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EASEMENTS IMPLIED IN A GRANT — AWAY WITH 'CONTINUOUS AND APPARENT'

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In Wheeldon v Burrows,¹ the law on implied grants of easements was pronounced to be that a grant would be recognised if the easement was 'continuous and apparent' or reasonably necessary for the enjoyment of the land, and used at the time of the grant for the benefit of the land granted. Ever since, there has been a controversy about whether the word highlighted actually means "and". But there has been no in-depth consideration of the purpose which the 'continuous and apparent' requirement is supposed to serve. This article concludes that it serves no purpose at all, is often ignored by the courts, is not justified for historical or any other reasons, is not binding as part of the ratio decidendi of Wheeldon nor part of the broader contribution of that case to the development of the common law, and accordingly should be deleted from the discussion.

I INTRODUCTION

As long ago as 1868 Cockburn CJ, speaking on behalf of the Queen's Bench, said that:

Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied.²

This was a view which informed his Lordship's stance in what was then the coming debate over the possibility of a criminal code for England.³ Nevertheless, his Lordship delivered this dictum in a defamation case, and such wisdom as is contained in it is certainly not to be confined to any one area of law.

Certainly the 20th century, even in slower-moving fields such as property law in which certainty is often highly prized, provided several memorable examples of judicial updating of the law. In this country the most prominent was undoubtedly

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1 (1879) 12 Ch D 31 ('*Wheeldon*').

2 *Wason v Walter* (1868) LR 4 QB 73, 93.

3 Sir Rupert Cross, 'The Making of English Criminal Law: (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 657f.

Mabo v Queensland [No 2].⁴ Even outside the realm in which conservatives vie with bolder judicial spirits and cries of judicial activism are heard, however, there is clearly something to be said for not tying oneself down to the words of a statute which may be drafted poorly or with insufficient foresight of the types of cases that may later arise, but rather leaving the door open to gradual changes as society’s needs develop.

But there is also something to be said for the certainty and reliability of a statute. This is certainly the case if the very wording of a common law rule remains uncertain because case law does not supply one authoritative text for it.

It beggars belief that there is a common law rule which has now been in existence for a century and a third in which it is uncertain whether the word ‘or’ actually means “or” or (!), rather, “and”. The first rule in *Wheeldon v Burrows*⁵ states — with the ‘or’ in question highlighted — that:

on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed,^[6] there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.⁷

There is a great deal of authority which suggests that ‘or’ here must actually be read as “and”, although there is also authority to the effect that ‘or’ means what it says.⁸ So must an easement used by the owners of the entirety before the grant be both ‘continuous and apparent’ and ‘reasonably necessary to the enjoyment of the property granted’, or is it sufficient if it meets just one criterion? A glance at comparative law provides little assistance, for the solutions adopted elsewhere also differ on this point, just as the authorities from England and Australia do. While, on the one hand, the equivalent unwritten rule of Scots law manages entirely without ‘continuous and apparent’,⁹ the codification of *Wheeldon* in s 13

4 (1992) 175 CLR 1; but for a convincing defence of the prior law, see Peter Connolly, ‘Theory of Universal and Absolute Crown Ownership’ (1994) 18 *University of Queensland Law Journal* 9, 11f.

5 (1879) 12 Ch D 31.

6 *Wheeldon* does not apply to the grant of a contractual licence: *Hinkley v Star City* (2010) 15 BPR 28, 983; on this topic, see Greg Taylor, ‘Implied Terms in Licences over Land’ (2001) 21 *University of Queensland Law Journal* 178.

7 (1879) 12 Ch D 31, 49; there is a similar statement at 58f.

8 An excellent analysis of the English authorities to 1996 may be found in Graham Ferris, ‘Problem Postponed: The Rule in *Wheeldon v Burrows* and *Wheeler v Saunders*’ [1996] 3 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/1996/issue3/ferris3.html>>; see also *Auerbach v Beck* (1985) 6 NSWLR 424, 443; *Germain v Brar* [2010] ABQB 530, [45]; *Rarere v Phildagap* [2011] NZHC 1810, [16] n 10. Despite the first-named author’s valiant effort at n 3 of his article, I take no account here of the third possibility that ‘continuous and apparent’ and ‘necessary to the reasonable enjoyment’ may be synonymous, as they are clearly not. An underground drain is an example of a case in which an easement may indeed be reasonably necessary — or even indispensable — without being continuous and apparent. As is pointed out below, *Wheeldon* was an unreserved judgment and too much weight should therefore not be placed on the words ‘in other words’ in the extract quoted.

9 *Moncrieff v Jamieson* [2007] 1 WLR 2620, 2629, 2656; see *Bowers v Kennedy* 2000 SC 555, 561.

of the *Indian Easements Act 1882* opts for ‘and’ as well as the double requirement. It thus ends all uncertainty in that country, but for those outside the range of that statute there is no such relief.

