1826 and 1830. There was, therefore, a period of indeterminate length before the marriage settlement in 1830, when Sir Robert held in fee simple. As a matter of probability, I find that disentailment took place in 1826 or shortly thereafter. Since the 1788 mortgage was reconveyed in 1828, the lands were neither mortgaged nor entailed for a period before 1830, when dedication could have taken place. The townlands in the marriage settlement of 1830 embraced by the description "Lisadill Estate" include, Ardtarmon, Ardtrasna, Ballinvoneen, Ballinfull, Dunowney, Dunfore, Liscorrnegark, Lissadell (otherwise Lisadill), *etc.*, in addition to many more other townlands in that area. It is noticeable that Ballygilgan is not included and also that Liscorrnegark is separately listed from Lissadell which clearly indicates that in the conveyance they were in different locations at that time. In contrast, only twenty-three townlands are mentioned in the mortgage of 1788 and the reconveyance of 1828. For these reasons I am not satisfied that the plaintiffs reliance on the will of 1801 proves incapacity to dedicate during this period.

(iii) Marriage Settlement 1830

262. Under this settlement, Sir Robert Gore-Booth (4th Baronet), in anticipation of his imminent marriage to Caroline Goold, conveyed lands at "Lissadill estate" to trustees in fee simple upon the trust and uses therein. There is still no mention of Ballygilgan lands at this juncture. This is because, as a later deed shows, the land at Ballygilgan, five hundred and fifty acres, was not purchased until 1838. The evidence that the Gore-Booths had any significant land interests in Ballygilgan prior to that is very weak. Under the settlement, the land in question was held by Sir Robert (4th Baronet) for life, thereafter to his son, Robert Newcommen Gore-Booth in fee tail male, with remainder in fee simple to Sir Robert himself. This remained the position until the lands were disentailed in 1857. It is significant to note, however, that since the Ballygilgan lands were not owned by the Gore-Booths until 1838, they could not have been subject to the will of 1801, or the settlement of 1830. It follows that the plaintiffs have not proven that these lands are affected by either the will of 1801 (or the codicil) or the marriage settlement and have not shown incapacity in relation to these lands before 1838 and could not do so for reasons given. This is important as much of the Coast Road (*i.e.* A to B to E referred to on the map used in court), at issue here falls within the townland of Ballygilgan. It should be noted also that the plaintiffs have only a possessory title to that part of this route which is to the west side of the Burrows. Clearly, the plaintiffs have no documentary title to this part of the road and, accordingly, it is not possible for them to show incapacity for this part of the road also.

(iv) Disentailment 1857-1861

263. There is no dispute between the parties that the Lissadell estate was disentailed by indenture of disentailment on the 5th November, 1857, between Sir Robert Gore-Booth (4th Baronet) and his son, Robert Newcommen Gore-Booth (both of whom lived at Lissadell House at the time) and Thomas Mostyn. Sir Robert's consent as protector was recited in the indenture. From 1857 as a result, the lands were held by Thomas Mostyn in fee simple on trust for Sir Robert (4th Baronet) for his life, remainder to Robert Newcommen Gore-Booth in fee simple. The son was twenty six years of age at that time and, according to the indenture, resided with his father, Sir Robert, at Lissadell until his premature death in a boating accident in 1861.

264. For this four year period, therefore, there was no question of an entailed estate in the title to Lissadell. The plaintiffs contend, however, that this is of no avail to the defendant as it is well established that the life tenant cannot dedicate to the public, unless there are special circumstances where it can be inferred (assumed) that the life tenant and the remainderman both acquiesced to the dedication. They say that the defendant has not shown such exceptional circumstances during those years.

265. I disagree. In my view, where the life tenant and the remainderman, being father and unmarried son, are living together (apparently in harmony) in the same house on lands over which the user is claimed to have occurred, I am prepared to infer that there was joint dedication; or, at the very least, that there could have been acquiescence to the user by both persons who had an interest in the property. Living in Lissadell House at the same time, it would be most unlikely that both did not have the same level of knowledge and appreciation as to what was happening on the lands at the time. In *Bruen and Ors. v. Murphy* (Unreported, High Court, McWilliams J., 11th March 1980) McWilliams J., where

lands were held for a lengthy term of years, indicated that acquiescence of the owner in fee might be presumed. In *Farquhar v. Newbury Rural District Council* [1909] 1 Ch. 12 where land was settled upon a tenant for life with an immediate remainder to a tenant in fee, both of whom were *sui iuris*, the Court of Appeal held that both together had the competence to dedicate to the public a road over the settled land. On the facts of the case, where the remainderman had moved into possession, and the owner of the life estate (his elderly uncle) had ceased to live on the lands, and apparently never had knowledge of public user, the Court was willing to infer dedication. Farwell L.J. stated (at pp. 18-19):-

> "It is therefore a simple case of dedication, so far as title is concerned, by the owners of the fee. A man cannot dedicate that which is not his own, but there is nothing to prevent several owners who between them own the entire fee from dedicating."

266. In the same case, Cozens-Hardy M.R. said (at p. 15):-

> "Warrington J. treats it as a matter of course that the tenant for life and the remainderman together could have dedicated this road to the public. I assent to that absolutely and without qualification."

267. 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 contrast to the facts in *Farquhar* (*supra*), 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.

