Secondly, although s. 6 applies to children born prior to its commencement, it should not be construed, in my view, so as retrospectively to invalidate, or to require any action to be taken to reverse, a past and completed event such as the acquisition by a child of his surname.

The orders I propose to make are: (1) Order that the summons be dismissed; (2) No order as to costs.

Order accordingly.

[EDITOR'S NOTE: The following is the list of cases referred to by the Judge, at p. 602, supra:
Pizzinato v. *Pizzinato* (1967) 10 F.L.R. 374.
K. v. *D.* (1968) 13 F.L.R. 430.
Y. v. *Y.* [1973] W.L.R. 80; [1973] 2 All E.R. 574.
Re W.G. (1976) 6 Fam. Law 210 (Eng.).
George and Radford, In Marriage of (1976) 25 F.L.R. 461.
Crick v. *Crick* (1977) 7 Fam. Law 239 (Eng.).
Arthur, In Marriage of (1977) 29 F.L.R. 262.
Sampson, In Marriage of (1977) FLC 76,355.
R. v. *R.* (Child Surname) [1977] 1 W.L.R. 1256; [1978] 2 All E.R. 33.
Ralph, In Marriage of (1977) FLC 76,551.
Putrino and Jackson, In Marriage of (1978) 33 F.L.R. 94.
D. v. *B. (otherwise D.)* (Surname: Birth Registration) [1979] 1 All E.R. 92; [1979] Fam. 38.
Pylarinos and Reklitis, In Marriage of (1979) FLC 78,125.]

Solicitors for the plaintiff (father): *Bray Jackson & Co.* (Double Bay) by their Sydney agents, *Robert Hall & Co.*

Solicitors for the defendant (mother): *C. E. Cranney & Co.* (Oatley) by their Sydney agents, *Aitkin & Pluck.*

O. M. L. DAVIES,
Barrister.

PROPRIETORS STRATA PLAN No. 9,968 AND ANOTHER *v.* PROPRIETORS STRATA PLAN No. 11,173 AND OTHERS

Equity Division: Needham J.

Sept. 17, 20, 30; March 14, 15; June 21, 1977.

Torrens System—Right of way, registered on certificate of title of both dominant and servient tenements—Circumstances in which abandonment will be inferred—Conveyancing Act, 1919, *s.* 89 (1) (b).

In 1928, a landowner subdivided suburban land into three blocks. One had a frontage to the street and the other two were "battle-axe" blocks, that is to say they were situated behind the first block, each having a strip of land 6 feet 3 inches wide, (a total of 12 feet 6 inches, or 3.66 metres, the total hereinafter being called "the strip") running to the street along the northern boundary of the first block. The first block had a right of way over the strip, created by Reconveyance Book 1509 No. 287.

Some months later, a block of flats called "Rotherwood" was erected on the first block, having a northern building line some 4 feet 8 inches from the southern boundary of the strip. Later a block of flats called "Coronel" was erected on the second block, which was immediately behind "Rotherwood"; and a block of flats called "Maronor" was erected on the third block, which was situated immediately to the north of the second block. The three blocks will hereinafter be referred to by the names of the three blocks of flats.

The title to "Rotherwood" was brought under the *Real Property Act,* 1900, in 1934; and the certificate of title current prior to the registration of Strata Plan No. 11,173 showed, in the Second Schedule: "Right of way created by Deed Book 1509 No. 187 appurtenant to the land above described affecting the piece of land 3.66 metres wide shown in the plan hereon." It was conceded that the notification of the appurtenant easement continued on the certificates of title issued upon registration of Strata Plan No. 11,173.

In 1957, after "Coronel" and "Maronor" had been brought under the *Real Property Act,* and at a time when they were united in one ownership, the registered proprietor transferred "Coronel", and granted a right of way over that part of "Maronor" which was part of the 3.66 metre strip, reserving to the transferor a similar right of way over that part of "Coronel" which was part of the strip. The transfer was expressed to be subject to the right of way granted by Reconveyance Book 1519 No. 287.

Each of the certificates of title to "Coronel" and "Maronor" showed the land to be burdened by a right of way over the strip "created by Reconveyance Book 1509 No. 287".

In 1976 the second and third defendants purchased "Rotherwood" with the intention of repairing and redecorating the flats and selling them as strata units. Part of the plan was to use the right of way over the strip for vehicular access to the land at the rear of the building, which was to be concreted and used for loading and unloading wheeled traffic, and for parking six cars. When the second and third defendants commenced this work the plaintiffs, being the statutory bodies of "Coronel" and "Maronor", commenced proceedings on the basis (1) that the strip was limited to pedestrian user by the owners of the dominant tenement; and, if that were not so, the owners of "Rotherwood" "by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part within s. 89 (1) (b) of the *Conveyancing Act,* 1919"—meaning that the right to use the strip otherwise than on foot, if initially granted, had been abandoned.

At the hearing, the judge found (1) that the occupants of "Coronel" and "Maronor" had not used the strip for the passage of vehicles, because of the drop in levels from the street; (2) that vehicular use of the strip by others had been extremely limited, although, of recent times, builders' vehicles had used it, and previously moving vans had done so when tenants were coming to or leaving "Rotherwood"; (3) that the grantees had erected a garden and a fence which, unless removed, made the use by them of the right of way to the rear of "Rotherwood" impossible; (4) that there were electric light poles down the

middle of the strip, which did not, however, prevent wheeled traffic, and (5) that there was no vehicle entry provided for at the street kerb opposite the strip.

Held: (1) The subsequent conduct of the parties (in this case non user by the owners of the dominant tenement) cannot be called in aid in the construction of the grant of an easement such as a right of way, unless such conduct amounts to an estoppel.

White v. *Grand Hotel Eastbourne Ltd.* [1913] 1 Ch. 113, at p. 116; *James Miller & Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583, at pp. 603, 606, 611, 614, 615 and *L. Schuler A.G.* v. *Wickman Machine Tool Sales Co. Ltd.* [1974] A.C. 235, followed.

Watcham v. *Attorney-General of East Africa Protectorate* [1919] A.C. 533, at p. 540, distinguished.

