LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

PRESCRIPTIVE EASEMENTS AND *PROFITS-À-PRENDRE*

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I. INTRODUCTION

The purpose of this Report is to examine how prescriptive rights function within Manitoba's two land holding systems, and to make recommendations for reform. At issue is whether or not the law of prescription can continue to perform a useful role in a province which has a highly developed land registration scheme. The Report considers whether the present law should be improved upon or simply abolished.

In 1978 the Commission completed a Working Paper on the subject of prescriptive easements, which set out the choices for reform that had to be considered. The Working Paper concluded that the law of prescription should be retained and that improvements should be made regarding its operation. The Commission tentatively proposed that the Court of Queen's Bench be empowered to recognize prescriptive easements subject to equitable terms as to compensation, repair, maintenance and conditions of use.

In accordance with the Commission's usual practice, the Working Paper was widely circulated so that we might obtain the views and comments of the legal profession and the public. The responses we received contained thoughtful and constructive comments which have assisted us in the preparation of this final Report.

Since the circulation of the Working Paper, we have also done additional research, particularly with respect to the problem that prescriptive easements present as overriding interests within the Torrens system. As a result of that further research, and in response to the comments received, we have significantly revised the proposals contained in the Working Paper.

The Report is divided into five parts, the first three of which are concerned with prescriptive easements. We outline in successive chapters the existing law and its operation in Manitoba; the arguments which can be advanced in favour of abolition and retention of the right to acquire prescriptive easements in the future; and our major recommendations for reform. The fourth section contains a brief examination of prescriptive *profits-à-prendre*. In the final chapter we consider what legislative changes are necessary to implement our recommendations.

II. THE LAW OF PRESCRIPTIVE EASEMENTS

A. Easements Generally

An easement has been defined as:

> A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.[1]

A landowner may, for instance, have a right to cross neighbouring land in order to gain access to his own property. The owner of a building may have the right to have that building supported by a building located on adjacent property. Neighbouring householders may share a driveway, each having the right to use the portion of the driveway on the other's property. These are all common examples of easements.

Easements are either positive or negative. If an easement confers a privilege of actively doing something on another's land, it is said to be positive. A right of way across another's land is an example of such an easement. If, however, a landowner agrees not to use his land in a certain way, a negative easement is created. An example of the latter is an agreement not to build on land in such a way as to block the flow of light to the windows of an adjacent building.

An easement is an interest in land and is a right which is annexed to land. The parcel of land to which the easement is annexed is called the dominant tenement; it is this land which is benefited by the easement. The land which is disadvantaged is called the servient tenement. Both a dominant and a servient tenement are essential for the creation of an easement at common law.

The characterization of a right as an easement is of no little importance. Being an interest in land, an easement is more than a personal right. The benefit and the burden of an easement are said to "run" with the land. This means that when the dominant land is transferred to a purchaser, the benefit of the easement is also transferred. Similarly, the purchaser of the servient tenement is bound by the terms of an easement which burdens the land, even though there is no contractual nexus between him and the dominant owner.

Easements are created either by statute or by grant. Examples of statutory easements in Manitoba can be found in *"The Condominium Act"*[2] and *"The Law of Property Act"*.[3] In addition, there are other statutes which enable the creation of interests analogous to easements but which lack dominant tenements. They include rights for the conveyance of water, gas and hydro by public bodies; they are specifically allowed for in *"The Real Property Act"*.[4] Statutory easements present no particular difficulty in Manitoba.

Easements created by grant are of three types:

1. those created by express grant or agreement by the parties;
2. those created by an implied grant. An example of an implied easement is one which arises when an owner of property sells part of it to X, retaining the rest himself. If the land sold to X is landlocked, the law will imply an easement over the owner's remaining land in favour of X;
3. those created by a presumed grant, or prescription. The law will presume the grant of an easement where there has been continued enjoyment by the person claiming the easement over a long period of time.

It is with easements created in this last manner that this Report is concerned.

B. Prescriptive Easements

The acquisition of easements by prescription is based on the principle that a privilege in respect of another's land which has been enjoyed continuously over a long period of time should not, as a matter of public policy and convenience, be lightly disturbed. The court will uphold a prescriptive easement by presuming that the use had a lawful origin, ie. that there was at one time an actual grant of the right even though there is now no evidence of it. This policy has the effect of preserving established arrangements "while at the same time paying lip service to the doctrine that every easement must owe its origin to a grant".[5]

It is important to distinguish between the acquisition of an easement by prescription and the acquisition of a title to land by adverse possession. A prescriptive easement arises as a result of the use of land for a limited purpose, whereas adverse possession confers a title to land because of the occupier's complete and exclusive possession of that land over a number of years. The law respecting adverse possession has its origin in English common law where a person's right to land was based on possession of the land itself rather than on the registration of ownership documents. In Manitoba a possessory title can arise by virtue of section 26 of *"The Limitation of Actions Act"*[6] which provides that once adverse possession has lasted for ten years, the dispossessed person cannot sue to recover the land. *"The Limitation of Actions Act"* provision applies, however, only to land governed by *"The Registry Act"*.[7] Its operation has been curtailed by section 61(2) of *"The Real Property Act"* which abolishes the law of adverse possession in respect of land governed by that Act.

When a court does uphold a prescriptive easement, the servient owner loses rights in his property despite the fact he has never formally agreed to the loss. There are therefore several strict requirements which must be met before the court will presume the grant of such an easement. The claimant must show that he has made use of the right as if he were entitled to do so, otherwise the court cannot presume that it is being enjoyed under a grant. Enjoyment must be without force, without secrecy and without permission (*nec vi, nec clam, nec precario*). The court will not presume a grant if the enjoyment has been procured forcibly, as for example, when a barricade must be removed from a right of way in order to make use of the way. Nor will a claimant succeed if the servient owner has no knowledge, either actual or constructive, of the use being made of his land. Finally, a grant will not be presumed if the servient owner has given permission, because that, too, is inconsistent with "use as of right". In the case where a claimant has made periodic payments to the servient owner, for instance, the use is permissive and not as of right and a prescriptive easement cannot arise.

A further requirement of a prescriptive easement is that the owner of the servient land must acquiesce in the use but he cannot have given permission: the line is a fine one and not always easy to draw in a particular case. Especially troublesome is the easement of support to a building where the servient owner may be deemed to have acquiesced, even though to protest or interrupt the use would be expensive and very difficult.

A successful claimant must also show that his use has been continuous, ie. that it has been exercized in such a manner and with such frequency as to indicate his assertion of a right.

It is also an established principle that the use must be by or on behalf of a fee simple owner against a fee simple owner. Thus, if user can be proved only during a time when the servient land was occupied by a lessee, the claim will be unsuccessful because the servient owner may never have been in a position to challenge the use. However, if the fee simple owner is in possession at the beginning of the period, the period will continue to run against him notwithstanding a subsequent lease. It is also settled that the use need not be established by one dominant owner over the respective time period: cumulative use by successive owners will suffice to establish a prescriptive right.

Under English law prescriptive easements could arise in three ways:

(1) at common law;

(2) under the doctrine of the lost modern grant;

(3) by virtue of the *Prescription Act*, 1832 (a copy of which is attached to this Report as an Appendix).