268. It is important to focus on the dates at this point. We have seen that Sir Robert was the owner in fee from 1828 (possibly 1826) to 1830 or at least for a period prior to 1830 when there was no mortgage on the lands. Dedication was clearly possible during this period. Dedication at this time, however, could only have relevance for the Coast Road (or that portion of the Coast Road then within Lissadell estate) which, from the Larkin map of 1819 clearly existed at that time. The other avenues in dispute in this case only came into existence in or around 1830–1833 or thereabouts when the new house was erected and the paths were laid out. The conclusion I have reached for the period 1857 to 1861, however, that dedication was not only legally possible, but on the facts should be inferred, means that this dedication covered all the avenues at issue in this case.

(v) The Period 1861 to 1894

269. On the death of Robert Newcommen Gore-Booth in a boating accident in 1861, his will took effect with the result that after 1861, the land was held by Sir Robert (4th Baronet) for life, then to his brother Sir Henry (5th Baronet) for his life with remainder to Sir Henry's first and successive sons severally in tail male with divers remainders over. During this period, although the estate was entailed it was capable of being disentailed and converted into fee simple estate, which happened on the 12th March, 1894. There was one day therefore, *i.e.* the 12th to 13th March, 1894, when there was no entail and dedication could have taken place since the fee simple was held for that short time by Sir Henry (5th Baronet).

(vi) From 1894 to 1944

270. By the disentailer made on the 12th March, 1894, between Sir Josslyn (the future 6th Baronet), his father, Sir Henry Gore-Booth (5th Baronet), and Mr. F.R.M. Crozier, the entail created by the will of 1861 was barred and the Lissadell estate (now including Ballygilgan and Finned for the first time) were conveyed to Mr. F.R.M. Crozier subject to the power of appointment of Sir Henry William Gore-Booth and Sir Josslyn Gore-Booth. The next day, the 13th March, 1894, Sir Henry and Josslyn exercised this power and the Lissadell Estate went to Sir Henry Gore-Booth, thereafter to Sir Josslyn Gore-Booth for his life without impeachment for waste with remainders in fee tail to the first and every other son of Sir Josslyn Gore-Booth successively in remainder one after the other, and with divers remainders over. Importantly, Sir Henry and Sir Josslyn in this resettlement document, expressly reserved to themselves powers which during their joint lives would have enabled them to dedicate if they so wished. Josslyn, later to become the 6th Baronet on the death of his father Sir Henry in 1900, was protector of the settlement. From this it can be seen that from 1894 to 1900 Sir Henry and Sir Josslyn (to become the 6th Baronet) had power to dedicate if they wished. There is no evidence that they exercised this power and I am not aware of circumstances, unlike the period from 1857 to 1861, that would enable me to presume that such power was likely to have been exercised. But it was legally possible to do so. From 1900, after his father Sir Henry died, Sir Josslyn was a life tenant in possession, with remainder to his sons successively in tail. As such he did not have power to dedicate during this period.

271. Two of Sir Josslyn's (6th Baronet) sons were killed in action during World War II, and by November, 1943 it was clear that Sir Michael Saville Gore-Booth would become the 7th Baronet under the estate created by the 1894 indenture of resettlement. Sir Michael was of unsound mind and his brother Angus was next in line to inherit the title. Angus's eldest son, the present Sir Josslyn, was born in 1950.

272. On the death of his father on the 14th March, 1944, Sir Michael Savile Gore-Booth held Lissadell Estate as tenant in tail in possession and as such he (or his committee under the direction of the President of the High Court) could have executed an indenture of disentailer at any time. This in fact was not done until 1978, and in 1982 the present Sir Josslyn became the owner of the fee simple. From that date Sir Josslyn was clearly in a position to dedicate. Angus, Sir Michael's brother became the 8th Baronet on Sir Michael's death in 1987. Angus lived all his life in Lissadell and died there in 1996. The plaintiffs bought the fee simple from Sir Josslyn in 2003.

(vii) The Wardship 1944 – 1978

273. The defendant also suggests, as a matter of law (though clearly contrary to the intention of both the committee for the ward and the President of the High Court during that period), that there was no reason why dedication could not have taken place during this period as although the life tenant in the entail, Sir Michael (7th Baronet), lived in care abroad, his interests were being looked after by the office of the ward in Ireland and the person entitled to the remainder. Angus, resided at all times in Lissadell. Apart from any question of acquiescence,

by the committee for the ward, dedication was possible at any time during this period, as Sir Michael being the tenant in tail in possession had a statutory power to bar the entail and effectively was owner in fee simple. The estate was finally disentailed in 1978, when it passed to Sir Josslyn (9th Baronet) in 1982 who was the owner in fee then.

274. Because of these findings I need not engage with the plaintiffs' arguments: that there can be no dedication while the title is entailed and second, that there can be no dedication without the mortgagee's consent, while the lands are mortgaged. It is clear that during the periods from 1826 probably (and certainly from 1828) to 1830 and from 1857 to 1861, the lands were neither entailed nor mortgaged and, for reasons already given, dedication was possible during those periods. The inference of dedication that arises from long user, therefore, is not weakened by the plaintiffs' arguments on the title. The fact that the lands were entailed and/or mortgaged at other times is irrelevant.

275. Nevertheless, because there was much argument on these issues before me, I should perhaps give my initial reactions to the submissions made by the plaintiffs on these matters.