Administration of Territory of Papua and New Guinea v. *Daera Guba* (1973) 130 C.L.R. 353, at p. 446, referred to.

(2) The expression "right of way" is not ambiguous. In different contexts it may mean different things, but, in construing the expression, the Court is required only to find its meaning in the context in which it appears, which, of course, involves an examination of the surrounding circumstances at the time of the grant.

St. Edmundsbury and Ipswich Diocesan Board of Finance v. *Clark (No. 2)* [1975] 1 W.L.R. 468, at p. 477; [1975] 1 All E.R. 772, at p. 780, applied.

(3) In the present case, the fact that a right of way some 12 feet wide was granted to the owners who already had a footway from the street to the rear of their building some 4 feet 8 inches wide was conclusive that a vehicular way, and not a footway, was intended, because in the circumstances, the grant of a footway would have been superfluous. *Keefe* v. *Amor* [1965] 1 Q.B. 334, at p. 345, referred to.

(4) (a) Where, as here, the grant of an easement creates a parcel of rights, the grantee may, by reason of his appropriate acts or omissions, be held to have abandoned one or more of such rights.

Webster v. *Strong* [1926] V.L.R. 509, followed.

Keewatin Power Co. Ltd. v. *Lake of the Woods Milling Co. Ltd.* [1930] A.C. 640 and *Bulstrode* v. *Lambert* [1953] 1 W.L.R. 1064; [1953] 2 All E.R. 728, distinguished.

(b) (i) In a case where, as here, notification of an easement appears on the certificates of title of the owners of both the dominant and servient tenements, and the question is whether or not the easement should be held to have been abandoned, the Court must have regard to the acts or omissions of registered proprietors who were predecessors in title of the present registered proprietor, as well as the present registered proprietor himself.

Treweeke v. 36 *Wolseley Road Pty. Ltd.* (1973) 128 C.L.R. 274, at pp. 282, 285, 286, 287, 302, followed.

(ii) The Court may be entitled, however, as a matter of discretion, to take account of the fact that a person who has recently become registered as the owner of a dominant tenement has bought on the faith of the register, and has actively pursued his rights under the easement.

Treweeke v. 36 *Wolseley Road Pty. Ltd.* (1973) 128 C.L.R. 274, at p. 287, followed.

(c) In the present case, the inference should not be drawn that the persons for the time being, or from time to time, entitled to the easement, by their acts or omissions, had abandoned the same, in so far as it conferred upon their rights to pass and repass on the site with motor vehicles.

(d) This was because

(i) it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it;

James v. *Stevenson* [1893] A.C. 162, at p. 168, applied;

(ii) non-user alone is insufficient to establish abandonment;

Swan v. *Sinclair* [1925] A.C. 227, applied;

(iii) abandonment is not lightly to be inferred;

Gotobed v. *Pridmore* (1970) 115 Sol. Jo. 78, applied;

(iv) abandonment of an easement can only be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself, or to attempt to transmit it to anyone else;

Tehidy Minerals Ltd. v. *Norman* [1971] 2 Q.B. 528, at p. 553, applied;

(v) abandonment is a question of fact, or of inference from proved circumstances, a substantial onus being placed on the grantor to show that the facts lead to the inference; and because

(vi) the plaintiffs had not discharged this onus.

CASES CITED.

The following cases are cited in the judgment:

Administration of Territory of Papua and New Guinea v. *Daera Guba* (1973) 130 C.L.R. 353.
Breskvar v. *Wall* (1971) 126 C.L.R. 376.
Bulstrode v. *Lambert* [1953] 1 W.L.R. 1064; [1953] 2 All E.R. 728.
Cannon v. *Villars* (1878) 8 Ch. D. 415.
Cook v. *Bath Corporation* (1868) L.R. 6 Eq. 177.
Frazer v. *Walker* [1967] 1 A.C. 569.
Gotobed v. *Pridmore* (1970) 115 Sol. Jo. 78.
James v. *Stevenson* [1893] A.C. 162.
James Miller & Partners Ltd. v. *Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583.
Johnstone v. *Holdway* [1963] 1 Q.B. 601.
Keefe v. *Amor* [1965] 1 Q.B. 334.
Keewatin Power Co. Ltd. v. *Lake of the Woods Milling Co. Ltd.* [1930] A.C. 640.
L. Schuler A.G. v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235.
R. v. *Chorley* (1848) 12 Q.B. 515; 116 E.R. 960.
Riley v. *Penttila* [1974] V.R. 547.
St. Edmundsbury and Ipswich Diocesan Board of Finance v. *Clark (No. 2)* [1975] 1 W.L.R. 468; [1975] 1 All E.R. 772.
Shannon Ltd. v. *Venner Ltd.* [1965] Ch. 682.
Standard and Conveyancing Act, 1919, Re (1967) 92 W.N. (N.S.W.) 953.
Swan v. *Sinclair* [1925] A.C. 227.
Tehidy Minerals Ltd. v. *Norman* [1971] 2 Q.B. 528.
Todrick v. *Western National Omnibus Co.* [1934] Ch. 190; reversed [1934] Ch. 561.
Treweeke v. 36 *Wolseley Road Pty. Ltd.* (1973) 128 C.L.R. 274.
Ward v. *Ward* (1852) 7 Exch. 838; 155 E.R. 1189.
Watcham v. *Attorney-General of East Africa Protectorate* [1919] A.C. 533.
Webster v. *Strong* [1926] V.L.R. 509.
White v. *Grand Hotel Eastbourne Ltd.* [1913] 1 Ch. 113.

No additional cases were cited in argument.

SUMMONS.

The plaintiffs sought (1) orders restraining the defendants (a) from allowing, or causing, motor vehicles to be driven over, or upon, land the subject of a right of way, and (b) from taking any action to remove a fence erected across the entrance to the land from the street in a Sydney suburb; and (2) a declaration (a) that the easement was, on the proper construction of the grant, restricted to pedestrian access; or, in the alternative, (b) that the easement, to the extent that it permitted user other than as a footway, had been abandoned; and (3) orders that the easement, so far as it permitted such user, be extinguished, or modified so as to restrict use to user as a footway.

W. H. Nicholas, for the plaintiffs (owners of the servient tenement).

J. C. Campbell, for the defendants (owners of the dominant tenement).

Cur. adv. vult.

