LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT

ON

LIMITATIONS

1970

(PROJECT NO. 6)

LRC 1

PART I - ABOLITION OF PRESCRIPTION

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE LESLIE R. PETERSON, Q.C.
ATTORNEY-GENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON LIMITATIONS
(Project No. 6)
Part I - *Abolition of Prescription*

This Report has been prepared in the Commission's Study on Limitations, which is Project No. 6 in the Commission's Approved Programme. It deals with a particular problem, which the Commission believed could best be considered separately from the balance of the limitations study.

One of the functions of the Commission is to make recommendations for the repeal of law that is archaic and obsolete. This report recommends the abolition of the law of prescription in this Province on these grounds.

In theory, it is possible in British Columbia for rights to be acquired over land by periods of adverse use. These rights, which are called prescriptive easements and *profits-a-prendre*, may arise out of the English common law inherited by this Province and under the *Prescription Act,* R.S.B.C. 1960, c. 296, a statute first enacted in England in 1832. This statute was included in the Imperial laws which became the law of British Columbia in 1858. Since 1897, it has appeared as a provincial enactment. Both statute and case law have severely restricted the operation of prescription. For example, earlier this year the Legislature, in enacting the *Land Act* (S.B.C. 1970, c. 17), provided that rights could not be acquired by prescription against the interest of the Crown in any lands.

In practice, the law of prescription has no utility. A canvass of the Registrars of Title and some thirty experienced conveyancers throughout the Province has not revealed a single instance of a successfully claimed prescriptive right.

Apart from the fact that it is obsolete, the law of prescription has always been regarded as obscure. The *Prescription Act* has been considered a badly drafted statute and one which is difficult to understand. In addition, the law of prescription is not compatible with the policy that lies behind the *Land Registry Act*, as prescriptive rights would not generally be registered and might well not be known to prospective purchasers and others dealing with the land concerned.

The Commission believes that the public will benefit by the removal of law of this kind.

CHAPTER I INTRODUCTION

In British Columbia, it is possible to acquire certain rights in land based on the passage of time, although such acquisition is severely limited by statute.

These rights are of two kinds:

1. Rights based on adverse possession, and

2. Rights based on adverse use (not amounting to possession), i.e. prescriptive easements and *profits-a-prendre.*

It is with this second group that this Report is concerned. Since both kinds of rights are founded on the passing of time, the word "prescription" is sometimes used, in a loose way, to describe the principle of law that enables these two kinds of rights to be created. However, "prescription" is used technically in law to refer to the basis for the creation of prescriptive easements and *profits-a-prendre.* It is used in this Report in the latter manner.

How the law of prescription works is set out in some detail in Appendix "A" which should be read as background to the text of the Report. Appendix "A" is Chapter VIII of the Ontario Law Reform Commission Report on the Limitation of Actions, published in 1969. There is no need for this Commission to re-do the research of the Ontario Commission. That Commission recommended the abolition of prescriptive rights, as did the English Law Reform Committee in its Fourteenth Report, completed in 1966. The English Committee's views are discussed in the Ontario Report.

In Appendix "B" of this Report, there is a concordance of the statutory provisions relating to prescriptive easements and *profits-a-prendre* in British Columbia, Ontario and England and some significant differences are noted. The British Columbia statute, the *Prescription Act,* is set out in Appendix "C".

This Commission was fortunate during the summer of 1970 to have the services of Professor Peter Barton of the Faculty of Law at the University of British Columbia to conduct the initial research in its limitations study. Professor Barton has produced a research paper dealing with the historical background of this Province's Statute of Limitations, the suspension of the running of time, special limitation periods, and the relationship of the acquisition of rights in land by adverse possession and prescription to the Province's land registration system. In this last aspect, Professor Barton's research has been very helpful to the Commission in the preparation of this Report.

In November, the Commission completed a working paper on the subject dealt with in this Report and circulated it for comment to some thirty experienced conveyancers throughout the Province, all Registrars of Title, and various other government officials who have responsibilities in dealing with land, particularly those in the Provincial Department of Lands, Forest and Water Resources. It was also sent to the Real Estate Institute of British Columbia and The Society of Notaries Public of British Columbia, and to two long-time teachers of property law on the University of British Columbia Faculty of Law, Professors Eric C.E. Todd and A.J. McClean.

The Registrars and the conveyancers were also forwarded a questionnaire designed to elicit information as to the frequency with which they dealt with

prescriptive claims, the nature of such claims and whether or not they concurred with the tentative conclusions of the Commission set forth in the working paper. The questionnaire is set out in Appendix "D".

In the working paper, the Commission had tentatively concluded that prescription should be abolished and that there should be transitional provisions similar to those recommended by the Ontario Commission. These transitional provisions are discussed later in this Report.

The Commission was very pleased by the extent of the response to the working paper and would like to express its gratitude to those who took the time and trouble to reply to us. Perhaps the Commission should add here that it firmly believes that this kind of consultation will assist in the making of proposals for the reform of the law that are both relevant and sound.