(viii) Capacity to Dedicate Land held in Tail

276. In *Dawes v. Hawkins* [1860] 8 C.B. (N. S.) 848, 858 it was stated that dedication of a way to the public cannot be for a limited time but must be in perpetuity. In the context of that case it was clearly *obiter*, but it was subsequently applied to the actions of life tenants and tenants holding for terms of years. The full owner in fee could clearly dedicate, but a life tenant (without the consent of the remainderman) could not. The question then arises as to whether there could be dedication when the estate is held in fee tail? There is little authority on the issue and the plaintiffs argue on first principles that the nature of such an estate would suggest that no such dedication can be made because the present incumbent cannot ignore the interests of the succeeding generations whose identity cannot be determined with certainty until the tenant in tail dies. A similar argument could also be made where the lands are held on a long lease (*e.g.,* for a term of 999 years). The plaintiffs argue that a similar restriction should also apply where the lands are mortgaged as an attempt by the mortgagor to dedicate in this case would lessen the value of the security and would require the mortgagee's consent. In *Bruen & Ors. v. Murphy* (Unreported, High Court, McWilliams J., 10th March, 1980) McWilliams J. doubted if the principle should apply to a lengthy term of years and indicated that the acquiescence of the owner in fee might be presumed.

277. The fee tail is a peculiar estate, created by settlement to pass down from the original grantee to his heir or heirs. (It can be noted that the fee tail is now abolished by s. 13 of the Land and Conveyancing Law Reform Act 2009) As stated, any given heir is only in possession for his or her lifetime. Although a tenant in tail in possession is considered to be a tenant for life under the Settled Land Acts 1882 – 1890 (now repealed by Schedule 2, Part 4 of the Land and Conveyancing Law and Reform Act 2009), caution should be exercised into readily drawing comparisons with a tenant in tail in possession for life, and a person in possession of a life estate *simpliciter*. There are a number of significant differences which point towards a difference in capacity and their ability to

encumber the land for future generations.

278. The fee tail, has in common with the fee simple, the fact that both are, in contrast to a life estate, estates of inheritance. The ability of the fee tail holder, however, to alienate is limited and an attempt to do so cannot take priority over the interests of "the heirs of his body".

279. The tenant in tail, however, can convert his interest into a fee simple, something patently not possible for a life tenant. This ability to upgrade his estate was originally done through fictitious litigation ("fines and recoveries") intended to circumvent the restrictive policy of *De Donis Conditionalibus* (1285). These techniques were replaced by statutory procedures in the Fines and Recoveries (Ireland) Act 1834, the result of which is that a tenant in tail in possession acquired the power to dispose of the fee simple estate, provided he complied with the Act. Even if the Act was not complied with in its entirety, a tenant in tail could, through a disentailing assurance, vest a base fee in himself.

280. This clearly indicates that the interests of the remaindermen in fee are vulnerable in some instances to the wishes of the tenant in tail. If this is the case why should not the tenant in tail be also able to dedicate?

281. In contrast to a tenant for life, a tenant in tail in possession cannot be held liable for waste; the heir takes the property as it is received from his predecessor. "A tenant in tail may commit waste because he can always acquire the fee." *Turner v. Wright* [(1860) 2 De G.F. & J. 234]. (Cited by Vaizey, A Treatise on the Law of Settlements of Property made upon Marriage and other Occasions (Vol. 2, 1887) at pp. 891, fn.(a))

282. This view is also consistent with s. 25 of the Landlord and Tenant Law Amendment (Ireland) Act 1860 ("Deasys Act") which make lessees of perpetually renewable leases unimpeachable for waste, other than fraudulent or malicious waste.

283. Likewise, Williams (*Principles of the Law of Real Property*) (18th Ed.) (1896 at p. 105-106) notes: -

> "As regards the right of free enjoyment, a tenant in tail is on an equal footing with a tenant in fee simple; he may a cut down timber for his own benefit, and commit what waste he pleases, without the necessity of barring the entail for the purpose."

284. Discussing where a tenant in tail may be bound by the actions of his own predecessor, Williams noted that, since the time of Henry VIII, debts owing to the Crown could be charged against the estate, and in later times, since the Judgments Act of 1838 (1 and 2 Vict., c. 110):-

> "[D]ebts, for payment of which any judgment, decree, order or rule had been given or made by any court of law or equity, where made binding on the lands of the debtor, as against the issue of his body, and also against all other persons whom he might, without the assent of any person, cut off and debar from any remainder or reversion."

285. Furthermore, he stated at p. 57:-

> "An estate tail may also be barred and disposed of on the bankruptcy of a tenant in tail, for the benefit of his creditors, to the same extent as he might have barred or disposed of it for his own benefit."

286. It is therefore clear that a tenant in tail can commit acts of waste and may bind the land into the future through his actions, for example in the way of orders as against the property. With regards to public rights of way, it is clear that if one were created over lands, or even in substance acquiesced to, so as to give rights to individuals over the land, this is certainly either a form of voluntary or permissive waste. A tenant in tail would not be prosecutable for either, it is suggested, and it is argued such acts or omissions could bind the successors in title.

287. It has long been held that a tenant in tail may also charge the settled property, even before the Fines and Recoveries (Ireland) Act 1834, since he could bar the entail by means of a fine or recovery; he could therefore charge the fee simple estate. As noted by Coveney (ed.), *A readable edition of Coke upon Littleton* (London,1830), (at para. 343 (b)):-

> "And so it is of lands entailed, for they may be charged in fee also; for the estate taile may be cut off by fine or recovery."

