appellant upon land of which the respondent claimed to be the owner, and for an injunction to restrain the appellant from further trespassing upon it. The appellant alleged that the loci in quo were public highways, or, in the alternative, that he was entitled to a right of way over them, and that the acts complained of were lawfully done in the exercise by the appellant of his right to use them. The respondent denied that the loci were public highways, and alleged that, if the appellant or his predecessor ever had any right in respect of the land in question, that right was only to an easement, and was barred by the Limitations Act; and the trial Judge had given effect to both of the contentions of the respondent.

The learned Chief Justice, after stating the facts, said that, if it had been established, as he thought it had been, that the appellant was right in his contention that the lands in question were public highways, there was an end of the case; but, even if the appellant had not established that, the respondent was estopped from denying the appellant's right to use them. The appellant was the owner of lot 3 on the west side of John street, and that lot was described in the conveyance from Nathan Vansickle to George H. Longman, through whom the appellant derived title, as fronting on John street, and by its lot number according to the plan. Reference to Rowe v. Sinclair (1876), 26 U.C.C.P. 233.

If it could not properly be held that the lands in question were public highways, at the least the appellant was entitled to use them as a means of access to his lot No. 3: Furness R.W. Co. v. Cumberland Co-operative Building Society (1884), 52 L.T.R. 144. The plan plainly indicated that the owners of the lots shewn on it were to have the right to use the parcels in question as streets; and, if that were so, the Limitations Act had no application: Mykel v. Doyle (1880), 45 U.C.R. 65; Jones v. Township of Tuckersmith (1915), 33 O.L.R. 634; and the proper conclusion upon the evidence was, that the appellant's right to use them had not been lost by abandonment. The question of abandonment is one of fact; and, in the circumstances of this case, abandonment had not been proved. Mere non-user is not of itself abandonment, though it may be evidence of it; and, as was said in James v. Stevenson, [1893] A.C. 162, 168, "it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it."

The appeal should be allowed with costs and the action dismissed with costs.