1. Common law prescription

Prescription at common law is based on a presumed grant which the law assumes was made prior to the beginning of legal memory, or, conventionally the year 1189, the first year of the reign of Richard I. For a claimant to prove use from this date, or even to raise a *prima facie* presumption of it, is impossible in Canada because legal memory does not go back as far as 1189.

2. Doctrine of the lost modern grant

It was very difficult even in England for a claimant

to prove use of a right since 1189, and because of this the courts at the end of the 18th century invented the doctrine of the lost modern grant. The doctrine is really a variation of common law prescription. It presumes that a grant was made at some time after 1189 and subsequently lost. Use for a period of 20 years is normally sufficient to raise the presumption. However, use for a shorter or longer period may suffice depending on the merits of the particular case and the relevant evidence.

The doctrine rests on a rather questionable base. Megarry and Wade point out that "presuming the existence of grants which had probably never been made was frequently felt to be objectionable, particularly when it fell to juries who were required to find it as a fact upon oath".[8] The presumption, for instance,could not be rebutted by showing that no grant was in fact ever made. And yet a claim would not succeed if the servient owner could prove that over the relevant period no one had the capacity to grant it.

Although the doctrine of lost modern grant has never been applied in Manitoba, it has been accepted in eastern Canadian jurisdictions,[9] and it might well be applied in Manitoba in a proper case. It would be useful as a second line of argument for a claimant who fails to satisfy some particular requirement of the *Prescription Act*, 1832.

3. The *Prescription Act*, 1832

The 1832 Act was a legislative response to widespread dissatisfaction with both common law prescription and the lost modern grant doctrine. That Act has been in force in Manitoba

since 1870 except to the extent that it has been altered by more recent legislation. Section 29 of *"The Law of Property Act"* has abolished the acquisition of prescriptive rights to light. In all other respects, however, the 1832 Act is in effect in Manitoba.

The preamble to the 1832 Act states:

> Whereas the expression "time immemorial" or "time whereof the memory of man runneth not to the contrary" is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard I whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice: For remedy thereof, be it enacted:-

The 1832 Act did not replace the common law and lost modern grant methods of acquiring an easement by prescription. It attempted only to provide newer and better evidentiary rules by which a dominant owner could establish a prescriptive right. This being the case, it has been possible in England since 1832 to claim such a right in three different ways. In Manitoba, only the statute and (possibly) the lost modern grant doctrine are available.

The *Prescription Act* is an extremely difficult statute to understand fully. The English Law Reform Committee has called it "one of the worst drafted Acts on the Statute Book".[10] Its provisions remain, in the words of the Ontario Law Reform Commission, "a mystery to many a practising lawyer".[11]

This Report will not attempt to analyze all of the fine points and idiosyncracies of the *Prescription Act*. Instead, what follows is a summary of its major provisions:

(i) The 20 year period

The Act provides two different time periods for the creation of prescriptive easements: a 20 year period and a 40 year period. If an easement is actually enjoyed for a full period of 20 years it cannot be defeated by showing that there has been a period of non-user at any time since 1189. The common law defence respecting use since time immemorial is irrelevant, and 20 years' use will now suffice. The claim, however, may still be defeated by any of the other defences available at common law, ie. that it was not capable of forming the subject matter of a grant in the first place, or that it was exercised with force, secretly or by permission. The Act also provides that any time during the 20 year period in which the servient owner was an infant or mentally incompetent or a life tenant is to be excluded in the computation of the 20 years.

(ii) The 40 year period

If an easement has been enjoyed for a period of 40 years the Act deems it "absolute and indefeasible", unless it was enjoyed by consent or agreement made by deed or in writing. Periods of time during which the servient owner was an infant or mentally incompetent are not excluded in computing the 40 year period as they are in computing the 20 year period; however, a life tenancy will be excluded in computing the 40 year period as will a lease for more than three years. A claim based on the 40 year period is not defeated, as is the 20 year claim, if it was enjoyed by oral permission. However, a claim based on the 40 year period may still be defeated if it can be shown that the user was forcible, secret or obtained by written permission.

(iii) The need for litigation

The 20 and 40 year periods referred to in the Act must, according to section 4, arise immediately prior to the bringing of an action. The Act does not state that an easement is created after 20 or 40 years' use; all periods referred to in the statute must precede litigation. As Megarry and Wade point out, "it is . . . said that the right remains merely inchoate until action is brought. The important point is that the fruits of the act can be reaped only by a litigant".[12]

The effect of this is that if the 20 or 40 years' enjoyment is proved only up until a time some years prior to the commencement of an action, the Act's

requirements will not have been met. A claimant may, however, still be able to rely on the doctrine of the lost modern grant where the period of user is not tied to litigation.[13]

(iv) Interruption in use

At common law or under the lost modern grant doctrine any interruption in the use made by the servient owner is relevant only to the issue as to whether or not the use has been "as of right". However, section 4 of the *Prescription Act* requires that the period of use be "without interruption". No act is deemed to be an interruption unless a dominant owner has submitted to it or acquiesced in it for one year. The essential factor is not the obstruction or interruption as much as the acquiescence in it.

The Ontario Law Reform Commission gives an example of the operation of section 4 of the Act which illustrates its capriciousness:

> X has been crossing Y's property as if he had an easement for 19 years and 1 day. The next day Y prevents X from crossing by placing an obstruction in the way of passage. At this time, X has no right to cross as he cannot show 20 years of enjoyment.
>
> However, if X sues for a prescriptive easement one year from the day after he had enjoyed the use for 19 years, he will succeed. X will now be able to show 20 years of enjoyment prior to bringing the action. The interruption will now not count as it was 1 year less a day. X could not have brought his action sooner as he would have been short of the 20 year period required.
>
> An action brought by X on the following day will be too late as the interruption will now have lasted a year and section (4) can no longer apply.[14]

There is no doubt that the *Prescription Act* is difficult and confusing. The Ontario Commission sets out the following difficulties in its report:

1. having two different methods of prescription when one would be sufficient;

2. having two different periods under the statute when one would be sufficient;

3. tying the prescription periods under the statute to the commencement of an action;

4. requiring long periods of adverse enjoyment, considering that ten years' adverse possession is sufficient to create a possessory title;

5. excluding from the periods required under the statute time when the servient tenement is owned by someone under a disability, when such persons usually have legal representatives who can act on their behalf;

6. the poor drafting of the statutory provisions;

7. the use of the fiction of the "presumed" grant;

8. the obscureness of the law as to the meaning of "user as of right"; and

9. the difficulty or undesirability, in some cases, of having to make "interruptions" in the running of time by the creation of physical obstructions.[15]

C. The Operation of Prescription in Manitoba

It remains to examine the place of prescriptive easements within the landholding systems in Manitoba. There are two systems: the first is a recording system governed by *"The Registry Act"*, and the second is a Torrens system governed by *"The Real Property Act"*. By far the larger proportion of land is registered under the latter Act.

Easements, including prescriptive easements, are ordinarily legal as opposed to equitable interests in land. At common law, a purchaser of an interest in land was bound by all prior legal interests whether he was aware of them or not. Equitable interests, on the other hand, were subject to a different rule: they were not binding on a *bona fide*

purchaser for value who had no knowledge of their existence.