June 21.

NEEDHAM J. These proceedings relate to the user of a right of way created on 5th April, 1928, by Reconveyance Book 1509 No. 287. The

plaintiffs, by their amended summons, seek orders restraining the defendants from allowing or causing motor vehicles to be driven over or upon the land the subject of the right of way, and restraining the defendants from taking any action to remove a fence erected across the entrance to the land the subject of the right of way from Kurraba Road, Neutral Bay. A declaration was sought that the easement was, on the proper construction of the grant, restricted to pedestrian access. Alternatively, the plaintiffs claimed a declaration that the easement, to the extent that it permits user other than as a footway, has been abandoned, and orders that the easement, so far as it permitted such user, be extinguished, or modified so as to restrict use to user as a footway.

The proceedings were commenced by the first plaintiff, owner of the common property of the strata plan which is registered in respect of the land and building (a block of flats) known as "Coronel", 135 Kurraba Road, Neutral Bay. The second plaintiff was later joined. It owns the common property of strata plan No. 9969, which is registered in respect of the land and building (a block of flats) known as "Maronor", 133 Kurraba Road, Neutral Bay. The first defendant is the owner of the common property of strata plan No. 11,173, which is registered in respect of the land and building (again a block of flats) known as "Rotherwood", 137 Kurraba Road, Neutral Bay. No question arose in these proceedings which depended upon the legal rights or obligations of the respective parties as proprietors of the various strata plans, and it is convenient to refer to those three parties as the owners of "Rotherwood" (the first defendant) "Coronel" (the first plaintiff) and "Maronor" (the second plaintiff), and to refer to the land and the building erected upon it by the name given to that building. The second defendant and third defendant were, at the date the proceedings commenced, proprietors of the various lots in the strata plan in respect of "Rotherwood". They will, for convenience, be included in the description of the owners of "Rotherwood".

"Rotherwood" fronts Kurraba Road, Neutral Bay. The building was erected in about 1928, apparently being completed some months after the grant of the right of way. It is approximately west of the road. Further west is "Coronel", erected immediately behind "Rotherwood". Between the two buildings is an open area owned as to part by each of the building owners. The land belonging to "Rotherwood" was used by its tenants as a drying area for laundry, the laundry being at the western extremity of the building on the ground floor. Entrances to the flats contained in "Rotherwood" are in the front and in the rear of the building.

"Coronel" includes in its title a strip of land about 6 feet 3 inches wide leading to Kurraba Road. The title to "Maronor", which lies north of "Coronel", includes a similar strip adjacent to the other. The building "Rotherwood" is about 4 feet 8 inches from the northern boundary of its land.

By deed of reconveyance, already referred to, McIntosh & Sons Ltd., the mortgagee of "Rotherwood", reconveyed the land to Arthur Edwin Wilson "together with a right-of-way over the land" thereinafter described, which was a strip 12 feet 6 inches at the eastern end and 12 feet at the western, being the land immediately to the north of "Rotherwood". Part of the site of the right of way is now the property of the first plaintiff and part that of the second plaintiff. The title to "Rotherwood" was brought under the provisions of the *Real Property Act*, 1900 in 1934. The certificate of title current prior to the registration of the strata plan showed, in the Second

Schedule: "Right of way created by Deed Book 1509 No. 287 appurtenant to the land above described affecting the piece of land 3.66 metres wide shown in the plan hereon". The certificates of title issued upon registration of the strata plan are not in evidence, but it is common ground that the notification of the appurtenant easement continued.

Each of the certificates of title to "Coronel" and "Maronor" shows the land to be burdened by a right of way over the relevant strip of land "created by Reconveyance Book 1509 No. 287"

By conveyance dated 22nd June, 1929, McIntosh & Sons Ltd. conveyed "Coronel" to James Park and granted a right of way over that part of "Maronor" 6 feet 3 inches wide which was part of the strip which was subject to the right of way granted to "Rotherwood". I was told, although there was no direct evidence of the fact, that "Coronel" and "Maronor" were subsequently united in one ownership, presumably that of James Park. Certainly, in August 1957, I.B.C. Pty. Ltd. transferred "Coronel" (the lands having been brought under the *Real Property Act*) and granted a right of way over that part of "Maronor" which was part of the strip, reserving to itself, as registered proprietor of "Maronor", a similar right of way over that part of "Coronel" which was part of the strip. The transfer was expressed to be subject to the right of way granted by Reconveyance Book 1509, No. 287.

The second and third defendants were the promoters of the first defendant. "Rotherwood" was purchased by them in July 1976 with the intention of repairing and redecorating the flats and selling them as strata units. Part of the plan was the use of the right of way for vehicular access to the land at the rear of the building, which was to be concreted and used for loading and unloading, and for parking for, six cars. The commencement of this work, involving as it did the use of the strip by vehicles, caused this litigation.

The plaintiffs' case is twofold. In the first place, they say that the 12 foot strip is limited to pedestrian user by the owners of the dominant tenement. If that is not so, they say that the owners of "Rotherwood" "by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part": s. 89 (1) (b), *Conveyancing Act*, 1919. It is not suggested that the easement has been abandoned wholly, but merely that the right to use the strip otherwise than on foot (if initially granted) has been abandoned.

In about December 1930, Mr. A. O. Wardle was employed as resident manager of "Coronel" and "Maronor". At that time a garden, edged with stone, trespassed on the site of the right of way to the extent of about 1 foot 9 inches. Such at least was the oral evidence, but a survey, made in 1972, showed that no part of the garden extended past the western boundary of "Rotherwood". The garden was situated at the north western corner of "Rotherwood" and was backed by a paling fence running east-west. Between the fence and the north western corner of "Rotherwood" building was a pedestrian gate. The garden and the original fence were made and erected in 1929, that is some time after the grant. Shortly after Mr. Wardle moved into "Maronor", he was asked by his employer to connect power to his building. When he asked where the poles should go, Mr. Park replied, pointing to the strip, "Put them down the middle; I don't want any cars down here." One pole is, and always has been, in the footpath, and were the strip to be extended to the road, it would be approximately in the middle of the strip. Another pole is rather more than

half way down the strip and is approximately in the centre of it. Another is between "Coronel" and "Maronor", off the strip.