It is time that this uncertainty was put to rest. Previous analyses of this field have collected the authorities in which judges line up on one side or the other, but have failed to see *Wheeldon* in its historical context and have thus mistaken the weight which should be placed on the exact words of Thesiger LJ in enunciating the rule. In fact his Lordship was directing his mind to another question altogether. It would therefore be quite legitimate for us in modern times to make small textual amendments to his words.

Equally, however, we should not become obsessed with every word of the judgment as if it were a statute,¹⁰ and are at liberty to consider the question from first principles. The detail of the rule as enunciated, and the needs of modern times, with near-universal land registration, as well as historical factors unite to suggest that the preferable course is to eliminate the ‘continuous and apparent’ limb of the test entirely. If that seems too bold a step, the next best thing is to read ‘or’ as meaning what it says so that ‘continuous and apparent’ does not get in the way of implying easements that truly are necessary for the enjoyment of a granted tenement.

It may be conceded at once that one of the reasons for the doubt about the precise meaning of ‘or’ in the first rule in *Wheeldon* is doubtless the comparatively few cases in which the question has been raised. In the modern world, most easements are created expressly and/or pursuant to legislation on subdivisions,¹¹ and not *via* the rules on implication into grants. Nevertheless, such cases do still arise, and there may well also be cases in which the rules exercise an influence over disputes which never reach the courts but are settled. Furthermore, there can be a long lead time before cases surface, because, for example, informal arrangements are made for a period to cover the lack of any express easement, and they may not break down for some time.¹² It therefore remains important to get the rule right.

II HISTORICAL FUNCTION OF *WHEELDON*

It is sometimes said that the rule currently under discussion derives from an obiter dictum,¹³ given that the facts in *Wheeldon* involved an allegation of an implied reservation rather than an implied grant. It may be doubted however whether an obiter dictum really was involved to the extent that the case established the proposition that implied grants were to be available more freely than implied

10 Cf *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 386.

11 Some of which, it may be noted parenthetically, adopts a solution rather similar to that advocated here: see the concluding words to the *Subdivision Act 1988* (Vic) s 12(2).

12 Cf Adrian Bradbrook, ‘Access to Landlocked Land: A Comparative Study of Legal Solutions’ (1983) 10 *Sydney Law Review* 39, 39f.

13 See, eg, *Wheeler v JJ Saunders* [1996] Ch 19, 30.

reservations. In order to illustrate this, it is necessary to place us in the legal world of the time before *Wheeldon* was decided.

Wheeldon terminated once and for all a long-running controversy involving much judicial debate about whether there was any difference in the law applicable to cases of alleged implied reservations as distinct from implied grants. The function of the case in the development of the common law was not to lay down the precise rules to govern the case of implied grants, but merely to establish that there was actually a difference between them and implied reservations. Accordingly, the precise form of the words used to describe the rules applicable to an alleged implied grant, as distinct from the implied reservation that was actually in question in *Wheeldon*, is indeed an obiter dictum.

The basis on which this distinction between grants and reservations is drawn is a familiar one: that the grantor, being in control of the terms of the grant, should take care to reserve what he or she needs, while no such exacting standard should be demanded of a grantee. In relation to property law, it might be added that a grantor is presumably familiar with the property and more likely to be aware of the easements that are required to enjoy it fully, while a grantee, being new to the property, is much less likely to be so familiar. Clearly exceptional cases can be postulated in which that is not so, but as a basis for general rule it is a valid hypothesis. This is all the more so given that the rule also and uncontroversially requires that the alleged easement should actually have been used at the time of the grant for the purpose in question. In this respect *Wheeldon* could be seen as a modification of the caveat emptor principle,¹⁴ and my suggested alternative justification will hold good even in cases where the rather schematic traditional one does not and the grantee is the party with the greater economic power and possibly even the author of the terms of the grant.

The distinction between grants and reservations can be traced back in embryo to the mid-17th century.¹⁵ By the middle of the 19th century however, the idea had caught on that an implied reservation might also be justified in cases where the proposed easement was merely apparent and continuous.¹⁶ In *Pyer v Carter* Watson B affirmed that proposition in a case involving drainage,¹⁷ and held that the grantee had a duty to inquire about easements. But in *Suffield v Brown*¹⁸ Lord Westbury LC, hearing an appeal from Sir John Romilly MR who had followed *Pyer*, attacked that decision in unusually strong terms as ‘a very serious and alarming doctrine; ... of very recent introduction; and ... unsupported by any

14 Having written this sentence I was pleased to see a very similar point made in Bruce Ziff, *Principles of Property Law* (Carswell, 5th ed, 2010) 383.

15 *Palmer v Fletcher* (1663) 1 Lev 122, 122; 83 ER 329, 329, where, on facts similar to *Wheeldon*’s, Kelynge J is certain that there is no implied reservation but merely doubts whether there is an implied grant; *Tenant v Goldwin* (1704) 2 Ld Raym 1089, 1093; 92 ER 222, 224. See also *Morris v Edgington* (1810) 3 Taunt 24, 30; 128 ER 10, 13; Ernest Firth, ‘The Quasi-Grant of Easements in English and Roman Law’ (1894) 10 *Law Quarterly Review* 323, 324.