288. In addition to having the powers of a tenant for life under the Settled Land Acts, it is clear that a tenant in tail has common law powers which exceed those of a tenant for life *simpliciter*; the Settled Land Acts only provide a statutory minimum for powers of tenants for life. As noted by de Londras, *Principles of Irish Property Law* (Dublin: 2007) at p. 134:-

> "The Settled Land Acts give the tenant for life powers of sale, mortgage, lease, disposition of the princip[al] mansion house and entry into contracts. These powers are additional to the powers that a tenant for life may possess in order to deal with his estate independently of the Settled Land Acts 1882 – 1890. Thus, for example, the holder of a fee tail will have the power to bar the entail under the Fines and Recoveries (Ireland) Act [1834] and the powers conferred on him by the Settled Land Acts 1882 – 1890."

289. The Settled Land Acts allowed the tenant in tail to undertake actions which would bind future holders of the estates. An essential role, however, in the operation of these Acts is played by the "trustees of the settlement". These persons are either those expressly named as such in the settlement or, if none is mentioned, *inter alia*, those with the power to sell or consent to a sale of the settled property, either then or in the future, will be recognised as trustees (s. 2(8), Settled Land Act 1882, now repealed by Schedule 2, Part 4 of the Land and Conveyancing Law Reform Act 2009). Their basic function is to ensure that the balance between security for the family and marketability of the land is achieved. This is generally done, *inter alia*, through a system of notices and consents between the trustee and the tenant. In the case of a tenant in tail in possession, being the tenant for life under the Act, the person, or persons, likely to be trustees of the settlement are the future tenants in tail and/or the remaindermen.

290. In the context of this case, it is clear that for the majority of the estates tail since 1777, both the tenant in tail and the immediate future tenants in tail and/or the remaindermen were in occupation of the House at the same time. It

is therefore possible that public rights of way could have been dedicated by the tenant in tail with the trustees' consent. Furthermore, as a matter of law, it is not certain what the effects of a dedication without consent would be. Whereas, in the case of the creation of a lease without consent, the lease would run only for the current tenant's life. As noted, however, dedication could be considered to be voluntary waste and the next tenant may have to accept such waste, as he would have to do if, for example, the previous tenant had cut down all the trees.

291. In the above circumstances, given the ability of the holder of the fee tail to bar the entail, his immunity for waste, the extensive powers which he has, not only as a "tenant for life" under the Settled Land Acts 1882 – 1890 but also, additionally, at common law, it would seem that it is very arguable that dedication could be considered to be legally possible during the course of the fee tail. It would seem to me that it would be no huge erosion of the rights of successors to recognise the additional ability of the tenant in tail to dedicate in such circumstances. In fact, I would be disposed to treating such dedication as waste in the circumstances which of course the heirs must accept.

292. It is appropriate to recall what Evershed J. said in *A.G. Newton Abbott Rule District Council v. Dyer* (1947) 1 Ch. 67, 86 in the context of a discussion on tolerance and dedication:-

> "But many public footpaths must be no less indebted in their origin to similar circumstances, and if there is any truth in the view (as stated by Chief Justice Cardozo) that property like other social institutions has a social function to fulfil, it may be no bad thing that the good nature of earlier generations should have a permanent memorial."

293. In *R.(Godmanchester T.C.) v. Environment Secretary* (*supra*), Lord Hoffmann recognised the interests of the public also in this matter when he said (at p. 88):-

> "The reason for juries and judges being willing to make and accept findings that there had been dedication … was of course the unfairness of disturbing rights which had been exercised without objection for a long time."

294. In the discussion of the capacity to dedicate under the entail, the balancing should not be confined only to the interests of the holder of the fee tail and the heirs: the public entitlement must also be considered.

295. I will refrain from making any comments on the ability of mortgagors to dedicate where there is a mortgage on the land except for these comments. If the dedication took place before the mortgage, the mortgagee would only have as security land that had already been dedicated. Insofar as the law is settled that user for living memory may infer dedication to a time prior to the first user even to a time more than hundreds of years before, this also could mean that the user could infer dedication back to a period when there was no mortgage on the property, for example, 1828–1830 in this case. Subsequent mortgages would then be of land over which the pubic had a right of way. There is also the possibility that one could imply into the loan contract a term that the mortgagee accepts the user already in progress, recognising that it may affect his security. In such a way, he might be fixed with knowledge of the user. In any event, I would be reluctant to accept as a rule of law, that an owner of property could

always prevent the public from acquiring public rights of way, simply by maintaining a small mortgage for this purpose on the property. It would be contrary to the established rule that if the landowner wishes to show he is not acquiescing he must communicate his position to the public by some overt act.

296. As already stated, however, because of earlier findings I need not determine these legal issues definitively here. (See also *President of the Shire of Narracan v. Leviston* [1906] 3 C.L.R. 846) In *Smith v Wilson* [1903] 2 I.R. 45 at 69, it was suggested that a fee farm grantee could dedicate without the assent of the owner of the fee farm rent.