In attempting to facilitate conveyancing under the common law, the two statutory schemes modify to a certain extent the common law doctrine of notice respecting legal and equitable interests.

1. *"The Registry Act"*

"The Registry Act" is designed to provide notice to the public of interests in land. Unlike the Torrens system, it does not guarantee title; it simply provides a registration system for all documents affecting land. Persons with interests in land are encouraged to register documents because priority is given to registered documents over those which are unregistered. In an important aspect, *"The Registry Act"* thus alters the common law respecting notice. Section 56 provides as follows:

> Except as mentioned in sections 57 and 58, any instrument that may be registered in pursuance of this Act, affecting any lands whatsoever situated in Manitoba, whether there has been any grant from the Crown of those lands or not, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, without actual notice, unless the instrument is registered in the manner in this Act directed before the registering of the instrument under which the subsequent purchaser or mortgagee may claim.

The effect of this section on a purchaser of land is two-fold: he must first acquire the land without notice of a prior instrument, and secondly, he himself must register before the prior instrument is registered. If he meets both of these requirements, he takes free from the prior interest.

A purchaser, however, cannot take advantage

of this section when the land he buys is burdened by a prescriptive easement of which he is unaware. The reason for this is that the section deals only with "instrument[s] that may be registered". It is thus relevant to the situation of an express agreement for an easement, but does not apply where the easement arises other than by written agreement, as in the case of a prescriptive easement arising by a presumption of law. Under *"The Registry Act"*, then, the common law rule survives and a *bona fide* purchaser for value is bound by a prescriptive easement whether or not he has knowledge of it. He cannot protect himself by registration when a prescriptive easement is involved.

2. *"The Real Property Act"*

Most land in Manitoba is registered under *"The Real Property Act"* which establishes a Torrens system of land-holding. Like Torrens legislation elsewhere, it attempts to provide a simple system whereby the state guarantees title by declaring that land is vested in a certain person, subject to specified encumbrances. The broad theory of the system is that the register should accurately reflect the title; it should act like a mirror which shows not only the present ownership but also any other interests in the land such as mortgages, leases, agreements for sale, easements and restrictive covenants. This mirror-like quality is achieved by requiring a transaction to be registered in order to be effective, and providing that once registered it can generally not be upset unless fraud is proved. The system allows land to be dealt with quickly and efficiently because the state of the title can be easily ascertained.

There are, however, a number of interests which do not have to appear on the register of title to be effective,

They create what has been called "a cavernous crack in the fundamental mirror principle".[16] Every Torrens jurisdiction has in its legislation a list of such interests which are said to "override" the title. They are effective without any special mention in the register and they bind a purchaser of the land whether he has knowledge of them or not. Because of this a purchaser must be careful to search beyond the register to determine if the land is affected by any overriding interests. Typical overriding interests are reservations contained in the original Crown grant, municipal charges, leases for less than three years where the land is actually occupied, public easements and planning schemes or by laws. The list of interests varies from jurisdiction to jurisdiction.

Manitoba's list of overriding interests is fairly similar to that found in other Canadian jurisdictions with the exception of the reference to easements. Section 57(1)(c) is as follows:

> 57(1) The land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to
>
> . . .
>
> (c) any right-of-way or other easement, howsoever created, upon, over, or in respect of, the land; . . . .

Prior to 1964 there was some doubt in Manitoba as to whether or not section 57(1)(c) was broad enough to include prescriptive easements created after the date on which the land was registered under the Act. This doubt was resolved by the Court of Appeal in 1964 in the case of *Stall v. Yarosz*[17] where it was decided that a prescriptive easement could be acquired over land under *"The Real Property Act"*. This case has since

been applied in *Wilton v. Hansen,*[18] a 1969 decision of the Court of Appeal respecting an easement of support, and in *Wiebe v.Enns,*[19] a 1971 Queen's Bench decision respecting an easement for discharge of surface water.

The effect of these decisions is that in Manitoba prescriptive easements are overriding interests which do not have to appear on the title in order to bind a subsequent purchaser. As such, they exist outside the register and whether a subsequent purchaser has notice of them or not is irrelevant.

III. ABOLITION OR RETENTION?

The problems created by prescriptive easements have two very different sources. The first is the difficulty inherent in "*The Prescription Act*" itself, and the second is the fact that prescriptive easements, because of their special nature, have never found a comfortable setting within the operation of the Torrens system. The question is whether or not these problems are of such importance that the right to acquire prescriptive easements should be abolished.

At the outset it should be noted that "abolition" refers only to the abolition of the right to acquire prescriptive easements in the future. The Commission is of the view that remedial legislation of this type should not be retroactive; it should not interfere with legal rights acquired by persons upon the faith of the existing law.

The question of "abolition or retention" was first addressed in 1966 by the Law Reform Committee of England.[20] The 14 person Committee chaired by Lord Pearson was divided, eight of its members were in favour of abolition, while six favoured retention of prescription with improvements to the existing law. The reasons for abolition and for retention are expressed in a succinct fashion in the Committee's report, and have been referred to extensively in both the Ontario[21] and British Columbia[22] reports dealing with this subject. Many of the reasons first expressed by the English Committee, to which we are indebted, are to be found in the following discussion.

A. Reasons for Abolition

1. Approximately ninety percent of land in Manitoba is registered under a Torrens system, one of the main tenets of which is that the register of land should accurately and

completely reflect all of the interests in that land. This ideal can never be entirely achieved because some important interests in land, such as short-term leases, zoning by-laws and municipal taxes, are not easily registrable. However, all interests which override the register should be scrutinized very carefully to determine their usefulness within the system. Are they of such importance that they should be allowed, in certain cases, to defeat the operation of that system? With respect to prescriptive easements as overriding interests, the majority of the Pearson Committee has said:

> It is not simply a question of balancing the disappointment of someone who is deprived of what he may think is a long-established right against the chagrin of a man who finds that his good nature or carelessness has allowed his neighbour to steal a march on him. The interests of the general public come into the picture as well; and the advantage to the community of being able to rely on the accuracy and completeness of the register ought to be allowed to tip the scales against the continuance of prescription.[23]

It should be noted that of all the Canadian jurisdictions which have a Torrens system (or some variation of it), Manitoba is the only one which allows the creation of easements by prescription. It has never been possible to acquire them in Alberta[24] or Saskatchewan[25] and they have recently been abolished in British Columbia.[26]

2. It is difficult to justify the acquisition of a legal right by a process which may be accidental, or which arises in circumstances where a landowner intends to acquire it for no cost. Such a right, which runs with the land forever, "may well have originated in the servient owner's neighbourly

wish to give a facility to some particular individual, or (perhaps even more commonly) to give a facility on the understanding, unfortunately unexpressed in words or at least unprovable, that it may be withdrawn if a major change of circumstances ever comes about".[27]

3. It is now generally true that legal rights and obligations are defined in writing, and there is no reason why this should not also be the case with respect to easements. If all easements had to be created by a written instrument, problems with respect to the exact nature and extent of the easement (which often arise respecting prescriptive easements) would be eliminated.

4. The present law, especially that embodied in *"The Prescription Act"*, is complicated and obscure.

5. Given current survey requirements and more extensive planning laws, there will be less need in the future for the law of prescription.