16 The conflict is well summarised in *Crossley & Sons v Lightowler* (1867) LR 2 Ch App 478, 486.

17 (1857) 1 H & N 916; 156 ER 1472.

18 (1864) 4 de G J & S 185; 46 ER 888.

reason or principle'¹⁹ as well as based on 'an ingenious and fanciful theory'.²⁰ The chief difficulty his Lordship saw in it was that it imposed an obligation to seek information about the use of the neighbouring property from the vendor and to accommodate his various uses of the property, a rule which would be entirely inconsistent with the idea that a vendor should not derogate from his grant. His Lordship traced the origin of the offending heresy (as his Lordship saw it) back to the first edition of *Gale on Easements*, of which more shortly, and Gale's own adoption of various rules of the *French Civil Code*. (The Lord Chancellor also described Gale as 'the late',²¹ although in fact he had over a decade's worth of life left in him at this point; it must be recalled that the old practice was against citing living authors.) Clearly the Lord Chancellor strongly disapproved of the adoption of rules from the exotic *French Civil Code*.

This bitter controversy even found an echo in case law as far away as Ontario.²² Its final resolution came in *Wheeldon*, in which, as already mentioned, it was held that Lord Westbury LC was right and there was indeed a difference between implied grants and implied reservations, and that easements were not to be implied as freely into reservations as they were into grants owing to the need not to allow the grantor to derogate.

The historical significance of *Wheeldon* and the fact that it was understood as finally solving this dispute and disposing of the contrary opinion in *Pyer* is shown by several English,²³ Canadian,²⁴ and Australian²⁵ cases over the succeeding decades when judges who had lived through the controversy and observed it in the light of the personalities and reputations of the various actors (only some of whom have been named here) recounted the dispute in later judgments. The resolution of the dispute was no doubt also a relief to what a contemporary writer called 'bewildered practitioners, [who were] ignorant which view would ultimately prevail [and] had to advise their clients.'²⁶

Accordingly *Wheeldon* has to be understood, in its historical context, as a case directed to resolving the controversy among the judiciary just mentioned rather than to the question of the precise requirements for an easement to be implied into a grant — even leaving aside the consideration that the facts of the case concerned an implied reservation.

19 Ibid 192; 891; and see further 195f; 892.

20 Ibid 199; 893.

21 Ibid 193; 891.

22 *Young v Wilson* (1874) 21 Grant's Chancery Rep 611.

23 *Brown v Alabaster* (1887) 37 Ch 490, 504f. Surprisingly, there is an echo as late as *Aldridge v Wright* [1929] 1 KB 381; [1929] 2 KB 117.

24 *Attrill v Plant* (1884) 10 SCR 425, 481f.

25 *Nelson v Walker* (1910) 10 CLR 560, 582; *Taylor v Browning* (1885) 11 VLR 158, 164; *Billiet v Commercial Bank of Australasia* [1906] SALR 193, 206.

26 Firth, above n 15, 326.

It is also worth noticing that the judgment of the Court of Appeal was delivered *ex tempore*,²⁷ and a great deal of precision cannot be expected from an unreserved judgment. Thus it would arguably be quite legitimate to read ‘or’ as “and” in the passage indicated, and thus to convert what appear to be alternative requirements into cumulative. There is however another possibility: that the whole ‘apparent and continuous’ caper is a wrong turning.

‘Apparent and continuous’ is, in fact, the sole remnant in the modern law of the 19th century quarrel just summarised. Lord Westbury LC succeeded in expelling the idea that grants and reservations were to be treated in the same way, but not in banishing those words. Professor A W B Simpson²⁸ has traced the manner in which ‘apparent and continuous’ made its way into the common law from certain articles of the *French Civil Code* that were noticed in the first treatise on the subject of easements in English law — *Gale on Easements*. Professor Simpson shows that it is Gale’s book which alone is responsible for the addition of ‘apparent and continuous’ to the more recognisably common law phrase ‘reasonably necessary’.²⁹ No such phrase as ‘apparent and continuous’ was known to our law before the publication of Gale’s book.³⁰ Professor Simpson concludes, ‘[w]hether by accident or design [Thesiger LJ] failed to take the opportunity which the case presented of sorting the whole matter out, but instead toyed with two possible solutions’,³¹ one taken from the common law and the other from the *French Civil Code*. We are still today in that position.

Who then was Gale? A German commentator on his life and work states that he ‘was no scholar and made no learned claims. His book is rather to be counted among the numerous series of those of young, ambitious barristers who wished to

27 This is implied by the official law report ((1879) 12 Ch 31, 48) and confirmed by the *Times*, 23 June 1879, 6.

28 A W B Simpson, ‘The Rule in *Wheeldon v Burrows* and the *Code Civile*’ (1967) 83 *Law Quarterly Review* 240.

29 *Ibid* 245f.