XV. Nature and Extent of the Rights of Way

297. Finally, I must say a word about the nature and extent of the public rights of way established by this Court. The evidence was that the user enjoyed by persons for generations involved passing and repassing on foot, on cycles and in motor vehicles. There was little or no evidence that the public traversed the ways with large agricultural or commercial vehicles. The usage by C.I.E. and others insofar as it involved buses and coaches was, in my view, by permission and not as of right. Moreover, although the claim by the defendant was for rights of way with no temporal restrictions, the evidence from most, if not all of the witnesses was that their usage was confined to daylight hours and they would not think of using the rights of way at night time. Based on this evidence, I hold that the rights of way are available to the public only during daylight hours. Furthermore, given the location of the rights of way, the evidence, as well as the owner's interests and entitlements, I also hold that vehicular traffic should observe speeds which are reasonable in the circumstances. In particular, the dedication never extended to the activities of so called "boy racers", whose presence, occasional as it was, was always a matter for complaint by the Gore-Booths in earlier years.

298. I accept the evidence of those witnesses who said that there was limited parking near the Water Wall over the years and I hold that such right to park for those visiting the Water Wall as a terminus, was also part of the dedication, but only to the extent that it does not obstruct passage on the roadway for other vehicles and particularly, but not exclusively, for vehicles used by the plaintiffs in servicing the Alpine Gardens or vehicles used by the plaintiffs' tenants in connection with the Fish Farm. I am not, however, prepared to hold that the right to park at or near the Alpine Gardens should require any alteration or adjustment to the recent landscaping carried out by the plaintiffs in that area.

XVI. Local Custom

299. Because of my decision that public rights of way exist in Lissadell over the routes referred to, there is no need for me to consider the alternative ground advanced by the defendants that is, that the existence of the rights of way could be justified on the basis of local custom. Accordingly, I will refrain from considering the merits of this additional ground as being unnecessary in the circumstances.

XVII. The Plaintiffs' Claim for Damages

300. For a similar reason, I do not have to engage with the claim made by the plaintiffs that the Council was liable in damages to them for slander of title, for interference with the plaintiffs' business relations and for intentional and/or unlawful interference with the plaintiffs' economic interests. An essential ingredient to these claims was that no rights of way existed over the plaintiffs' land. Since I found, otherwise, an essential element of the plaintiffs' claim is removed, and this claim having no factual support, must inevitably collapse. Counsel for the plaintiffs conceded this to be the situation and I will refrain from further comment on these claims for this reason.

XVIII. Absent Witnesses

301. In final submissions, the plaintiffs' counsel urged the court to take cognisance of the fact that the defendant failed to call certain witnesses whom the plaintiffs say had critical evidence to offer. He relied on a dictum of Laffoy J. in *Fyffes plc v. D.C.C. plc* [2009] 2 I.R. 417, where she said at p. 508:-

> "While, as I have already stated, the plaintiff did not point to any Irish authority in which the basis on which adverse inferences may be drawn from the absence or silence of a witness whose evidence might be expected to be critical to an issue arose, I have no doubt that in practice, in the course of fact finding, judges do draw adverse inferences in such circumstances. The type of situation I have in mind arose in one of the earlier authorities considered in *Wisniewski: Herrington v. British Railways Board* [1972] A.C. 877. Where an issue arises as to whether an adverse inference should be drawn, I consider that the principles outlined in *Wisniewski* are helpful guidelines for the court."

302. The Wisniewski principles were expressed by Brooks L.J. in the Court of Appeal decision in *Wisniewski v Central Manchester H.A*. [1988] P.I.Q.R. P324 who at p. 340 reviewed the earlier authorities in the following terms:-

> "From this line of authority I derive the following principles in the context of the present case:-
>
> (1) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> …
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.…"

303. In one of the earliest authorities cited in Laffoy J's judgment, *M'Queen v. Great Western Railway Co.* [1875] L.R. 10 Q.B. 569, Cockburn C.J. indicated that the inference arising from an absent witness could only arise when a *prima facie* case was made out. At p. 574, he said:-

> "But that always presupposes that a *prima facie* case has been established; and unless we can see our way clearly to the conclusion that a *prima facie* case has been established, the

> omission to call witnesses who might have been called on the part of the defendants amounts to nothing."

304. I have no difficulty in accepting this proposition in general, but in doing so I would point out that as a submission it is a knife that cuts both ways. The plaintiffs complain that Gráinne Dunne, Finín O'Driscoll, Hugo Hamilton, Marcus Magneer and the area engineer responsible for the erection of road signs were not called by the defendant on the critical issue (in their view) of what went on in the run up to the motion passed by the defendant in December, 2008. In response, Ms. Butler for the defence said that there were much more glaring absences on the plaintiffs' side on other issues.

305. Mr. Murray's suggestion for the plaintiffs that an adverse inference should be drawn against the defendant is largely focused on the conduct of the defendant in allowing the motion to be passed at the meeting of the Council in December, 2008. The relevant issue, therefore, in this context was the charge advanced against the defendant that it had slandered the plaintiffs' title or had interfered with the plaintiffs' economic or business interests.

306. Because I have held, however, that public rights of way do exist, this now is not an issue that arises for the court to determine. The evidence that these witnesses might have given, therefore, is irrelevant and cannot give rise to an adverse inference on issues that never fell to be determined by the court. It might have been otherwise if the witnesses had relevant evidence to give on issues relating to dedication, *etc.* On that issue, the defendants called many witnesses and the "missing witnesses" could have little to add in that regard.