B. Reasons for Retention

1. Many of the unsatisfactory characteristics of the present law of prescription can be remedied by new legislation and do not call for the abolition of prescription itself.

2. There is a moral justification for the recognition of easements which have arisen by prescription. It is that such easements involve the open enjoyment of land, over a

long period of time, in the assertion of a right to that land. The law of prescription is designed to give legal validity to a situation of long standing, in which successive owners of the servient land may have acquiesced. As the Pearson Committee minority has said,

> The well-settled principle of English law that long-continued possession in assertion of a right should, if possible, be presumed to have a legal origin (per Lord Herschell in *Phillips v. Halliday*, [1891] A.C. 228, at p. 231) remains as valid as ever. It would be widely accepted by the public as fair and right that a servient owner who has not for many years taken the trouble to protest against the open enjoyment over his property by a neighbour of a benefit of a kind capable of existing as an easement should be debarred from putting an end to such enjoyment.[28]

3. To abolish prescription may leave a gap in the law with respect to lateral support for buildings. At common law there is a general right of support from adjoining land for land in its natural state. However, if a landowner erects a building on that land he has no natural right to have it supported either by adjacent land or buildings. Such a right can only exist as an easement of support. That type of easement can be created, like other easements, either by express, implied or presumed (prescriptive) grant. Once a building has been standing for 20 years it can acquire by prescription an easement for lateral support from the adjoining property. The acquisition of easements of support by prescription is necessary to protect building owners.

4. A recommendation for the abolition of future acquisition of prescriptive rights should be coupled with a logical recommendation respecting rights in existence at the

time of abolition. The Ontario and British Columbia Law Reform Commissions have both recommended that existing rights be required to be registered. However, such a provision would be anomalous in Manitoba given the fact that *"The Real Property Act"* does not now even provide for the compulsory registration of express grants. Why abolish prescription and require the registration of existing prescriptive easements if the much larger class of express easements will continue to override the register?

C. Conclusions

Because most land in Manitoba is governed by the provisions of *"The Real Property Act"*, the problem of prescriptive easements should be looked at primarily in light of that Act. Within the scheme of that Act, the prescriptive easement is an interest in land which overrides the register and binds a subsequent purchaser whether he has notice of it or not. As an overriding interest, the prescriptive easement presents a choice which must be made between two competing factors. On the one hand is the purchaser's interest in being able to rely on the completeness of the register, and on the other is the interest of the landowner who has been making use of a long-standing unregistered easement which has never been challenged.

The most persuasive argument for abolition of prescription in Manitoba is that the register of title to land should as far as possible be a mirror of title. It is inconsistent with the broad goals of the land titles system that interests in land be allowed to exist outside that system. This argument is a compelling one unless it can be demonstrated

that strong policy reasons exist for permitting the acquisition of rights which operate outside the system.

Several reasons have been cited for retaining the existing law, but we do not consider that either individually or as a whole they present a strong enough case for retention. First of all, the argument that the complexity and archaic nature of the present law can be remedied by new legislation is true enough; however, it is not in itself sufficient justification for retaining a law which does not otherwise perform a necessary or desirable function.

Secondly, the argument that long-standing arrangements should be given legal recognition can in large measure be addressed by a recommendation that existing rights be retained, and that only the acquisition of future rights be abolished. It has already been noted that any new prescriptive easements will arise with much less frequency given modern survey and planning requirements.

Thirdly, the argument with respect to the easement of support can no longer be asserted with any real conviction given the 1969 decision of the Manitoba Court of Appeal in *Wilton v. Hansen*.[29] In that case excavations by an adjoining owner caused the plaintiff's wall to collapse. The action for damages was allowed based on the plaintiff's acquisition of a prescription right. However, Freedman J.A. stated that irrespective of the easement of support the plaintiff could recover in negligence. He applied the maxim *sic utere tuo ut alienum non laedas* - so use your property as not to injure another's:

> The principle to be followed was well set forth by Cockburn, C.J. in *Bower v. Peate*(1876) 1 Q.B.D. 321, 45 L.J.Q.B. 446. He declared that where anyone does an act on his own premises *prima facie* lawful

> in itself, but from which, in the natural course of things, injurious consequences to a neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, he is bound to see to the doing of that which is necessary to prevent the mischief.[30]

M'Alister (or Donoghue) v. Stevenson[31] was also referred to, as was an earlier Manitoba Queen's Bench decision, *Glazerman Fur Co. Ltd.v. Gibson's Investments Ltd.*[32] in which Monnin, J. also found in the plaintiff's favour on the basis of negligence.

It would appear from *Wilton v. Hansen* that while there may not be an absolute right to support for buildings, there is nevertheless protection for the landowner when interference with support by an adjoining owner constitutes negligence. The *Wilton* case clearly stands for the principle that a duty of care exists in such cases, whether or not an easement of support has been acquired.[33]

Finally, the argument that abolition will be of little benefit to the Torrens system because *"The Real Property Act"* does not require that other types of easements appear on the register must be addressed. Section 57(1)(c) of the Act allows all easements "howsoever created" to override the register. The provision is wide enough to include not only prescriptive easements, but also easements created by express grant and implied easements. Thus the problem raised by prescriptive easements within the Torrens system is also raised by the other easements protected by section 57(1)(c). All override the register, and all bind an unsuspecting purchaser of servient land.[34]

We are of the view that the problems presented by the other easements protected by section 57(1)(c) should be examined. However, the Alberta Institute of Law Research and Reform has recently initiated a land titles study in which we have agreed to participate. The purpose of this study is to draft a Land Titles Act which might form the basis of new legislation in Alberta, Saskatchewan, Manitoba, Yukon and the Northwest Territories. In the course of this study section 57(1)(c) will naturally be carefully examined, and we are therefore refraining from making any recommendations on the wider issues presented by section 57(1)(c) at this time.

In conclusion, we are of the view that while there is certainly justification for not disturbing existing prescriptive easements, there are no strong policy reasons for permitting the acquisition of such rights in the future.

The Commission therefore recommends:

1. *All existing methods of acquiring easements by prescription should be abolished.*

At this point in the Report, it should be noted that one of our members, Prof. D. Trevor Anderson, would have preferred to maintain (but under an improved and simplified prescription statute) the possibility of acquiring prescriptive easements, provided that they not be effective against third parties acquiring interests in the servient land unless noted, by caveat or otherwise, on the register before the acquisition of such interests. Subject to this one reservation, however, he believes that the recommendations contained in this Report certainly improve the current law and will provide substantial protection for existing acquired rights.

IV. RECOMMENDATIONS RESPECTING EXISTING AND ACCRUING RIGHTS

The most important reason for abolishing the right to acquire easements by prescription is the benefit that would thereby flow to the Torrens system: abolition means there will be one less overriding interest which can adversely affect an unsuspecting subsequent purchaser. Once the right to acquire prescriptive easements is abolished, however, the question becomes what to do with rights that are either in existence or are accruing at the time of abolition. In looking at this issue, the Commission's objective will be to recommend provisions which balance the broad goals of the Torrens system against the concerns of individuals who have already acquired rights under existing law.

A. Registration Requirements

What must be considered here is how to deal with prescriptive easements in existence at the time of abolition. There are two choices:

1. They can continue to exist outside the registration system; or

2. They can be required to be registered within a certain period of time after abolition, with failure to register resulting in the extinguishment of the right.