While Mr. Wardle was doing the wiring for the power, service pipes for water and gas were laid in a trench in the strip, and when the buildings were finished the strip was surfaced with a thin cover of concrete. There are some small pipes (presumably gas pipes) above ground near the eastern end of the strip and near them is a thin structure containing letter boxes. The evidence satisfies me that vehicular use of the strip has been extremely limited although, of recent times, builders' vehicles have used it. Previously, moving vans had done so when tenants were coming to or leaving "Rotherwood". The evidence of this use was limited to the years 1973-1976. There is no vehicle corssing from Kurraba Road into the strip, although from January 1973 until July 1976 and possibly for a longer period bricks were placed in the gutter, allowing reasonable access on to the footpath and thence on to the strip for vehicles. There is evidence from Mr. P. S. Westbury that, some years ago, when he saw trenches dug in the strip and workmen laying pipes in the trenches, he saw a utility truck parked at the bottom of the strip. He was not referring to the original laying of pipes, as he had knowledge spanning only some eighteen years. There is also evidence of the use of the strip by a motor cycle.

When builders' vehicles commenced to use the strip on a regular basis, the plaintiffs erected a fence across the western end of the strip. A gate was included in the fence. The solicitors for the defendants required the first plaintiff to remove the fence and, upon refusal, the defendants removed it.

There is no physical impossibility in the use of the strip by vehicles. Despite the presence of the power poles, vehicles could pass one another. It is to be remembered that there is a strip of approximately 4 feet 8 inches on the north of the "Rotherwood" building which adds breadth to the strip.

The first question is the proper construction of the grant, and coupled with that is the question whether evidence of events taking place after the grant are of assistance in construing it.

In my opinion, the subsequent conduct of the parties, unless it amounts to an estoppel, cannot be called in aid in the construction of the grant of the right of way. There are many statements in the authorities to the effect that, unless the words used in the grant are perfectly clear, extrinsic evidence is admissible of material facts existing at the time of the grant—see, for example, *Shannon Ltd.* v. *Venner Ltd.* (1) citing with approval *Johnstone* v. *Holdway* (2); *Cannon* v. *Villars* (3); *Todrick* v. *Western National Omnibus Co.* (4).

In *White* v. *Grand Hotel, Eastbourne Ltd.* (5) Cozens-Hardy M.R. said: "It is a right of way claimed under a grant, and, that being so, the only thing that the Court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant, and we cannot consider the subsequent user as in any way sufficient to cut down the generality of the grant."

(1) [1965] Ch. 682, at p. 691.
(2) [1963] 1 Q.B. 601, at p. 612.
(3) (1878) 8 Ch. D. 415, at pp. 419, 420.
(4) [1934] Ch. 190, at p. 206.
(5) [1913] 1 Ch. 113, at p. 116.

That statement, of course, was made before the decision of the Privy Council in *Watcham* v. *Attorney-General of East Africa Protectorate* (6). In that case a grant of land contained an ambiguity, in that the area stated as an acreage and as described by the physical boundaries varied. Lord Atkinson, in delivering the advice of the Board, said (7): ". . . even in the case of a modern instrument in which there is a latent ambiguity, evidence may be given of user under it to show the sense in which the parties to it used the language they have employed, and their intention in executing the instrument as revealed by their language interpreted in this sense."

His Lordship then expressed the view that the principle applied also to patent ambiguities. The decision has been criticized. The House of Lords, in two recent decisions, has said that the general rule in the construction of documents is that evidence of subsequent conduct of the parties is inadmissible—*James Miller & Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.* (8). In *L. Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.* (9) their Lordships were invited to reject their 1970 decision but adhered to it. Lords Reid (10), Morris of Borth-y-Gest (11) and Wilberforce (12) were prepared to leave open the question of the correctness of *Watcham's* case (13), but Lord Simon of Glaisdale (14) said that the case could no longer be regarded as authority for the proposition for which it was cited in the Court of Appeal in *Schuler's* case (15), and Lord Kilbrandon (16) expressed the view that *Watcham's* case (17) would not be questioned by him "so far as it merely lays down that, where the extent of a grant of land is stated in a ambiguous manner in a conveyance, it is legitimate to interpret the deed by the extent of the possession which proceeded upon it". In *Administration of Territory of Papua and New Guinea* v. *Daera Guba* (18) Gibbs J., whose judgment was expressly concurred in by Menzies and Stephen JJ., left open the question of the correctness of *Watcham's* case (19).

I do not have to determine whether, in these circumstances, I should follow *Watcham's* case (20), because, in my opinion, no ambiguity exists here, and the principle of *Watcham's* case (21) applies only where it does. In *Schuler's* case (22) Lord Wilberforce said: "But ambiguity in this context is not to be equated with difficulty of construction, even difficulty to a point where judicial opinion as to meaning has differed."

The expression "right of way" is not ambiguous. In different contexts it may mean different things, but, in construing the expression, the court is required only to find its meaning in the context in which it appears. Its use does not import ambiguity. Its use, without more, does, however "call aloud for an examination of the surrounding circumstances"—*St. Edmundsbury and Ipswich Diocesan Board of Finance* v. *Clark* (*No.* 2) (23).

What, then, are the surrounding circumstances? The plaintiffs point to several circumstances which they claim show that the parties intended

(6) [1919] A.C. 533.
(7) [1919] A.C. 533, at p. 540.
(8) [1970] A.C. 583, at pp. 603, 606, 611, 614, 615.
(9) [1974] A.C. 235.
(10) [1974] A.C. 235, at p. 252.
(11) [1974] A.C. 235, at p. 260.
(12) [1974] A.C. 235, at p. 261.
(13) [1919] A.C. 533.
(14) [1974] A.C. 235, at p. 269.
(15) [1974] A.C. 235.
(16) [1974] A.C. 235, at p. 272.
(17) [1919] A.C. 533.
(18) (1973) 130 C.L.R. 353, at p. 446.
(19) [1919] A.C. 533.
(20) [1919] A.C. 533.
(21) [1919] A.C. 533.
(22) [1974] A.C. 235, at p. 261.
(23) [1975] 1 W.L.R. 468, at p. 477; [1975] 1 All E.R. 772, at p. 780.

that this strip should be used only as a footway. They point to matters which occurred or became apparent after the date of the grant, but I have already given reasons for saying that such things cannot be taken into account. However, they point to the fact that, in the unfinished "Rotherwood", there was no arrangement for the parking or the turning of vehicles. They point to the further fact that the strip would undoubtedly, in the future, be used as the street approach to "Coronel" and "Maronor", as indeed it so transpired. There is no vehicle approach possible to those buildings because of the drop in levels from Kurraba Road. Further, it is suggested that the area between the building "Rotherwood" and the land upon which "Coronel" was subsequently erected was unsuited to the access or parking of vehicles, because of the intended use of that area for the drying of clothes.