307. When this point was raised by the plaintiffs, Ms. Butler for the defence, replied in kind. She said it was very significant that none of the following witnesses were called by the plaintiffs: Sir Josslyn, the vendor, Ms. Constance Cassidy (the second plaintiff herein), Ms. Asumptha Kenny, the solicitor who had carriage of the purchase of Lissadell for the plaintiffs, and a sister of the second plaintiff, Ms. Helen Cassidy, an auctioneer who was not only the agent for the plaintiffs negotiating the purchase but who has also been engaged as manager of Lissadell since 2005. Ms. Constance Cassidy, in particular, had spent many holidays as a girl in the area around Lissadell and had introduced Lissadell to her husband. She, one would expect, would have relevant evidence to give in respect of user at that time *i.e.* in the 1960s and 1970s. Presumably her sister, Helen Cassidy, the auctioneer, would also have been in a position to offer evidence on this matter. Ms. Constance Cassidy would also, one would assume, have evidence in relation to the negotiations with Sir Josslyn's lawyers at the time of purchase, especially in relation to Sir Josslyn's statutory declaration. She was also in attendance at the meeting between the plaintiffs and Susan Gilmartin, Gráinne Dunne and Michael Carty, shortly after the Main Avenue was closed in or around April, 2004. It will be recalled that there was a conflict of evidence between the parties as to what transpired on that occasion. Ms. Constance Cassidy, like her husband, is a senior counsel and for that reason should have no fear of the courtroom.

308. One might also anticipate that Ms. Kenny, the plaintiffs' solicitor, would have significant evidence relating to the conveyance and the terms of the statutory declaration furnished by Sir Josslyn at the end of the day. The defendants called an expert conveyancer, Mr. Brian Gallagher, who gave

evidence that the purchasers were on notice about the public access because of replies to requisitions on title which were furnished by Sir Josslyn. In these circumstances, one would assume that the purchaser's solicitor would be called to comment or explain why the plaintiffs were not more insistent in that regard. I appreciate that there would be a confidentiality issue, but there is no reason why this could not be waived by the plaintiffs if they saw fit to do so. It is not insignificant also that during this evidence, Mr. Walsh (the first plaintiff) suggested, when questioned on certain issues, that Ms. Cassidy and Ms. Kenny could give their own evidence on those issues intimating that they would be called. The witnesses were not called, however, at the end of the day.

XIX. Impact on Third Parties

309. Counsel for the plaintiffs state that, the defendant is also in a difficulty when it asks the court to find a public right of way to a terminus at the sea on the Coast Road which runs partly across Coillte lands. The plaintiffs ask how can the court make an adverse finding against either Coillte or the State, when neither is a party to these proceedings.

310. In my view, the answer is simple: any decision in this case will only bind the parties to these proceedings, the findings of this court are binding *inter partes* only. The absence of other persons, such as Coillte or the State, does not prevent the court from determining the dispute between the protagonists here or from making a finding that the public have a right of way across Coillte land to the beach. Such determination or finding, however, is not a finding *in rem*, and either Coillte or the State may contest this Court's determinations in such other proceedings they may wish to initiate. *Res judicata* does not apply to them. I rely on *Hue v. Whiteley* ([1929] 1 Ch 440]) and *Jones v. Bates* ([1938] 2 All E.R. 237]) as support for my approach to this question. See also *Moser v. Ambleside* ((1924) 89 J.P. 59; affirmed in C.A. (1925) 89 J.P. 118, 120). When the Chief State Solicitor's Office was alerted by the plaintiffs' of their intention to commence these proceedings, the Chief State Solicitor refused to become involved. In a letter to the solicitors for the defendant the Chief State Solicitor replied:-

> "As you know, the State is not a party to these proceedings, no relief is sought against the State and in those circumstances the Attorney General takes the view that no right *in rem* can be established against the State. The dispute appears to be essentially a local one and is not appropriate that the State become involved in these proceedings.
>
> The Attorney General's position is that the State does not acknowledge the existence of any local or customary rights or public rights over State foreshore in this area or at any location comprising State foreshore." (Letter from Chief State Solicitor to McHale's Solicitors dated 20th December, 2009)

311. The defendant accepts that this is the position and stresses that there is no dispute between the defendant and either Coillte or the State since neither of these bodies have sought to close down either the right of way along the Crushmore Avenue or, access to the Sea across the foreshore. When the matter of including the Coast Road now owned by Coillte as an objective in the

Development Plan of 1967, Coillte signified that it would not oppose any existing right of way and it did not appeal its inclusion in the Development Plan when it was adopted. The defendant argues in the circumstances that it would be contrary to public policy for Sligo County Council to have joined additional parties when there is no *de facto* dispute with them on the matter. The defendant also draws attention to the directions issued in 1967 by the then relevant Minister to local authorities who were engaged in preparing development plans for the first time under the Local Government (Planning and Development Act) 1963. In a letter to these local authorities the Minister for the Environment emphasised that he was anxious that access to places of public amenities, such as beaches should be dealt with in the development plan, either by the preservation of existing rights of way or the potential creation of new ones to the beaches.

