

HIGH COURT ON CIRCUIT

LINDA O'GARA

.v.

VINCENT MURRAY



Judgment of McCarthy J., delivered the 10th day of November
1988.

The parties are adjoining owners on Connolly Street in Sligo. Since the closure by blocking of commercial access to the Defendant's licensed premises, the only service access has been from Burton Street at the rear using a way to which it is admitted the Defendant has no title. It was the most convenient way and, having acquired the premises, he chose to use it. The map attached to a lease of 1912 shows a gap in the rear boundary which would indicate some form of way giving access to the rear of the premises; I have already expressed my factual conclusion that there was such a way and the right to use it was exercised until sometime in the early 1950's; since that time it has not been used and gradually became overgrown, cultivated as a vegetable garden by the Plaintiff and eventually the subject of dumping to one side and the building of some form of masonry wall probably covering over the gap which was dug out by the Defendant after he bought the property. The evidence concerning the

building of another wall from front to rear along portion of the property I disregard for this purpose. Indeed I do not find it necessary to make any finding in respect of any wall construction.

The legal principles applicable to circumstances such as the present appear to be clear; much of the relevant authority is cited in the judgment of O'Hanlon J., in Carroll .v. Sheridan (High Court - unreported - 28th October 1983). A right-of-way or other easement may be released expressly or impliedly; such implied release may arise where it is established that there was an intention on the part of the owner of the easement to abandon it. Mere cesser of user may not be enough; cesser of user coupled with incidents indicating abandonment may well be enough. Here it is said the use as a vegetable garden of the area over which the right is claimed, the building of the wall, and, finally, the purported creation of a way along an entirely different area all support release. The cavalier conduct of the Defendant in knocking down the wall constructed by the Plaintiff and creating a wide access road has already been the subject of adverse comment, but I do not readily tie it into an alleged abandonment; I have not found it necessary to deal with the allegation that the wall constructed by the Plaintiff extended over the original area covered by the right-of-way; the use, however, by the Plaintiff and her predecessors of the area over which the original way extended as a vegetable patch and as adjoining what seems to have bordered on being a public dumping ground appear to me to lend ample support to the Plaintiff's case that whatever right-of-way existed in 1912 has long since been released by cesser of use and surrounding circumstances.

Whatever the source of the right-of-way, be it prescription or, under the doctrine of lost modern grant, I am wholly satisfied that in the events that have happened no such easement now exists.

The acts of trespass complained of in the Civil Bill are not in issue; the Defendant has claimed a declaration of entitlement to a right-of-way through the Plaintiff's property; I reject this claim. In the result, there will be:-

1. An injunction prohibiting the Defendant his servants or agents from trespassing upon the Plaintiff's property situated Burton Street, Sligo as coloured green/yellow on the map lodged in Court and not to include the area marked right-of-way.
2. An order that the Defendant do pay the Plaintiff the sum of £2,500 damages for trespass.
3. An order that the Plaintiff's costs and expenses of these proceedings, in this Court and in the Circuit Court, be paid by the Defendant.



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