I do not think that any of these factors can tip the scales in favour of the plaintiffs, when balanced against the most critical fact of all, namely, that a right of way 12 feet wide was granted to the owners of a building who already had a footway from the road to the rear of the building 4 feet 8 inches wide. The grant of a footway was, in my opinion, superfluous: cf. *Keefe* v. *Amor* (24). The grant of such a right of way, without express limitations, must, I think, when the surrounding circumstances are taken into account, lead a court to construe it as a right of way for all purposes suitable to the needs of the grantee and to the essential conditions of the way. The facts in *Keefe* v. *Amor* (25) call more strongly than those in the present case for a conclusion that the grant was limited by the circumstances of the way at the date of the grant, but the Court of Appeal held that the grant was not so limited. None of the matters relied on by the plaintiffs, in my opinion, should lead to a restriction on the grant.

The question then arises whether the right of way, so far as it authorized use beyond pedestrian use, has been abandoned. This question divides into two, namely, whether a grantee can abandon his right to exercise one or more of the permissible uses of the way and, secondly, whether the evidence in this case leads to a conclusion of such abandonment. A further point was argued on behalf of the defendants, namely, that, before abandonment of an easement which is noted on the certificate of title of the dominant tenement can be held to have been established under s. 89 (1) (b) of the *Conveyancing Act*, it must be shown that the proprietors of the dominant tenement registered as such at the time of the proceedings have abandoned the easement.

I consider, first, the question whether the owner of the dominant tenement, by appropriate acts or omissions, may abandon, or be held to have abandoned, part of the rights granted by an easement. I approach the question initially without reference to any complications which might arise from the fact that the easement is noted on the registered title of the dominant tenement.

As a matter of pure theory, there seems to be no reason why the law should not recognize such a partial abandonment. An easement is not unlike a fee simple, in the sense that it comprises a number of rights. In each case, they are rights which enure to the benefit of the dominant tenement, and to the detriment of the servient. It is open to contracting parties to provide that an easement, particularly in the case of a non-continuous easement such as a right of way, shall include certain of such

(24) [1965] 1 Q.B. 334, at p. 345.

(25) [1965] 1 Q.B. 334.

rights and shall exclude others. An obvious example, in relation to a right of way, can be found in Parts I and II of Sch. VIII to the *Conveyancing Act*, that is, rights of carriageway and rights of footway. If such separation of rights can be achieved expressly, I can see no reason why they cannot be achieved by implication from conduct.

I was referred, on this subject, to two cases, namely, *Keewatin Power Co. Ltd.* v. *Lake of the Woods Milling Co. Ltd.* (26) and *Bulstrode* v. *Lambert* (27). On examination, these cases seem to me to deal more with the question whether, in the proved circumstances, abandonment should be inferred. In the former, the grant included a right to use water from artificial channels from a lake. The Judicial Committee held that the defendants had a right to use all the water that the channels could bring them; user of less was no abandonment of the full right. Their Lordships said (28): "When you are dealing with grant, the grantee may always, if he chooses, not exercise his right under the grant to the full without in any way prejudicing his full right if he finds it convenient to use it."

It seems to me that there is a distinction between not using a single right (e.g. the right to draw water, or to walk along a right of way) to the full extent permitted and the omission to use one of a parcel of rights (e.g. driving a vehicle along the site of a right of carriageway). In the former case the right is exercised, albeit not to the full extent permitted, while in the latter that particular right is not used at all.

Bulstrode v. *Lambert* (29) seems on the surface to bear more closely upon the present problem. There, the right of way, which was for use with or without vehicles, was not used at all, although Upjohn J. did say (30) that there may have been some user by foot. When the owner of the servient tenement removed some dilapidated gates, the grantee commenced to use the right of way. His Lordship, after citing the passage from *Keewatin Power Co. Ltd.* v. *Lake of the Woods Milling Co. Ltd.* (31), which I have set out above, said (32): "That is all that has happened here. Therefore, the failure to use this grant for 10 years, in the absence of any claim of abandonment, which would obviously be impossible to suggest in this case, is irrelevant."

The question there was whether the grantee could stop on the site of the way in order to unload his vehicles.

I do not think that either of these cases requires me to hold that abandonment of one of the rights included in the parcel of rights created by the grant is not possible. I think it may well be more difficult to establish such abandonment where there is user of other rights over the locus, but that is, of course, a different question. There is a decision directly in point—admittedly given prior to the two decisions I have mentioned—in which Macfarlan J. held that a right of carriageway could be pruned down to a right of footway by virtue of such acts and omissions as would at common law be sufficient to infer abandonment: *Webster* v. *Strong* (33). The land in that case was under the Torrens System, and the trial judge stated a case to the Full Court on the question whether the fact that the grantee's certificate of title stated that he was entitled to a right of carriageway over the site of the way was conclusive in his favour that

(26) [1930] A.C. 640.
(27) [1953] 1 W.L.R. 1064; [1953] 2 All E.R. 728.
(28) [1930] A.C. 640, at p. 657.
(29) [1953] 1 W.L.R. 1064; [1953] 2 All E.R. 728.
(30) [1953] 1 W.L.R. 1064, at p. 1068; [1953] 2 All E.R. 728, at p. 731.
(31) [1930] A.C. 640, at p. 657.
(32) [1953] 1 W.L.R. 1064, at p. 1068; [1953] 2 All E.R. 728, at p. 731.
(33) [1926] V.L.R. 509.

he was so entitled. The Full Court answered the question in the affirmative, and their conclusion was followed and applied by Gillard J. in *Riley* v. *Penttila* (34). These decisions must, of course, be considered in the light of the provisions of s. 89 of the *Conveyancing Act*, but the conclusion of Macfarlan J. as to implied abandonment of a right to use vehicles, other than vehicles able to go through a 4-foot gateway, supports the view I have reached as a matter of principle. I am, therefore, of opinion that, where the grant of an easement creates a parcel of rights, the grantee may, by reason of his appropriate acts or omissions, be held to have abandoned one or more of such rights.