The Law Reform Commissions of British Columbia and Ontario recommended in their respective reports that prescriptive easements should be required to be registered. The British Columbia recommendation is as follows:

> Prescriptive rights in existence five years after the time of abolition should cease to exist at that

> date, unless in the meantime the persons entitled to their benefit have registered a judgment or filed a notice of claim, setting forth the particulars of the prescriptive rights, in the appropriate land registry office.[35]

If the full benefit of abolition is to be achieved, existing rights must be registered. Otherwise, a potentially large number of prescriptive rights in existence at the time of abolition would never appear on the register and would continue, *ad infinitum*, to affect unsuspecting purchasers.

The registration requirement can, however, present certain problems. For instance, it would be very difficult to provide adequate notice to property owners that their rights would cease if not registered within a specific time period. The Ontario Commission considered this problem to be an important one, and accordingly recommended an extension of time provision to deal with cases of hardship. That Commission proposed that where a person has failed to register during the specified time period, the judge should be empowered to grant an extension if:

1. The applicant is able to demonstrate that the loss of enjoyment would result in substantial hardship; and
2. The applicant had been unaware of the registration requirement.[36]

Such a hardship clause would go a long way to alleviating the harshness of a registration requirement. The negative feature of it is that it must be open-ended which would mean that there would be no final cut-off point; prescription would not be entirely eliminated and potential purchasers of land would still not be able to rely solely on the register.

The Commission considers, however, that there may be a sufficient number of prescriptive easements now in existence in Manitoba to warrant a special provision for hardship cases. The British Columbia Commission decided against such a provision because there had never been a reported case in British Columbia in which the law of prescription had been applied so as to give rise to a prescriptive right. In addition, the British Columbia Supreme Court[37] had determined that such a right could not be established against land for which a certificate of title had been issued. That Commission therefore concluded that there were few, if any, existing prescriptive rights in British Columbia. In Manitoba the situation is quite different: The Court of Appeal, in interpreting section 57(1)(c) of *"The Real Property Act"*, has decided that prescriptive easements can be acquired over land under that Act,[38] and there are four reported cases[39] where prescriptive easements have been successfully claimed. The Commission believes, therefore, that the approach taken in Ontario is a more appropriate one to be used in Manitoba.

We think that the Ontario recommendation would be improved by the addition of a provision allowing the court to extend the time for registration on the condition that the applicant pay to the servient owner such compensation as the court may determine. The issue of compensation to a servient owner is currently addressed (albeit in a somewhat different context) in section 28(a) of *"The Law of Property Act"* of Manitoba which provides:

> Where, upon the survey of a parcel of land being made, it is found that a building thereon encroaches upon adjoining land, the Court of Queen's Bench may in its discretion
>
> (a) declare that the owner of the building has an easement upon the land so encroached upon during the life of the building upon making such compensation therefor as the court may determine; . . . . (emphasis added)

If the court is to be given the power to allow extensions of time for registration indefinitely, there will likely be cases where the servient owner should receive compensation. Section 28 of *"The Law of Property Act"* now provides a workable solution for encroachment problems in Manitoba, a solution which may also be appropriate as part of a "hardship" clause respecting the late registration of prescriptive easements.

We have considered what would be a suitable length of time for registration and have concluded that five years, the length of time recommended in British Columbia, would be appropriate.

We have also given consideration to whether or not a landowner wishing to register a prescriptive easement should be required to commence an action. The Pearson Committee recommended that such an action not be required. This position was later adopted by the Ontario Commission which pointed out in its report that currently under the lost modern grant doctrine an action may not be required to establish a prescriptive right.[40] The Ontario Commission recommended that repeal of the *Prescription Act* should not affect the position of a person who has the required period of use but has not established his right by an action as required by that Act. It recommended that a landowner be allowed to file either a judgment or a notice of claim in the appropriate registry or land titles office.

We agree with the reasoning expressed by the Ontario Commission and think that in terms of *"The Real Property Act"* in Manitoba, the filing of a caveat should be sufficient. The situation is somewhat different, however, with respect to *"The Registry Act"* which does not provide for the registration of either a notice of claim or of a caveat. With respect to *"The Registry Act"*, then, the registering of a judgment or a

certificate of *lis pendens* would be necessary for a prescriptive right to be protected.

We are mindful of the fact that such registration requirements will affect the rights of landowners in the province. We believe that they should be made aware of the new requirements by public advertising or by municipal notices distributed with property tax bills. Property owners should be informed of the specific date by which registration must be made, as well as the different registration requirements for land under *"The Real Property Act"* and land under *"The Registry Act"*.

The Commission therefore recommends:

2. *Prescriptive easements in existence at the time of abolition should cease to exist on a specific date five years after the time of abolition unless a person asserting the right has, prior to that date,*

   (a) where the servient land is registered under "The Real Property Act", registered either a judgment, certificate of lis pendens or caveat setting forth the particulars of the prescriptive easement, in the appropriate land titles office; or

   (b) where the servient land is subject to "The Registry Act", registered a judgment declaring his right or a certificate of lis pendens.

3. *Where a person has not filed a judgment, certificate of lis pendens or caveat within the five year period for registration, he should be able to apply to a judge of the Court of Queen's Bench for an extension of time on the grounds of substantial hardship. The extension should only be granted if*

   (a) the applicant is able to demonstrate the loss of enjoyment would result in substantial hardship; and

   (b) the applicant had been unaware of the registration requirement.

The judge should be empowered to grant such an extension of time on the condition that the applicant pay to the servient owner such compensation as the court may determine.

4. *The Prescription Act requirement that an action be brought to establish a prescriptive right should not apply to persons having, at the time of abolition, the required adverse use under the present law.*

5. *Land owners should be made aware of the registration requirements by public advertising or by municipal notices distributed with property tax bills. They should be informed of the specific date by which registration must be made, as well as the different registration requirements for land under "The Real Property Act" and for land under "The Registry Act".*

B. Rights Accruing at the Time of Abolition

There is a further issue which needs resolution. That is whether there should be a transitional period during which the current law would remain in force to allow those persons with an insufficient period of adverse use at the time of abolition a further period within which to establish rights.

In England, the Pearson Committee recommended such a transitional period so that rights that were accruing or inchoate under the existing law would be able to ripen. The period chosen was twelve years (the period of time required in England to establish title by adverse possession). The transitional period would operate in the following manner:

1. as from the commencement of the new Act no new prescriptive period would start to run;

2. any prescriptive enjoyment which had already begun and was running at the commencement of the Act could be defeated during the transitional period of twelve years in any way in which it could be defeated under existing law;

3. at the end of the transitional period any prescriptive enjoyment which had continued uninterrupted throughout that period would confer a prescriptive right.[41]

This would mean that if the use had begun one day before the new legislation came into force, the prescriptive right would arise at the end of the twelve year transitional period, or eight years earlier than under existing law.

A similar recommendation was made by the Ontario Commission which suggested a ten year transitional period, the period of time required to establish title by adverse possession in Ontario.

The British Columbia Commission also gave consideration to recommending a transitional period to accommodate ripening rights. However, the Commission was of the view that in British Columbia, unlike Ontario and England, there would be few, if any, ripening rights. The Commission considered that a transitional period would only have the effect of unduly lengthening the period that the law of prescription would remain applicable in the province.