30 This conclusion is also reached by Lord Blackburn in *Dalton v Angus* (1881) 6 App Cas 740, 821 and by a search of the English Reports database: Commonwealth Legal Information Institute, *English Reports* <<http://www.commonlii.org/uk/cases/EngR/>>, which yields no results before 1809; William Holdsworth, *A History of English Law* (Sweet & Maxwell, 1978) vol 7, 334f may appear to imply that ‘continuous and apparent’ goes back to the Year Books, but a glance at the case he cites at 335 n 1 (YB 11 Hy VII Trin pl 6) indicates that, while the right in question (a gutter) might have met the modern definition of ‘continuous and apparent’, the Court did not refer to that as a precondition of finding that an easement is implied; indeed, the case is on another topic (revival of easement). For a translation of the case into English, see Charles Gale and T D Whatley, *Treatise on the Law of Easements* (S Sweet, 1st ed, 1839) 55f. It should also be noted that Gale also wrote that ‘continuous and apparent’ and ‘reasonably necessary’ were alternatives and not cumulative: at 49; see Simpson, ‘The Rule in *Wheeldon v Burrows* and the *Code Civile*’, above n 28, 242.

31 Simpson, ‘The Rule in *Wheeldon v Burrows* and the *Code Civile*’, above n 28, 246.

make a name for themselves with often handbook-like works.³² This is certainly accurate. Gale (1805–1876; he was thus 34 when his treatise first appeared) was a barrister who became a Judge of the County Court for Hampshire in 1847 (the year in which that Court was created), serving until 1874.³³ Judge Gale is said to have ‘evinced a sound knowledge of law, and great tact and judgment in the discharge of the business. He was very highly respected by the solicitors who practised before him, and his decisions were rarely reversed on appeal.’³⁴

No doubt Judge Gale was a most valuable asset to the legal system in which he worked, but if it is established, as it now is, that *Wheeldon* was not meant to be the last word on implication into grants as distinct from the difference between them and reservations, it may well be asked: why are we still applying a phrase plucked out of the *French Civil Code* by a young barrister and repeated without much thought in an unreserved judgment of the Court of Appeal? In order to confirm that ‘continuous and apparent’ is an unnecessary addition to the law, it will be necessary to consider, first, what each word means; secondly, what the courts are making of them; and thirdly, what, if any, purpose these requirements are supposed to serve.

III MEANING AND APPLICATION OF ‘CONTINUOUS’

The meaning of ‘apparent’ in the source from which the phrase is taken, namely the articles of the *French Civil Code*, is more or less the same as the ordinary meaning of that word in English. The mystery surrounds what is meant by ‘continuous’. In the French Code easements were ‘continuous’ if able to be exercised without repeated human intervention, and the Code itself gives water supply and drainage as examples; today we might well add electricity or even internet connectivity. Occasionally such services will, of course, need repair or

32 Christoph Seebo, *Servitus und Easement: die Rezeption des römischen Servitutenrechts in England* (Wallstein, 2005) 109. The word translated ‘learned’ above is the word *wissenschaftlich*, which is often gravely mis-translated as ‘scientific’ but connotes rather a body of ordered knowledge — there is no word quite equivalent in English. At n 51 the same author also states that he has not been able to find out anything about T D Whatley, the co-author of the first edition, through ‘the usual biographical means’. There is, however, a brief biographical note in the preface of Michael Bowles, *Gale on Easements* (Sweet & Maxwell, 13th ed, 1959). Internet searches have brought to my notice the existence (but not a copy) of a pamphlet by Kinnear and Fletcher entitled *The Lediards and Whatleys of Gloucestershire: A Holst Family History* (Holst Birthplace Museum, 2009), which indicates that he was a solicitor of Cirencester, Gloucestershire — and related to Gustav Holst. He is a barrister, however, in the *London Standard*, 22 June 1874, 7. Whether rightly or wrongly, however, the authorship of the passage in question is everywhere attributed to Gale and not to Whatley, including in contemporary sources; see *Suffield v Brown* (1864) 4 de G J & S 185, 193; 46 ER 888, 891.

33 Anonymous (1876) 20 *Solicitor’s Journal* 807; A W B Simpson (ed), *Biographical Dictionary of the Common Law* (Butterworths, 1984) 199f; Walford (1876) 61 *Law Times* 277.

34 (1876) 20 *Solicitor’s Journal* 807, 807.

other forms of human intervention, but the contrast is made clear by referring to the non-continuous easements instanced by the Code such as rights of way.³⁵

According to the text of the *French Civil Code*, easements must be continuous and apparent in order to be capable of acquisition by prescription as well as by what we should call express grant. The Code provides for what might be called implied grant in two cases:³⁶ most notably, where there exists an apparent sign of the easement on land alienated (Article 694); in such cases nothing depends on whether the easement is continuous.