CHAPTER II ADVERSE POSSESSION AND PRESCRIPTION

Although consideration of rights acquired by adverse possession is outside the scope of this Report, the Commission believes that it would be helpful here to describe the difference between rights acquired in this way and those acquired by prescription.

1. *Adverse Possession*

For centuries, the right to land in England has been based on possession. The English law in this respect became British Columbia law as of the year 1858. (*See the English Law Act,* R.S.B.C. 1960, c. 129.) Under that law, a person who is adversely in possession of land for a particular length of time acquired title to it. This is how the so-called "squatter's title" arises. The law achieves this result by:

(a) barring the right of the dispossessed person to recover the land after twenty years of adverse possession; and

(b) extinguishing his right and title to the land after that period.

The law is found in Part II of the British Columbia *Statute of Limitations* (R.S.B.C. 1960, c. 370). In particular, reference should be made to sections 16 and 41 of that enactment.

The operation of the law of adverse possession has been restricted in British Columbia by statute. Once a certificate of title to land has been issued under the *Land Registry Act* (R.S.B.C. 1960, c. 208), title cannot be acquired to that land by adverse possession. Nor can title be acquired in this way in Crown lands or against the interest of the Crown in any lands. (*See the Land Act*, S.B.C. 1970, c. 17, s. 6.) Thus the adverse possession rule can only operate with respect to lands for which no certificate of indefeasible title has been issued and which are not Crown lands.

The Commission will be considering at another stage in its limitations study the extent to which (if any) the adverse possession rule should be retained in British Columbia, the problem of a limitation period for actions to recover land for which a certificate of title has been issued under the *Land Registry Act*, and a general revision of Part II of the *Statute of Limitations*, which in many respects is obscure and archaic, having been taken from English statutes of 1833,1837 and 1856. (*Real Property Limitation Act*, 1833: 3 & 4 Will. IV, c. 27; *Real Property Limitation Act*, 1837; 7 Will. IV and 1 Vict., c. 28; and the *Mercantile Law Amendment Act*, 1856: 19 & 20 Vict., C. 97.)

2. *Prescriptive Easements and Profits-a-Prendre*

Also under the English law received in this Province, it became possible to acquire rights over another person's land by periods of adverse use or enjoyment, which did not amount to dispossession. The rights acquired in this way are prescriptive easements and *profits-a-prendre*,
which are described in Appendix "A". (For a detailed discussion of these interests, *see also* Bowles, *Gale on Easements*, 13th ed. (1959), chap. 4; Megarry and Wade, *The Law of Real Property*, 3rd ed. (1966), pp. 802 et seq.; Cheshire, *The Modern Law of Real Property*, 10th ed. (1967), pp. 465 et seq.; and *Halsbury's Laws of England*, 3rd ed., vol. 12, at pp. 543-559.)

Rights over land arising by adverse possession do not need to be for the benefit of other land. on the other hand, the adverse use giving rise to a prescriptive easement

must be for the benefit of other land, which is referred to as the "dominant tenement". The land which is subject to the prescriptive easement is referred to as the "servient tenement".

Under English law (in England), prescriptive rights can arise in three ways:

(a) at common law

(b) under the doctrine of the lost modern grant, or

(c) under the *Prescription Act*, 1832 (2 & 3 Will. IV, c. 71).

To establish a prescriptive easement at common law, one had to show enjoyment to have continued from time immemorial, i.e., 1189, the first year of the reign of Richard I. In Ontario, it has been said that prescription cannot arise in this way as "legal memory" does not go back to 1189, since the Ontario courts have taken judicial notice of the fact that America was discovered in 1492. (*Abell v. Village of Woodbridge* (1917), 39 O.L.R. 382 at p. 388.) Presumably, similar reasoning would be applied in British Columbia. In any event, from a practical standpoint, it is obvious that no prescriptive rights can be regarded as having arisen in this Province by the "common law" method.

The doctrine of the lost modern grant is really a variety of prescription at common law. Its development was begun in the eighteenth century, in England, by the courts as a means of avoiding the problem of having to show user since 1189. This was achieved by presuming long user (say, fifty years) that an actual grant of the right had been made when the enjoyment began, but that the deed making the grant had been lost. It appears that this presumption cannot be rebutted by evidence that, in fact, no such grant was ever made. One view of the doctrine is that it is nothing more than a rule of evidence to facilitate proving prescription at common law. However, it clearly has become established as an independent mode of establishing prescriptive rights and is pleaded independently from common law prescription. In view of its link with common law prescription there should perhaps be some question as to whether the doctrine should be regarded as operative in British Columbia if common law prescription has no application here. Yet the existence of the doctrine has been accepted in other common law jurisdictions which received English law, such as the Province of Ontario. (*See* Anger and Honsberger, *Canadian Law of Real Property*, at pp. 990-994.)