In Manitoba there may be some persons who could benefit by a transitional period which would allow them further time to establish prescriptive rights. However, it must be remembered that persons who do not have the required twenty years of use at the time of abolition have as yet no legal right to an easement, and could be barred from use at any time by the servient owner. Consequently, the Commission does not recommend establishing a transitional period, the effect of which would be to lengthen the operation of prescription in Manitoba by a further ten or twelve years.

C. A "Fair Terms" Doctrine?

The Commission's Working Paper contained a tentative proposal that the law of prescription be retained in Manitoba. It was also proposed that the Court of Queen's Bench be empowered "to recognize easements by prescription subject to equitable terms as to compensation, maintenance, repair and conditions of use". The purpose of the recommendation was to provide neighbours with a mechanism for solving the disputes which can sometimes arise respecting the responsibility for the repair and maintenance of the easement area, and the use being made of it. The "fair terms" recommendation is a unique one; no similar legislation appears to exist in Canada, England, New Zealand or Australia respecting easements arising under the common law, prescriptive or otherwise.

Since the circulation of the Working Paper we have had the benefit of comments and criticism and we have also undertaken additional research. One of the problems with the "fair terms" recommendation appears to be that the court is being asked to write an agreement for two feuding neighbours, the implementation of which could require continued supervision by the court. In determining whether or not to order specific performance of a contract already written by the parties, the court will look at the issue of supervisability of performance. I.C.F. Spry in *The Principles of Equitable Remedies* puts the matter this way:

> Further, even where the obligations of the parties are sufficiently clear and definite to enable courts of equity both to specify how performance may be effected and to determine when performance has been duly carried out, it may appear that the performance of the obligation of one of the parties will involve the performance of so many acts, or will take place over so long a period of time, that courts of equity will not, in all the circumstances, be prepared to burden themselves with a possible task of determining upon the many disputes which may arise.[42]

These considerations, which apply to the supervision of an already existing contract, are also relevant at the earlier stage where a court is being asked to make an agreement for the parties. Are prescriptive easement problems significant enough to warrant the creation of a new jurisdiction of this type for the Court of Queen's Bench?

In our view, it is questionable whether a "fair terms" provision is now necessary. Problems of repair, maintenance and use of prescriptive easements do not appear to have arisen with any frequency in Manitoba. In addition, our recommendation that the right to acquire such easements be abolished will mean that there will be fewer situations in which such problems can arise. It should also be noted that neighbours who are having problems with prescriptive easements can, under the current law, always agree to submit their differences to arbitration.

Thus, given the reluctance of the courts to grant orders which require continuing enforcement, and the diminishing need for a "fair terms" doctrine if prescription is abolished, the Commission is of the opinion that no "fair terms" jurisdiction should be vested in the Court of Queen's Bench, as was tentatively proposed in the Working Paper.

D. Extinguishment and Modification of Easements

The Commission's Working Paper also recommended that the Court of Queen's Bench be given the power to extinguish prescriptive easements subject to equitable terms "where it appears fair to do so". A similar recommendation made by the Pearson Committee in 1966 is as follows:

> We recommend that the Lands Tribunal be given power on the application of the servient owner, to order the discharge of an easement or the substitution of an easement in a different place or of a different nature upon being satisfied (i) that the dominant owner would not thereby suffer any damage for which he could not be adequately compensated, and (ii) that the continuation of the existing easement would impose an unreasonable restriction on the enjoyment of his land by the servient owner. Any such order should become effective only upon the servient owner paying to the dominant owner such compensation (if any) as the Lands Tribunal might stipulate.[43]

The Pearson Committee also suggested that the recommendation should extend not only to easements acquired by prescription but also to those acquired by grant.

The British Columbia *"Property Law Act"*[44] contains a provision allowing the Supreme Court to modify or cancel an easement (whether prescriptive or otherwise) if certain conditions, similar to those referred to by the Pearson Committee, are met.

The Commission recommends:

6. *The Court of Queen's Bench be empowered, on the application of the servient owner, to order the discharge of an easement or the substitution of an easement in a different place or of a different nature upon being satisfied*

   (a) that the dominant owner would not thereby suffer any damage for which he could not be adequately compensated, and

   (b) that the continuation of the existing easement would impose an unreasonable restriction on the enjoyment of his land by the servient owner.

   Any such order should become effective only upon the servient owner paying to the dominant owner such compensation (if any) as the court may determine.

V. *PROFITS-À-PRENDRE*

This Report has so far discussed easements. One further type of prescriptive right, the *profit-à-prendre*, remains to be considered. A *profit-à-prendre* is a right to enter on the land of another person and take some profit of the soil or a portion of the soil itself, such as timber, crops, minerals, fish or game. Unlike an easement, a *profit-à-prendre* need not be appurtenant to any dominant land. *Profits-à-prendre* can be acquired by prescription in the same manner as easements, although the periods of adverse use required to establish a *profit-à-prendre* under the *Prescription Act*, 1832 are much longer than the periods required to establish an easement. There appear to be no reported cases in Manitoba where a prescriptive *profit-à-prendre* has been claimed.

The law of prescription, as it applies to *profits-à-prendre* does not seem to be providing relief to anyone, and no one has argued in favour of retaining it: the Pearson Committee, the Ontario Law Reform Commission and the Law Reform Commission of British Columbia have all recommended abolition. In concluding that the right to acquire prescriptive *profits-à-prendre* be abolished, the Pearson Committee stated:

> Broadly speaking, it can be said that it is less harsh and unfair to deprive a man of a profit which he has been enjoying but to which he cannot adduce a documentary title, than is the case where an easement is concerned. The acquisition of a profit is normally of a more commercial character than is the acquisition of an easement and it is not unreasonable that the purchaser should be required to prove the bargain upon which he relies.[45]

We are of the view that the law of prescription with respect to *profits-à-prendre* is archaic and serves no

useful function. However, any prescriptive rights which have been acquired under the present law should not be disturbed. Accordingly we recommend:

7. *All existing methods of acquiring profits-à-prendre by prescription should be abolished.*

8. *Prescriptive profits-à-prendre in existence at the time of abolition should be treated in the same manner as prescriptive easements.*

VI. MECHANICS OF REFORM

The Commission is of the view that its recommendations respecting abolition of the right to acquire prescriptive easements and *profits-à-prendre* should be implemented by way of amendment to section 29 of *"The Law of Property Act"*, which already deals with prescriptive rights to light. This amendment could be referred to by an appropriate annotation in *"The Registry Act"* and *"The Real Property Act"*. Our recommendation respecting the discharge or substitution of an easement should also be implemented by way of amendment to *"The Law of Property Act"*.

The Commission's recommendations respecting the registration of existing rights, and the special provisions for cases of hardship, should be implemented by way of amendments to both *"The Real Property Act"* and *"The Registry Act"*.