It is hard to see any reason why continuousness — whether repeated human action is required for the use of an easement or not — should matter in the context of implied grants either in England, France or anywhere else, and Professor A W B Simpson is surely right to say that nothing would be lost by dropping it entirely.³⁷ It is a square peg in a round hole. It is easy to see that an apparent easement is more likely to be detected than a non-apparent one, and thus this requirement seems to fulfil something in the nature of notice, but what could be the point of requiring a lack of continual human intervention for the enjoyment of an easement to be granted by implication? In the law of prescription, for which the French Code invented both the concept and the requirement of continuousness, it was presumably thought that the requirement of continuousness showed uninterrupted use for the requisite period of prescription, but in the context of sale and implied grant no-one should care about how far back into the past the right in question has been exercised for, or how easy it is to prove uninterrupted use for any period: while the *Wheeldon* rule requires the alleged easement to have been used before the grant, a house built last year will need a right of way just as much as one that is hundreds of years old. Implication is about the needs of the future, not the practice of the distant past.

Indeed, human intervention may give notice of the existence of an easement in a more conspicuous manner than in the case of an easement that can operate without human intervention: if the vendor leads the purchaser down a path through land proposed to be retained by the former, the purchaser will be alerted to the need for access along that path, but not to the need for the drain that runs under the path. If anything the fact that an easement is continuous may serve to conceal it. The requirement is thus not merely out of place; it is positively opposed to any conceivable purpose in the law of implied grant.

35 Simpson, ‘The Rule in *Wheeldon v Burrows* and the *Code Civile*’, above n 28, 241f, 244f; Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade’s Law of Real Property* (Sweet & Maxwell, 7th ed, 2008), 1249f express the same idea by referring to rights that are enjoyed passively as distinct from those enjoyed through personal activity. In *Suffield v Brown* (1864) 4 de G J & S 185, 199; 46 ER 888, 894, the phrase used is ‘constant and uninterrupted’ use.

36 The other being the ‘mere fanciful analogy’ criticised by Lord Westbury LC in *Suffield v Brown* (1864) 4 de G J & S 185; 46 ER 888, on which see Simpson, ‘The Rule in *Wheeldon v Burrows* and the *Code Civile*’, above n 28, 243f.

37 Simpson, ‘The Rule in *Wheeldon v Burrows* and the *Code Civile*’, above n 28, 245; see also Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law: Text, Cases and Materials* (Oxford University Press, 2009) 888.

Naturally enough, various writers and courts have attempted to fill the requirement of continuousness with some relevant content by changing the meaning which it was originally intended to bear. Occasionally attempts are made to rescue ‘continuous’ by proposing that it requires ‘more than merely occasional’ user.³⁸ This probably reduces to nothing more than ‘not merely occasionally apparent’: if user of some easements, such as rights of way, is not continuous in the sense of reasonably frequent, it will usually not be apparent either. Another concept often used is that of permanency:³⁹ if this is not merely also an aspect of ‘apparent’, it again asks a backward-looking question rather than a forward-looking one adapted to the purpose of the rule we are applying.

Some courts have also abandoned the requirement entirely and ‘turned a blind eye’ to the fact that a right of way is not continuous in the intended sense of the word.⁴⁰ Sometimes they even frankly admit that an easement is not continuous but imply it anyway.⁴¹ In *Campbell v McGrath*⁴² Barrett J stated bluntly, if with some exaggeration, that ‘the element of “continuity” has largely been ignored’.⁴³ Many cases barely, if at all, draw a distinction between ‘continuous’ and ‘apparent’, so that continuousness is merged into and disappears into the question of apparency.⁴⁴ Others use ‘continuous’ in its spatial rather than temporal sense to mean not broken into parts on the ground⁴⁵ — in *Millman v Ellis* the Court of Appeal referred to the ‘continuous and unbroken area of tarmac’.⁴⁶ As a matter of semantics this is unobjectionable, but it too is either an aspect of ‘apparent’ or irrelevant to the issue.

38 Peter Butt, *Land Law* (Law Book, 6th ed, 2010) 467; an example may be *Suffield v Brown* (1864) 4 de G J & S 185, 199; 46 ER 888, 894.

39 *Ward v Kirkland* [1967] 1 Ch 194, 225 (‘Ward’); *Hardy v Herr* [1965] 1 OR 102, 115 (affirmed on other grounds: [1965] 2 OR 801); *Nelson v 1153696 Alberta* [2009] ABQB 732, [213]f, [219]; *Campbell v McGrath* [2005] ANZ Conv R 433; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 100; Edward Burn and John Cartwright, *Cheshire and Burn’s Modern Law of Real Property* (Oxford University Press, 18th ed, 2011) 664; cf Martin Dixon, *Modern Land Law* (Routledge-Cavendish, 6th ed, 2009) 344, where the requirement is said (without citation of authority) to amount to ‘constantly available’ (emphasis in original).

40 Harpum, Bridge and Dixon, above n 35, 1250; see also *Schwann v Cotton* [1916] 2 Ch 120, 128 (judgment affirmed *Schwann v Cotton* [1916] 2 Ch 459).

41 In addition to the cases about to be cited: *Borman v Griffith* [1930] 1 Ch 493, 499.

42 [2005] ANZ Conv R 433; appeal allowed on other grounds: *McGrath v Campbell* (2006) 68 NSWLR 229 (‘*McGrath*’).