312. In these circumstances, I do not think that this Court should concern itself with this issue.

XX. Legal Fiction

313. When the law infers dedication from long user it is consciously engaging in a fiction. As Lord Hoffmann said in *R. (Godmanchester T.C.) v. Environment Secretary* (*supra*) it is not credible to infer dedication in many cases were the true reason for the owners inaction is tolerance, good nature, ignorance or inertia *etc.*, rather than a conscious decision to dedicate. Nevertheless, the law is willing to indulge in this pretence because, to put it bluntly, it wishes to recognise the public's right arising out of long user "as of right". Behind the fiction is a deeper recognition that such long user should be right-creating and if the language of precedent requires this conclusion to be paraded as dedication, the courts have little hesitation in doing so.

314. Fictions are a useful tool in legal reasoning especially when social realities have moved on from existing statements of the law. When the precedents become oppressive, threatening to thwart current values in a changing society, the judges may maintain respectability (consciously or unconsciously) by adopting existing verbal formulae to disguise what they wish to achieve. The judiciary may pretend in finding a private right of way, that there must have been a lost grant or in finding in the area of occupier's liability, that repeated trespasses amount to a licence or, in finding that child trespassers were really licensees, because an "attractive nuisance" such as a farm machine lured them "as mechanically as a fish follows a bait" onto the occupier's premises. There has been no more notorious example of this judicial device than the pretence in "fines and recoveries" invented to avoid the strict entailing provisions of *De Donis Conditionalibus* (1285). Such devices can be justified as a temporary technique to promote current notions of justice when the legislators have failed to reform and the common law is well established. In truth, they may be no more than the manifestation of the incremental and organic nature of the common law. As a permanent solution, however, they are unsatisfactory and somewhat dishonest.

315. Inevitably in this process there comes a time when there should be an end to dissembling and when one must speak clearly. When the fictions lead to a situation where the ordinary citizen, for whom the law should be accessible, fails to understand what should be simple, and where even the lawyers, whose

business is to engage with the law, struggle to sustain the pretence, it is incumbent on the judges to clarify and simplify in the interests of justice and certainty.

316. In *Purtill v. Athlone U.D.C*. [1968] I.R. 205, our Supreme Court set a clear example for the judiciary in this regard. Sweeping aside the outmoded authorities, relying on no precedent whatsoever and driven by principle alone it, recognised a new era for the foreseeable trespasser in an area that was already swamped with fictions and required above all justice and clarity.

317. In the present area, the judges have held that the inference that arises from long user is "almost irresistible". For the owner to rebut it on capacity grounds, he must show that dedication in the past was not only improbable, but impossible. Even where the true attitude of the landowner, that he has no intention of dedicating, may be identified from private correspondence, *etc.*, the law will ignore this and persist with a finding of dedication. It is clear that the courts, once presented with long user "as of right", will not be deflected from recognising the right-creating force of this user and will still declare dedication to be the legal basis.

318. I think the time has come for the courts to abandon this fictional reasoning and language and show themselves ready to embrace and acknowledge the real position in law: where there is strong evidence of long user "as of right," a public right of way is created. The protection for the landowner is contained in the phrase that user must be "as of right" (*i.e. nec vi, nec clam, nec precario*). If the user does not comply with these conditions, the right is not created. But if the user is without force, open and is not by licence or permission, what complaint can the landowner have if he fails to act in protection of his property? Even private property has a social dimension and the owner has responsibilities as well as rights. One of these is to protect his property when it is attacked. The law is not slow to assist in such a situation. But if, in the teeth of such long and notorious user, he sits on his hands and does nothing, what complaint can he have if the law recognises and blesses such user as being right-conferring for the public.

319. I do not believe the law is enhanced, if like the "three -card -trick –man", it thinks it is necessary to engage in some sleight of hand before announcing this conclusion in language mandated by the history of the card shuffle itself. It must not become a slave to historical fiction. Sooner or later the law must confront reality. It is interesting in this context that the legislature has now seen fit, in the context of easements and profits *á prendre* acquired by prescription at common law, to abolish the fiction of the doctrine of lost modern grant. (Section 34 of the Land and Conveyancing Law Reform Act 2009)

320. Obliging the parties to indulge in this façade, in a search for a "will-o-the wisp" notion, which prolongs litigation, dramatically increases costs and ties up scarce resources, does no service to the public perception of the administration of justice. The present case ran for fifty eight days, there were more than fifty five witnesses and hundreds of documents were referred to, some of them hundreds of years old. Very many weeks, were concerned with a presentment of £84.17.4 made in 1814 which in turn depended on establishing whether a semi-circular protuberance of land existed at the time. Ancient maps were produced,