The Commission recommends:

9. *The abolition of the right to acquire prescriptive easements and profits-à-prendre (recommendations 1 and 7) be accomplished by amendment to "The Law of Property Act".*

10. *Recommendations 2, 3, 4 and 8 be implemented by amendments to "The Real Property Act" with respect to land registered under that Act, and by amendments to "The Registry Act" respecting land subject to that Act.*

11. *After the five year period for registration has elapsed, section 57(1)(c) of "The Real Property Act" should exclude prescriptive easements as overriding interests.*

12. *Recommendation 6 respecting the discharge or substitution of an easement should be accomplished by way of amendment to "The Law of Property Act".*

VII. SUMMARY OF RECOMMENDATIONS

1. All existing methods of acquiring easements by prescription should be abolished. (p. 24)

2. Prescriptive easements in existence at the time of abolition should cease to exist on a specific date five years after the time of abolition unless a person asserting the right has, prior to that date,

   (a) where the servient land is registered under *"The Real Property Act"*, registered either a judgment, certificate of *lis pendens* or caveat setting forth the particulars of the prescriptive easement, in the appropriate land titles office; or

   (b) where the servient land is subject to *"The Registry Act"*, registered a judgment declaring his right *or a certificate of lis pendens. (p. 29)*

3. Where a person has not filed a judgment, certificate of *lis pendens* or caveat within the five year period for registration, he should be able to apply to a judge of the Court of Queen's Bench for an extension of time on the grounds of substantial hardship. The extension should only be granted if

   (a) the applicant is able to demonstrate the loss of enjoyment would result in substantial hardship; and

   (b) the applicant had been unaware of the registration requirement.

   The judge should be empowered to grant such an extension of time on the condition that the applicant pay to the servient owner such compensation as the court may determine. (pp. 29-30)

4. The *Prescription Act* requirement that an action be brought to establish a prescriptive right should not apply to persons having, at the time of abolition, the required adverse use under the present law. (p. 30)

5. Land owners should be made aware of the registration requirements by public advertising or by municipal notices distributed with property tax bills. They should be informed of the specific date by which registration must be made, as well as the different registration requirements for land under *"The Real Property Act"* and for land under *"The Registry Act"*. (p.30)

6. The Court of Queen's Bench be empowered, on the application of the servient owner, to order the discharge of an easement or the substitution of an easement in a different place or of a different nature upon being satisfied

   (a) that the dominant owner would not thereby suffer any damage for which he could not be adequately compensated, and

   (b) that the continuation of the existing easement would impose an unreasonable restriction on the enjoyment of his land by the servient owner.

   Any such order should become effective only upon the servient owner paying to the dominant owner such compensation (if any) as the court may determine. (p. 34)

7. All existing methods of acquiring *profits-à-prendre* by prescription should be abolished. (p. 36)

8. Prescriptive *profits-à-prendre* in existence at the time of abolition should be treated in the same manner as prescriptive easements. (p. 36)

9. The abolition of the right to acquire prescriptive easements and *profits-à-prendre* (recommendations 1 and 7) be accomplished by amendment to *"The Law of Property Act"*. (p. 37)

10. Recommendations 2, 3, 4 and 8 be implemented by amendments to *"The Real Property Act"* with respect to land registered under that Act, and by amendments to *"The Registry Act"* respecting land subject to that Act. (p. 37)

11. After the five year period for registration has elapsed, section 57(1)(c) of *"The Real Property Act"* should exclude prescriptive easements as overriding interests. (p. 37)

12. Recommendation 6 respecting the discharge or substitution of an easement should be accomplished by way of amendment to *"The Law of Property Act"*. (p. 37)

This is a Report pursuant to section 5(2) of *"The Law Reform Commission Act"*, signed this 18th day of January, 1982.

Clifford H.C. Edwards, Chairman

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

Knox A. Foster, Commissioner

Beverly Ann Scott, Commissioner

Victor Rosenman, Commissioner

D. Trevor Anderson, Commissioner

FOOTNOTES

1. *Black's Law Dictionary* (5th ed. 1979).

2. C.C.S.M., c. C170, s. 9.

3. C.C.S.M., c. L90, s. 28.

4. C.C.S.M., c. R30, s. 106.

5. Megarry, R. and Wade, H.W.R., *The Law of Real Property* (4th ed. 1975), 841.

6. C.C.S.M., c. L150.

7. C.C.S.M., c. R50.

8. *Supra* n. 5, at 849.

9. See Anger, H.D. and Honsberger, J.D., *Canadian Law of Real Property* (1959), 992-4.

10. *Fourteenth Report: Acquisition of Easements and Profits by Prescription* (1966) Cmnd. 3100. The Committee's recommendations have not been implemented.

11. Ontario Law Reform Commission, *Report on Limitation of Actions* (1969),146. The Commission's recommendations respecting prescription have not been implemented.

12. *Supra* n. 5, at 851.

13. The law is unsettled as to whether or not the doctrine of lost modern grant will be applied <u>whenever</u> enjoyment for a period of 20 years has not continued right down to the time an action is commenced. In *Healey v. Hawkins* [1968] 1 W.L.R. 1967 at 1976, Goff J. stated that each case must be decided on its own facts. For a discussion of this issue see Jackson,Paul, *The Law of Easements and Profits* (1978) at 120-1, and *Gale on Easements* (14th ed. 1972), at 142-3.

14. *Supra* n. 11, at 147.

15. *Id.*, at 148.

16. Hayton, David J., *Registered Land* (2nd ed. 1977), 79.

17. (1964), 47 W.W.R. 133.

18. (1968), 65 W.W.R. 23, aff'd. (1969), 67 W.W.R. 660.

19. [1971] 3 W.W.R. 469.

20. *Supra* n.10.

21. *Supra* n. 11.

22. Law Reform Commission of British Columbia, *Report on Limitations, Part I: Abolition of Prescription* (Project No. 6) (1970).

23. *Supra* n. 10, at 12.

24. S. 50 of *"The Limitation of Actions Act"*, R.S.A. 1970, c. 209, specifically prohibits the acquisition of easements and *profits-à-prendre* by prescription.

25. S. 72 of the *Land Titles Act*, R.S.S. 1978, c. L5, specifically prohibits the acquisition of easements and *profits-à-prendre* by prescription.

26. *"The Land Registry (Amendment)Act"*,S.B.C. 1971, c. 30, s. 8. *"The Land Registry Act"* has since been repealed and replaced by *"The Land Title Act"*, R.S.B.C.,1979, c. 219 as am., which now provides, in s. 24, that "all existing methods of acquiring a right in or over land by prescription are abolished and, without limiting the generality of the foregoing, the common law doctrine of prescription and the doctrine of the lost modern grant are abolished".

27. *Supra* n. 10, at 11.

28. *Supra* n. 10, at 13.

29. *Supra* n. 18.

30. *Id.*, at 664.

31. [1932] A.C. 562, 101 L.J.P.C. 119 (H.L.).

32. (1960), 31 W.W.R. 529.

33. For an analysis of the *Wilton* case and a discussion of the relationship between property law and tort law with respect to support for buildings, see Girard, "An Expedition to the Frontiers of Nuisance" (1980), 25 *McGill L.J.* 565.

34. For an interesting discussion of easements as overriding interests, see Mapp, Thomas W., *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (1978), 191-2.

35. *Supra* n. 22 at 22.

36. *Supra* n. 11, at 161.

37. *Morrison v. Weller*, [1951] 3 D.L.R. 156.

38. *Stall v. Yarosz, supra* n. 17.