43 *Ibid* 439. Note, however, that at 440 his Honour gives reasons, possibly intended as a fig-leaf, for holding that the right of way is continuous, namely that it is permanent.

44 *Aldridge v Wright* [1929] 2 KB 117, 124f; *Donaldson v Smith* [2006] EWHC B9, [23], [25]; *Kung Ming Tak Tong v Park Solid Enterprises* (2008) 11 HKCFAR 403, 428 (‘*Kung Ming Tak Tong*’).

45 *Liddiard v Waldron* [1933] 2 KB 319, 322; *Loyal Luck Trading v Wah* [2008] 4 HKLRD 681, 692f.

46 (1995) 71 P & CR 158, 162.

In short, both courts and commentators pay lip service to ‘continuous’.⁴⁷ It is a red herring and a historical mistake, and it should be removed from the discussion at once.⁴⁸

IV APPLICATION AND PURPOSE OF ‘APPARENT’

Recently a number of appeal courts throughout the common law world have also begun to question the place of ‘apparent’ as well, or at least to pass over it in silence.⁴⁹

In *Wilcox v Richardson* the Court of Appeal for New South Wales mentioned Thesiger LJ’s ‘continuous and apparent’ but virtually refused to apply it,⁵⁰ holding that an easement for the use of a right of way and a fish-filleting area attached to a shop was ‘continuous and apparent’ even though some of the facilities in question showed no ‘physical features apparent on inspection.’⁵¹ To put the matter more precisely, it could not have been said in that case, to quote a commentator, ‘not that it is obvious to the reasonable man that an easement will be required to enjoy the property, but rather that a man with reasonable eyesight will be able to see that something in the nature of an easement has actually been exercised.’⁵² The emphasis in *Wilcox* was, rather, on what was required to ensure that a grantor did not derogate from his grant — admittedly a lease was involved, and that principle is familiar in relation to leases as well as implied easements. The Court of Appeal for New Zealand has approved and applied *Wilcox*.⁵³

For its part, the (English) Court of Appeal has recently, after reproducing Thesiger LJ’s conditions in *Wheeldon*, re-stated the rule as follows:

The two propositions which, together, comprise the rule (or rules) in *Wheeldon v Burrows* are confined, in their application, to cases in which, by reason of the conveyance (or lease), land formerly in common ownership ceases to be owned by the same person. It is in cases of that nature that, in order to give effect to what must be taken to be the common intention of the grantor and the grantee, the conveyance (or lease) will operate as a grant (for the benefit of the land conveyed) of such easements

47 As in Jonathan Gaunt and Justice Paul Morgan, *Gale on Easements* (Sweet & Maxwell, 18th ed, 2008), where at 145 a statement is made (or reproduced from *Ward* [1967] 1 Ch 194, 224f) that all reported cases of implied positive easements have been ‘continuous and apparent’, but then at 148 *Borman* [1930] 1 Ch 493 is cited. See also Thompson, ‘Case Note’ [1995] *Conveyancer and Property Lawyer* 239, 240.

48 After writing this section, I was pleased to find a similar argument made by Anna Lawson, ‘Easements’ in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Willan, 2002) 87f.

49 This does not imply that earlier courts have not occasionally done the same thing, eg *Hansford v Jago* [1921] 1 Ch 322, 338; so have lower courts: see eg *Kavia Holdings v Bevillesta* [2006] NSWSC 633 (27 June 2006), [9]; see also Ferris, above n 8, paragraph under heading ‘The Judgments’.

50 (1997) 43 NSWLR 4.

51 *Ibid* 16.

52 Aldridge, ‘Easements on Sub-Divisions’ (1966) 110 *Solicitor’s Journal* 938, 938.

53 *Mikitasov v Collins* [2008] NZCA 390, 29; application for leave to appeal dismissed: [2009] NZSC 1.

over the land retained by the grantor as are necessary to the reasonable enjoyment of the land conveyed. But, because the principle is founded on the common intention of the parties, the easements necessary to the reasonable enjoyment of the land conveyed are those which reflect (and, following separation of ownership, are needed to give effect to) the use and enjoyment of the land conveyed at the time of the conveyance and while that land and the retained land were in the common ownership of the grantor.⁵⁴

Admittedly the question of ‘continuous and apparent’ was not the subject of the appeal, but the omission of any mention of those criteria cannot be overlooked.

If the ‘apparent’ requirement may be gradually fading away as well, it behoves us to ask whether it should be saved, and what the purpose is of a requirement that an implied easement should ‘betray its presence, either by some indication of its existence or by its obvious use in connexion with the land’.⁵⁵ The answer seems intuitively obvious: it is ‘a rule of conveyancing convenience which exists to facilitate the discovery of incumbrances’.⁵⁶ It exists for the sake of notice.⁵⁷

But is the answer as obvious as that? To whom is notice being given? It should be given, if at all, to the person who will be disadvantaged by the proposed easement. But that is the vendor of the property — the grantor — who, of all people, has the best means of knowing what easements exist and are currently in use. The person with little to no capacity for that — the buyer — also has no need for notice, for *ex hypothesi* the easements can only favour and not disadvantage him.