The next question is whether, in the case of land under the Torrens System, the appropriate acts or omissions must be or include only those of the proprietor of the dominant tenement registered as such at the time of the proceedings. The defendants submit that, title to Torrens land being created by registration, acts or omissions of predecessors are irrelevant. It was submitted that s. 89 (1) (b) was a provision distinct from the type of provisions contained in s. 89 (1) (a) and (c), which were said to create objective criteria. If the acts or omissions of predecessors are to be considered, then the defendants submitted that the grantors must show that all the registered proprietors, or at least all those since the acts or omissions began, must be included in the persons "for the time being or from time to time entitled to the easement". It was submitted that, the easement remaining noted on the register, no extinguishment can take place until an order of the Court is made. This is consistent with *Webster* v. *Strong* (35) and *Riley* v. *Penttila* (36), considered above. It was submitted that the Registrar-General would not be empowered to cancel the recording of an easement on the certificate of title under s. 32 (5) of the *Real Property Act*.

It was further submitted that, when a transferee of Torrens land was registered, his title to the easement noted on the certificate was thereby created: *Breskvar* v. *Wall* (37). Accordingly, it followed that acts or omissions of predecessors in title could not affect that registered right. As their Lordships said in *Frazer* v. *Walker* (38): "It is in fact the registration and not its antecedents which vests and divests title."

The question of extinguishment upon merger of the dominant and servient tenements is logically apposite. The defendants submit that extinguishment on that basis is effective only if the notification is cancelled during the merged ownership. This submission is certainly supported by the decision of McLelland C.J. in Eq. in *Re Standard and the Conveyancing Act*, 1919 (39).

These submissions raise interesting and important points. It may be that the High Court will be faced, at some future time, with their resolution. In the present state of authority, however, I do not believe that I am at liberty to accept the defendants' submissions.

In *Treweeke* v. 36 *Wolseley Road Pty. Ltd.* (40), the High Court dealt with a claim that a right of way noted on the title had been abandoned. McTiernan J. and Mason J. held that the evidence was not sufficient to lead to the inference of abandonment. Walsh J. held that it was. There is no suggestion in the judgment of McTiernan J. that different considerations apply to the solution of such a question where there are

(34) [1974] V.R. 547.
(35) [1926] V.L.R. 509.
(36) [1974] V.R. 547.
(37) (1971) 126 C.L.R. 376, at pp. 385, 386.
(38) [1967] 1 A.C. 569, at p. 580.
(39) (1967) 92 W.N. (N.S.W.) 953.
(40) (1973) 128 C.L.R. 274.

successive registered owners of Torrens land from those applying to the case of Old System land. His Honour did refer (41) to the "existing registered title", but he relied upon acts of user by predecessors of the respondent and discussed the significance of acts and omissions of such predecessors.

Mason J. stated (42) the problem which is the subject of the submissions of the defendants in this case. However, his Honour said (43): "It is, I think, unnecessary to resolve these questions in this appeal because in the circumstances of this case it is for the appellant to show on any view that the learned judge was incorrect in refusing to draw the inference that the respondent or its predecessors in title intended to abandon the easement. If the appellant fails to show that his Honour was incorrect in this respect, she has no ground for relief under sub-s. (1) or sub-s. (3). Conversely, if she is held to be successful on this issue and it is held that the respondent or its predecessors intended to abandon the easement then she is entitled to an order, either under sub-s. (1) or sub-s. (3). The fundamental question for this Court is therefore whether his Honour was incorrect in declining to draw an inference of abandonment."

His Honour then considered, as relevant factors, acts and omissions both of the respondent and of its predecessors.

Walsh J. who dissented, holding that abandonment had been established, expressed (44): "... some reluctance in accepting and applying two propositions upon which the appellant must rely in order to maintain that she was entitled to an order under s. 89 of the *Conveyancing Act*, 1919 (N.S.W.), as amended. The first is that an easement formally created by express grant may be lost by the grantee or his successors in title, without any express release or surrender and without any written declaration of an intention to abandon it or to give up the benefit of it. The second is that, even where the dominant land and the servient land are registered under the *Real Property Act* and notifications of the existence of the easement appear on the certificates of title relating to both parcels of land, the easement may become liable to be extinguished and may cease to be enforceable by the person for the time being registered as proprietor of the dominant tenement. But the first of those propositions is firmly established and is not in dispute. The second of them must be accepted because of the express provision contained in s. 89 (8) of the *Conveyancing Act*. That sub-section is applicable in the form in which it stood before the amendment made by the *Conveyancing (Amendment) Act*, 1972, but the changes then made are not material for present purposes. It makes s. 89 applicable to land under the provision of the *Real Property Act* and authority is conferred upon the Registrar-General to make such amendments and entries in the register book as are necessary to give effect to an order made thereunder. The provision clearly contemplates that orders will be made which affect rights which were vested in the registered proprietor, according to the state of the register, at and after the time when he acquired his title to the dominant tenement. It is, of course, the function of the Court to give effect to the intention which it finds to be expressed in the provision, notwithstanding that it may operate as a limitation upon the conclusiveness of the register, which is conferred, as to matters of title, subject to specified exceptions, by the provisions of the *Real Property Act*."

(41) (1973) 128 C.L.R. 274, at p. 282.
(42) (1973) 128 C.L.R. 274, at p. 301.
(43) (1973) 128 C.L.R. 274, at p. 302.
(44) (1973) 128 C.L.R. 274, at pp. 285, 286.