39. *Huddlestone v. Love* (1901), 13 Man. R., 432; *Stall v. Yarosz, supra* n. 17; *Wilton v. Hansen, supra* n. 18; *Wiebe v. Enns, supra* n. 19.

40. See n. 13 *supra*.

41. *Supra* n. 10, at 25.

42. Spry, I.C.F., *The Principles of Equitable Remedies* (2nd ed. 1980), 96-97.

43. *Supra* n. 10, at 29.

44. *Property Law Act*, R.S.B.C. 1979, c. 340, s. 31.

45. *Supra* n. 10, at 30.

APPENDIX

2° & 3° GULIELMI IV. A.D.1832.

CAP. LXXI.

An Act for shortening the Time of Prescription in certain Cases. [1st *August* 1832.]

'WHEREAS the Expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the Law of *England* in many Cases considered to include and denote the whole Period of Time from the Reign of King *Richard* the First, whereby the Title to Matters that have been long enjoyed is sometimes defeated by shewing the Commencement of such Enjoyment, which is in many Cases productive of Inconvenience and Injustice;' for Remedy thereof be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any Right of Common or other Profit or Benefit to be taken and enjoyed from or upon any Land of our Sovereign Lord the King, His Heirs or Successors, or any Land being Parcel of the Duchy of *Lancaster* or of the Duchy of *Cornwall*, or of any Ecclesiastical or Lay Person, or Body Corporate, except such Matters and Things as are herein specially provided for, and except Tithes, Rent, and Services, shall, where such Right, Profit, or Benefit shall have been actually taken and enjoyed by any Person claiming Right thereto without Interruption for the full Period of Thirty Years, be defeated or destroyed by shewing only that such Right, Profit, or Benefit was first taken or enjoyed at any Time prior to such Period of Thirty Years, but nevertheless such Claim may be defeated in any other Way by which the same is now liable to be defeated; and when such Right, Profit, or Benefit shall have been so taken and enjoyed as aforesaid for the full Period of Sixty Years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some Consent or Agreement expressly made or given for that Purpose by Deed or Writing.

Claims to Right of Common and other Profits à prendre, not to be defeated after Thirty Years Enjoyment by shewing the Commencement; after Sixty Years Enjoyment the Right to be absolute, unless had by Consent or Agreement.

II. And be it further enacted, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any Way or other Easement, or to any Watercourse, or the Use of any Water, to be enjoyed or derived upon, over, or from any Land or Water of our said Lord the King, His Heirs or Successors, or being Parcel of the Duchy of *Lancaster* or of the Duchy of *Cornwall*, or being the Property of any Ecclesiastical or Lay Person, or Body Corporate, when such Way or other Matter as herein last before mentioned shall have been actually enjoyed by any Person claiming Right thereto without Interruption for the full Period of Twenty Years, shall be defeated or destroyed by shewing only that such Way or other Matter was first enjoyed at any Time prior to such Period of Twenty Years, but nevertheless such Claim may be defeated in any other Way by which the same is now liable to be defeated; and where such Way or other Matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full Period of Forty Years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly given or made for that Purpose by Deed or Writing.

In Claims of Right of Way or other Easement the Periods to be Twenty Years and Forty Years.

Claim to the Use of Light enjoyed for 20 Years.

III. And be it further enacted, That when the Access and Use of Light to and for any Dwelling House, Workshop, or other Building shall have been actually enjoyed therewith for the full Period of Twenty Years without Interruption, the Right thereto shall be deemed absolute and indefeasible, any local Usage or Custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly made or given for that Purpose by Deed or Writing.

Before mentioned Periods to be deemed those next before Suits.

IV. And be it further enacted, That each of the respective Periods of Years herein-before mentioned shall be deemed and taken to be the Period next before some Suit or Action wherein the Claim or Matter to which such Period may relate shall have been or shall be brought into question, and that no Act or other Matter shall be deemed to be an Interruption, within the Meaning of this Statute, unless the same shall have been or shall be submitted to or acquiesced in for One Year after the Party interrupted shall have had or shall have Notice thereof, and of the Person making or authorizing the same to be made.

In Actions on the Case, the Claimant may allege his Right generally, as at present.

In Pleas to Trespass and certain other Pleadings, the Period mentioned in this Act may be alleged.

Exceptions, &c. to be replied to specially.

V. And be it further enacted, That in all Actions upon the Case and other Pleadings, wherein the Party claiming may now by Law allege his Right generally, without averring the Existence of such Right from Time immemorial, such general Allegation shall still be deemed sufficient, and if the same shall be denied, all and every the Matters in this Act mentioned and provided, which shall be applicable to the Case, shall be admissible in Evidence to sustain or rebut such Allegation; and that in all Pleadings to Actions of Trespass, and in all other Pleadings wherein before the passing of this Act it would have been necessary to allege the Right to have existed from Time immemorial, it shall be sufficient to allege the Enjoyment thereof as of Right by the Occupiers of the Tenement in respect whereof the same is claimed for and during such of the Periods mentioned in this Act as may be applicable to the Case, and without claiming in the Name or Right of the Owner of the Fee, as is now usually done; and if the other Party shall intend to rely on any Proviso, Exception, Incapacity, Disability, Contract, Agreement, or other Matter herein-before mentioned, or on any Cause or Matter of Fact or of Law not inconsistent with the simple Fact of Enjoyment, the same shall be specially alleged and set forth in answer to the Allegation of the Party claiming, and shall not be received in Evidence on any general Traverse or Denial of such Allegation.

Presumption to be allowed in Claims herein provided for.

VI. And be it further enacted, That in the several Cases mentioned in and provided for by this Act, no Presumption shall be allowed or made in favour or support of any Claim, upon Proof of the Exercise or Enjoyment of the Right or Matter claimed for any less Period of Time or Number of Years than for such Period or Number mentioned in this Act as may be applicable to the Case and to the Nature of the Claim.

Proviso for Infants, &c.

VII. Provided also, That the Time during which any Person otherwise capable of resisting any Claim to any of the Matters before mentioned shall have been or shall be an Infant, Idiot, Non compos mentis, Feme Covert, or Tenant for Life, or during which any Action or Suit shall have been pending, and which shall have been diligently prosecuted, until abated by the Death of any Party or Parties thereto, shall be excluded in the Computation of the Periods herein-before mentioned, except only in Cases where the Right or Claim is hereby declared to be absolute and indefeasible.

What Time to be excluded in computing the Term of Forty Years appointed by this Act.

VIII. Provided always, and be it further enacted, That when any Land or Water upon, over, or from which any such Way or other convenient Watercourse or Use of Water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any Term of Life, or any Term of Years exceeding Three Years from the granting thereof, the Time of the Enjoyment of any such Way or other Matter as herein last before mentioned, during the Continuance of such Term, shall be excluded in the Computation of the said Period of Forty Years, in case the Claim shall within Three Years next after the End or sooner Determination of such Term be resisted by any Person entitled to any Reversion expectant on the Determination thereof.

Limitation.

IX. And be it further enacted, That this Act shall not extend to *Scotland* or *Ireland*.

Commencement of Act.

X. And be it further enacted, That this Act shall commence and take effect on the First Day of *Michaelmas* Term now next ensuing.

Act may be amended.

XI. And be it further enacted, That this Act may be amended, altered, or repealed during this present Session of Parliament.