The concept of ‘continuous and apparent’ as a prerequisite for an implied easement was originally intended by Gale, in pre-*Wheeldon* days, as applicable both to implied grants and implied reservations.⁵⁸ In that context it is not surprising that it made some sense, for it would give notice to purchasers of servient tenements that their purchase would be affected by an implied reservation. Now, however, it is clear that only absolute necessity will justify the imposition of an implied reservation, there is no symmetry between the requirements for implied reservations and implied grants. The requirement that an implied grant should be apparent has thus lost even the purpose of making the law tidy and uniform in the two fields in which it was previously thought to apply.⁵⁹

54 *Kent v Kavanagh* [2007] Ch 1, 21.

55 *Alexander v Challenger* [2010] EWHC 2301, [58].

56 Charles Harpum ‘Easements and Centre Point: Old Problems Resolved in a Novel Setting’ (1977) 41 *Conveyancer and Property Lawyer* 415, 422; cited with approval in Bradbrook and MacCallum, above n 39, 100.

57 Even though the *Wheeldon* doctrine is legal not equitable: *McGrath* (2006) 68 NSWLR 229, 245; *Kitching v Phillips* (2011) 278 ALR 551, 561 (*‘Kitching’*) (application for special leave to appeal refused: Transcript of Proceedings, *Kitching v Phillips* [2011] HCATrans 335 (9 December 2011)); Lyria Moses and Cathy Sherry, ‘Unregistered Access: *Wheeldon v Burrows* Easements and Easements by Prescription over Torrens Land’ (2007) 81 *Australian Law Journal* 491, 495f, 501.

58 Gale and Whatley, above n 30, 49f, 52.

59 Cf Simpson, ‘The Rule in *Wheeldon v Burrows* and the *Code Civile*’, above n 28, 243f.

One suggestion is that the notice requirement constituted by ‘apparent’

is perfectly consistent with the doctrine of non-derogation from grant which requires the parties to have had an expectation or intention that the right should be granted — only if a grantee is aware of a quasi-easement can they genuinely expect to receive it.⁶⁰

This is an ingenious suggestion, but it will not do, for the grantee will as a rule have an expectation only that services will be provided to the land somehow, but may well not know how exactly they are provided and, in particular, whether an easement is necessary to provide them, and if so which one or more of the potential easements — and thus have no expectations on the need for any particular easement, which happens to be the point in issue. The grantee assumes that the grantor will not be permitted to derogate, but does not necessarily know how or in what way the non-provision of any and if so which type of easement might constitute derogation. This is because the grantee cannot always know how exactly hidden services such as sewerage and drainage are provided, nor even — assuming an apparent right such as a right of way is in question — whether or not there is some other legally assured access to the property which renders an apparent means of access redundant. If, on the other hand, the grantee does take the trouble to find out the unobvious ways in which easements are required for his purchase to be effective, he or she is to be congratulated on his thoroughness — but will no longer need *Wheeldon* at all, for he or she will stipulate for an express easement. Requiring notice of the very existence of a quasi-easement, therefore, will help only those who do not need help, and as far as the rest are concerned will often permit the grantor to derogate. Thus this suggestion for salvaging ‘apparent’, at least, misses the mark.

Furthermore, notice is a concept which, famously, has no place in the Torrens system. Whatever the rules may be for determining whether a *Wheeldon* easement will bind a registered proprietor — and they vary among States⁶¹ — the Torrens legislation, supplemented by the standard equitable principles that have grown up relating to the enforcement of in personam rights (in the rare case when they are necessary), is the place in which they are to be found, not the *Wheeldon* rule itself. In the context of near-universal registration, which did not exist in the time and place where the *Wheeldon* rule was first enunciated, that rule should deal only with how easements arise as a result of transactions, not how their existence is recorded. The decision of the legislature of each State on the question of the relationship between unregistered implied easements and the register must take precedence over that of the Court of Appeal a century and a third ago. The Torrens system exists for the purpose of providing notice of interests, including to later purchasers from the original grantor, who are the most obvious parties who will need it — not the rule in *Wheeldon*.

60 Lawson, above n 48, 91.

61 They are described in Fiona Burns, ‘Implied Easements and the Integrity of the Torrens System’ (2009) 21(2) *Bond Law Review* 1, 13–18; Moses and Sherry, above n 57, 500–6.

This is certainly how the Court of Appeal for New South Wales saw the matter in *McGrath v Campbell*,⁶² in which both parties — the owners of the dominant and servient tenements — were, exceptionally, purchasers and the *Wheeldon* principle applied by virtue of simultaneous conveyances by one landowner to two separate purchasers. It was held that the indefeasibility provisions of the Torrens system were crucial in the determination that a *Wheeldon* easement did not bind the purchaser of the alleged servient tenement. This was based, of course, on the statutory provisions applicable in New South Wales. Each State has the right to adopt its own solution to this problem. Whatever solution a State adopts, there is no call to duplicate, by the principle of notice derived from the old law, the provisions of the Torrens system on the topic of the effect of unregistered interests on registered proprietors.