Walsh J. rejected an argument put by the respondent which was similar to the argument put here. His Honour said (45): "It has been submitted on behalf of the respondent that it came late upon the scene and that the evidence does not support a view that the respondent itself by its own acts or omissions exhibited any intention to abandon the easement and it has been put that the requirements of par. (b) of s. 89 (1) are not satisfied, unless *all* the persons of full age and capacity from time to time entitled to the easement have shown by their acts or omissions such an intention. If those arguments were accepted, the appellant would fail, not because the Court's discretion ought to be exercised in favour of the respondent, but because of a lack of proof of the necessary requirements for the making of an order. However, they should not be accepted. My reason for not accepting them will appear later in this judgment. But at this point it is appropriate to say that, in my opinion, the mere circumstance that the existence of an easement was noted on the register at the time when the title passed to a new owner would not furnish a reason for refusing, as a matter of discretion, to make an order under s. 89 (1) or s. 89 (3). If the new owner could show, also, that he took steps promptly to make use of the easement, or to claim the right to use it, it may be that the Court could take that into account, together with any evidence which might be provided as to the conduct and attitude of the owner of the servient tenement at the time of the change of ownership of the dominant tenement, in determining whether or not an order should be made. But this is a question which does not arise in this case, in which no such claim was made for several years after the acquisition by the respondent of its title."

His Honour's consideration of the question of abandonment, as a matter of inference from the facts, then ranged over the whole period of the existence of the right of way, and was not restricted to the period since the respondent became registered.

In these circumstances, my opinion is that I am bound to hold that, in sidering whether an easement should be held to have been abandoned, where a notification of that easement appears on both certificates of title, I must have regard to the acts or omissions of registered proprietors who were predecessors in title of the present registered proprietor. I may be entitled, as a matter of discretion, to take account of the fact that the first defendant in this case recently became registered, bought on the faith of the register and has actively pursued its rights.

I now consider the final point, namely, should the inference be drawn that the persons for the time being, or from time to time, entitled to the easement, by their acts or omissions, have abandoned the easement in so far as it conferred upon them rights to pass and repass on the site with motor vehicles.

The evidence shows that "Rotherwood", when constructed, was occupied by tenants. That was also the case as from 1973, and I think the evidence entitles me to infer that the flats in the building have been let to tenants ever since the building was constructed. This fact has some relevance, I think, to the question whether the plaintiffs have shown that the first defendant or its predecessors (as registered proprietors of an estate in fee simple) abandoned the right of way: see *Treweeke's* case (46) per McTiernan J., *Gale on Easements*, 14th ed., pp. 316-317. There is no evidence of any specific act of acquiescence by the registered proprietors for the time being.

(45) (1973) 128 C.L.R. 274, at pp. 286, 287.

(46) (1973) 128 C.L.R. 274, at pp. 282, 283.

The plaintiffs submit that, while non-user in itself is not enough to allow the inference of abandonment, a long period of non-user, coupled with acquiescence in acts which make the site of the way unusable, will lead to the inference, unless otherwise satisfactorily explained, that the right has been abandoned. The plaintiffs rely, principally, upon the act of the grantees themselves in erecting the garden and fence which made it impossible, without removing the obstacles, to proceed by vehicle to the western portion of "Rotherwood". They also rely upon the electricity poles, the pipes and the letter boxes and the lack of an entry over the street kerb.

In *Tehidy Minerals Ltd.* v. *Norman* (47), the Court of Appeal said: "Abandonment of an easement or of a profit à prendre can only, we think, be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else." *Gale on Easements*, 14th ed., p. 337 says that non-user accompanied by the intention to relinquish the right can be sufficient. It is clear enough that non-user alone is insufficient: cf. *Cook* v. *Bath* (48); *Ward* v. *Ward* (49); *R.* v. *Chorley* (50); *Swan* v. *Sinclair* (51), and there are many others. In *James* v. *Stevenson* (52), it was said that "it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it." Abandonment is not to be lightly inferred: *Gotobed* v. *Pridmore* (53).

In the submissions of the plaintiffs, it was emphasized that the main purpose and usefulness of the way was the right to enter from the road, proceed down the way and then turn left on to the ground between the building "Rotherwood" and the western boundary of the land. From the creation of the garden and the erection of the fence by the grantee it is said an intention to abandon clearly arises. I do not agree that this is the prime purpose or usefulness of the way. If it were, it would have been strange that, almost immediately after the grant, the grantee shut off that access. I think the proper inference is that the grantee had no proposal to use that ground for the housing of motor vehicles until recent times. Recent acts have shown that the garden and fence constituted very fragile barriers. Even with the existence of those barriers, vehicles could have used (and did use) the way. Admittedly the use was very limited and, so far as the evidence goes, very recent, but the fact of user indicates that the contention of the plaintiffs is not sound. In any event, as the defendants submitted, many private drive-ways contain no area for turning around, and require owners to back their cars either into or out of their premises.

The other obstructions, as I have already said, did not and do not make access impossible. No doubt they make access less convenient than it could have been if there had been a driveway over the footpath and the poles, pipes and letter boxes had not been there. But two motor vehicles may pass one another without difficulty, and I do not think that acquiescence in the siting of these obstructions is sufficient evidence from which to draw the inference of abandonment. While there is no evidence to explain the non-user by vehicles, I think the facts leave it open to inference that the owners of "Rotherwood", in letting twelve flats in an

(47) [1971] 2 Q.B. 528, at p. 553.
(48) (1868) L.R. 6 Eq. 177.
(49) (1852) 7 Exch. 838; 155 E.R. 1189.
(50) (1848) 12 Q.B. 515; 116 E.R. 960.
(51) [1925] A.C. 227.
(52) [1893] A.C. 162, at p. 168.
(53) (1970) 115 Sol. Jo. 78.

area so close to the city and so accessible by public transport, did not see a need to provide parking space for their tenants. Circumstances have now altered, because, no doubt, modern strata units are more saleable with parking spaces than without.

Abandonment is a question of fact, or of inference from proved circumstances. In reaching a conclusion on the matter, I think one is entitled to begin by placing a substantial onus on the grantor to show that the facts lead to the inference. In the present case, I do not think they do.