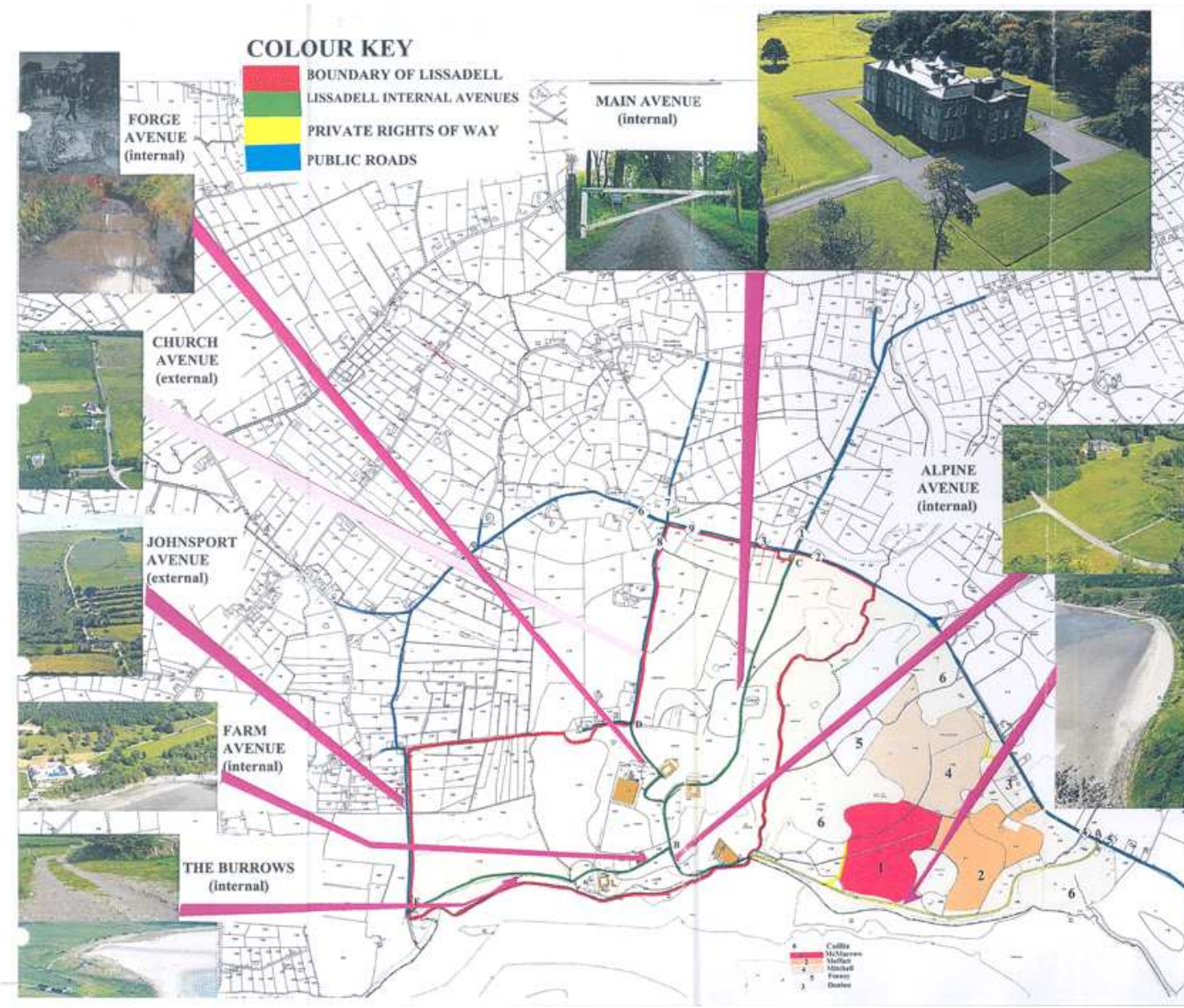
sketch books by surveyors made in preparation for the first ordnance survey map of 1837 were forensically parsed and analysed, historians and cartographers were examined, cross-examined and, in one case recalled, all in an effort to establish whether this small bulge of land existed or not at that time. All of this in an effort to reinforce or destabilise the inference justified by long user. The eventual costs of this exercise will be enormous.

321. The present case was pleaded and argued with the fictions in mind. The conclusions that I have reached were justified in traditional terminology and were based on existing precedents which, on the evidence, mandated a finding of "fact" that the long user inferred dedication to such an extent that it had become an "irresistible inference".

322. Perhaps the time has come for the final step to be taken, namely that the inference in such cases should not be an inference of a "fact" but a presumption of law. If it were necessary in this case, I should have no hesitation in declaring that to be the proper evolution of the common law in this area. Pending that, and for reasons already given, I am content to declare that evidence of long user "as of right" creates a public right of way, except in truly exceptional cases.

323. I have reached my decision on this matter having listened carefully to the evidence of more than fifty five witnesses and having applied legal principles to the facts as I found them. That is the way the courts operate. It is regrettable, however, that it came to this. Although the dispute has pitched neighbour against neighbour, it is appropriate to acknowledge that when the defendant's witnesses were giving evidence of user, many complimented the restorative work done by the plaintiffs which they acknowledged, displayed energy, passion and total commitment. It is clear that what the plaintiffs are attempting to do is commendable and aesthetically sensitive and of benefit to the whole of the Sligo area. My part in this dispute is now finished and I can only hope that the community and the public in exercising the rights recognised by this Court, will do so in a way that is sensitive to the rights of the plaintiffs and in a manner which recognises the plaintiffs' efforts to further enhance that beautiful part of Sligo for the benefit of all.

324. I dismiss the plaintiffs' claim and I make a declaration that the roadways A-B (shaded yellow and green) and B-C, B-D and B-E (shaded green) on the map annexed to this judgment are subject to rights of way in favour of the public.


COLOUR KEY
BOUNDARY OF LISSADELL
LISSADELL INTERNAL AVENUES
PRIVATE RIGHTS OF WAY
PUBLIC ROADS
FORGE AVENUE (internal)
MAIN AVENUE (internal)
CHURCH AVENUE (external)
ALPINE AVENUE (internal)
JOHNSPORT AVENUE (external)
FARM AVENUE (internal)
THE BURROWS (internal)