Only in relation to the few remaining pockets of old system land would it make any sense to retain any requirement that an implied easement should be apparent, as a means of giving notice; but this requirement would still be largely out of place in relation to implied grants, for notice will be required principally by the person who will be affected by them, the vendor, who usually has ample opportunity to discover the facts.

V CONCLUSION

As has been pointed out on numerous occasions, the true basis of the *Wheeldon* doctrine is that a grantor must not derogate from his grant⁶³ — ‘a principle which merely embodies in a legal maxim a rule of common honesty’.⁶⁴ The basis of the *Wheeldon* doctrine is not the doctrine of notice which has been grafted on it.⁶⁵ This article has shown that there is therefore no place for ‘apparent and continuous’ alongside ‘reasonably necessary’: the former phrase came into the law by a historical mistake, is inconsistent with the purpose of the rule and indeed serves no other useful purpose at all.

62 (2006) 68 NSWLR 229.

63 A selection of recent statements by high-ranking courts to that effect is: *Sovmots Investments v Environment Secretary* [1979] AC 144, 168, 175, 183; *McGrath* (2006) 68 NSWLR 229, 242, 245; *Kung Ming Tak Tong* (2008) 11 HKCFAR 403, 426; *Kitching* (2011) 278 ALR 551, 559–61; Harpum, Bridge and Dixon, above n 35, 1248.

64 *Harmer v Jumbil (Nigeria) Tin Areas* [1921] 1 Ch 200, 225.

65 If anything this is only emphasised by the recent trend in New South Wales to stress the contractual side of *Wheeldon*, which is most apparent in *McGrath* (2006) 68 NSWLR 229, 242–6. This path appears to have been taken for the workaday reason given in *Kitching v Phillips* [2009] WASC 396, [72] (appeal dismissed: *Kitching* (2011) 278 ALR 551; application for special leave to appeal refused: Transcript of Proceedings, *Kitching v Phillips* [2011] HCATrans 335 (9 December 2011)). I do not analyse this trend here, but I am not sure that it is historically accurate or correct today — although there is clearly some degree of commonality in the general purpose behind *Wheeldon* and the basis on which terms are implied into contracts. It must be recalled, however, that it is not in all cases that a conveyance of land is produced contractually.

The best option therefore is for this phrase simply to be deleted from the discussion. If that seems too bold a step, ‘or’ should be read to mean what it says, so that there is no need to prove ‘continuous and apparent’ in cases of reasonable necessity.

Another author,⁶⁶ however, has proposed the opposite solution: deleting the requirement that the easement should be reasonably necessary for the enjoyment of the property and retaining ‘continuous and apparent’. The view is put forward that *Re Ellenborough Park*’s⁶⁷ conditions for the recognition of an easement should be the test for implication instead. But that would overshoot the mark by some way: not every easement that could legally be created and happens to be visible should be imposed by the law in order to prevent the grantor from derogating. The point of *Wheeldon* is to prevent derogation and thus rescue a grant of land from pointlessness, not to convert all continuous and apparent quasi-easements into easements no matter how superfluous they may be to the grantee’s needs after sale.⁶⁸ For example, the grantor might provide ample access to the road and completely obviate the need to use the path taken by the grantor when the properties were united, even though the path is still apparent. Philosophers remind us that ‘ought’ implies ‘can’; but ‘can’ does not necessarily imply ‘ought’. It is ‘continuous and apparent’ that is dispensable, not the requirement of reasonable necessity.

A further suggestion that has been made by one author and the Law Commission (England and Wales) amounts to the idea that ‘continuous and apparent’ should be downgraded from a requirement to a guideline to be used in determining the issue of implied grant.⁶⁹ This article has suggested, however, that ‘continuous and apparent’ is not merely less central to the question of implied grant of easements than its current apparent status in the law might make it appear to be, but positively harmful to clear thinking on the topic, given that it poses a question about the grantee which should not be asked of him but can only be sensibly answered by the grantor, who will usually have other means of answering it anyway, and performs no other function in the law. Furthermore, a guideline would be a lazy compromise which leaves the status of ‘continuous and apparent’ barely clearer than it is now. Its fate should, rather, be oblivion — in accordance with the authorities already mentioned that ignore it.

66 Thompson, above n 47, 241f.

67 [1956] Ch 131.

68 Cf Lawson, above n 48, 89f.

69 Nicholas Hopkins, *Informal Acquisition of Rights in Land* (Sweet & Maxwell, 2000) 213, citing a text which is not available to me; Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre*, Report No 327 (2011) 36, 196 (draft Bill cl 20(2)(b)); cf Northern Ireland Law Commission, *Land Law*, Report No 8 (2010) 155, which contains no such requirement.