During the hearing of this matter, I was referred to a number of cases not all of which have been mentioned in these reasons. I would merely say that I have read the cases to which I was referred, and such others as appeared to me to bear on the questions at issue.

In my opinion, the plaintiffs have failed to establish their case, and I think the summons should be dismissed with costs.

Order accordingly.

Solicitors for the plaintiffs (owners of the servient tenement): *Windeyer Dive & Co.*

Solicitors for the defendants (owners of the dominant tenement): *K. D. Manion McCosker & Co.*

O. M. L. DAVIES,
Barrister.

AUSTRALIAN HI-FI PUBLICATIONS PTY. LTD. *v.* GEHL

Court of Appeal: Reynolds, Samuels and Mahoney JJ.A.

Oct. 8; Nov. 27, 1979.

Easements and Prescription—Subdivision of land into two lots—Possible Wheeldon v. Burrows type easement in favour of lot 1 *over lot* 2*—Sale of both lots—No notification of any easement upon either new certificate of title—No easement established in favour of new owner of lot* 1*—Real Property Act*, 1900, *s.* 42 (b).

In 1969, the registered proprietor of land which had been under the *Real Property Act*, 1900 since about 1900 subdivided it into lots 1 and 2. A block of shops had been for some years erected on lot 1. A block of offices had been erected on lot 2 in 1966 or 1967. In 1971, the owner sold lot 1 to Gehl and his wife. In 1978, the owner sold lot 2 to a company.

At all material times the owners or lessees of lot 1 used part of lot 2 in such a way that, had the land been under Old System Title, the basis would have been land for the implementation of an easement in accordance with the principles discussed in *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31, that is to say, an apparent, continuous easement necessary for the enjoyment of lot 1. There was, however, no notification of any easement on either certificate of title.

In 1979, the company sought an injunction to restrain Gehl from trespassing upon lot 2, the trespass arising from the latter's attempt to exercise the easement claimed by him to exist over the relevant portion of that lot. Helsham C.J. in Eq. held that Gehl had no such easement; and he made orders in favour of the company accordingly. On appeal,

Held: (1) (a) The matter was determined in the company's favour by s. 42 of the *Real Property Act*.

(b) This was (i) because Gehl could avoid the effect of the opening words of the section only if the present case was a "case of the omission . . . of" the relevant easement within s. 42 (b); or if, for some other reason, s. 42 was seen to be inapplicable; (ii) because "omission", in s. 42 (b) involves two things: that something is "not there", and that this is so because something which should have been done was not done—which was not the case here.

R. v. *Phillips* (1971) 45 A.L.J.R. 467, at pp. 470, 471, 477, referred to.

(c) It was also because pars. (a) to (c) of s. 42 are directed to curing defects in the operation of the system of registration of title, that is to say, to the operation of the Act by the Registrar-General; and they take effect if what ought to have been done under the Act, or by the Registrar-General, has not been done—which, also, was not the case here.

Trieste Investments Pty. Ltd. v. *Watson* (1963) 64 S.R. (N.S.W.) 98, at pp. 104, 105, 109; 81 W.N. (Pt. 2) 136, at pp. 140, 141, 145, applied.

Pryce v. *McGuinness* [1966] Qd. R. 591, referred to.

(d) (i) Even if the meaning of "omission" in s. 42 (b) were extended to a case where a thing is "not there" because a person did not do something which he was entitled to do, it would not avail Gehl in the present case.

Eastwood v. *Ashton* [1915] A.C. 900, at pp. 908, 913, 917, 921, referred to.

(ii) This was because there was, in this case, no opportunity for the Act, or the Registrar-General, to operate on the relevant easement, because it was not brought forward for appropriate action, at any time prior to the company becoming registered as proprietor of lot 2.

R. v. *Earsman* (1936) 53 W.N. (N.S.W.) 118, applied.

(2) (a) Section 42 should not be held not to apply to *Wheeldon* v. *Burrows* easements, in the sense that such easements should be seen as implied exceptions to the operation of that and other relevant sections of the *Real Property Act*.

(b) This was because considerations which are sufficient to take public rights outside s. 42 are not available in respect of interests such as were under consideration here.

Pratten v. *Warringah Shire Council* (1969) 90 W.N. (Pt. 1) (N.S.W.) 134, at p. 139 et seq., applied.

(c) It was also because, in respect of land under the *Real Property Act*, easements (with exceptions not here relevant) cannot arise, otherwise than by instruments executed under the Act, so as to be enforceable against a subsequent registered proprietor.

Jobson v. *Nankervis* (1943) 44 S.R. (N.S.W.) 277; 61 W.N. 76, followed.

Pryce v. *McGuinness* [1966] Qd. R. 591, at pp. 601, 602, 603, 606, 607, distinguished.

(d) It was also because the construction of s. 42 (b) should not be governed by the decisions upon this kind of point based upon other statutes, operating in other jurisdictions. Rather, the matter should be determined upon the construction of the *Real Property Act* alone.

Anthony v. *Commonwealth* (1973) 47 A.L.J.R. 83, at p. 90, followed.

CASES CITED.

The following cases are cited in the judgments:

Anthony v. *Commonwealth* (1973) 47 A.L.J.R. 83.
Barry v. *Heider* (1914) 19 C.L.R. 197.
Breskvar v. *Wall* (1971) 126 C.L.R. 376.
Concord Municipal District v. *Coles* (1905) 3 C.L.R. 96.
Eastwood v. *Ashton* [1915] A.C. 900.
Frazer v. *Walker* [1967] A.C. 569.
James v. *Registrar-General* (1967) 69 S.R. (N.S.W.) 361; 87 W.N. (Pt. 2) 239.
James v. *Stevenson* [1893] A.C. 162.
Jobson v. *Nankervis* (1943) 44 S.R. (N.S.W.) 277; 61 W.N. 76.
Kostis v. *Devitt* (Powell J., 4th July, 1979, unreported).
Miller v. *Minister of Mines* [1963] A.C. 484.
Nelson v. *Hughes* [1947] V.L.R. 227.
Pratten v. *Warringah Shire Council* (1969) 90 W.N. (Pt. 1) (N.S.W.) 134.
Pryce v. *McGuinness* [1966] Qd. R. 591.