The English *Prescription Act*, 1832 became law in this Province as part of the received English law, as of 1858. With some minor modifications, its provisions are now contained in the British Columbia *Prescription Act* (R.S.B.C. 1960, c. 296), which is attached as Appendix "C" to this Report. The replacement of the Imperial statute by the provincial statute took place in 1897. (*See* R.S.B.C. 1897, c. 156 and S.B.C. 1897, c. 41, s. 6(2).)

The British Columbia statute retained the preamble to the English enactment until as late as the 1948 revision. (*See* R.S.B.C. 1948, c. 263.) That preamble stated:

> 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 showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice: For remedy thereof, be it enacted:

The *Prescription Act* is not well-drawn and is difficult to understand. The Ontario Commission's Report describes the similar statutory provisions in Ontario as remaining "a mystery to many a practising lawyer". The British Columbia statute establishes in sections 2 and 3 two different periods for the creation of prescriptive easements (twenty and forty years) and two different periods for prescriptive *profits-a-prendre* (thirty and sixty years).

The shorter periods, of twenty and thirty years, merely make it easier to establish prescription at common law by eliminating the defence that user began after 1189. Any other defence that is available at common law can defeat a claim for a prescriptive right under the shorter periods.

On the other hand, use for the longer periods, of forty and sixty years, would appear to create rights that are "absolute and indefeasible". This is subject to some qualifications. For example, a claim to a prescriptive easement based on forty years' adverse use will be defeated, as would a twenty-year claim, by proving that the user was forcible or secret, or enjoyed by written permission. Claims for prescriptive rights based on the longer periods of adverse use cannot be defeated, however, as claims based on the shorter periods can, by proving that the adverse use was enjoyed by oral permission. Nor do the disabilities, such as infancy or mental incapacity, which suspend time from running in the case of the shorter periods, by virtue of Section 9, affect the longer periods.

As is the case with the doctrine of the lost modern grant, the *Prescription Act* is closely related to common law prescription. The provisions in the statute for claims based on the shorter periods have been said "to facilitate the operation of prescription at common law". Thus, if common law prescription could not arise in this Province, it might be argued that the *Prescription Act* could have no application here, at least insofar as claims based on the shorter periods are concerned. Nevertheless, as with the lost modern grant doctrine, the Ontario courts have recognized the application in that jurisdiction of statutory provisions similar to the British Columbia enactment.

In British Columbia, there does not appear to be a reported decision in which the law of prescription has been applied so as to give rise to a prescriptive right. There are, however, at least three reported cases where the courts assumed that the law of prescription was part of the law of the Province, but did not apply it for one reason or another. These cases are *Feigenbaum* v. *Jackson* (1901), 8 B.C.R. 417; *Fraser and Fraser* v. *City of Vancouver* (1942), 58 B.C.R. 81; and *Morrison v. Weller* [1951] 3 D.L.R. 156. It should be pointed out, nevertheless, that not one of the Registrars of Title or any of the conveyancers who responded to our questionnaire had ever dealt with a successful claim for a prescriptive right.

The result would appear to be that the courts in both British Columbia and Ontario recognize that prescriptive rights may arise by virtue of the doctrine of the lost modern grant and the *Prescription Act* (and its equivalent in Ontario), presumably on the ground that both these methods of acquiring prescription remove the need to prove user back to 1189.

Accordingly, it would seem that the common law prescriptive right exists in both British Columbia and Ontario, but the common law means of *proving* that the right exists is not available in these provinces. The existence of the common law right in this Province therefore may be *proved* by relying on either the doctrine of the lost modern grant or the *Prescription Act*.

To sum up, if prescriptive rights can be acquired in British Columbia, it would

only be possible by virtue of:

(a) the doctrine of the lost modern grant, or

(b) the *Prescription Act* (R.S.B.C. 1960, c. 296).

3. *Some Other Related Problems*

Sometimes boundary and encroachment problems will arise through mistakes that are made in surveying or in the physical siting of buildings, fences or other structures. At some stage, and most likely when the Commission is considering the problem of adverse possession, consideration will be given to whether the law now provides satisfactory solutions to these problems.

It may be that the principle of adverse possession, if it were permitted to operate in this Province in a limited way, could be a useful tool in settling some boundary and encroachment difficulties. However, as stated earlier, this is a matter which the Commission will consider on another occasion.

At present, the common law and equity provide relief in certain situations. (*See*, for example, *Clark* v. *McKenzie*, [1930] 1 D.L.R. 226, [1930] 2 D.L.R. 843 and *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129.) In addition, the *Special Surveys Act*, R.S.B.C. 1960, c. 368, may provide a statutory solution in some cases.

In Manitoba, encroachment problems may be dealt with under a provision of that province's *Law of Property Act*, R.S.M. 1970, c. L90, which we believe has a great deal of merit. Section 28 of that statute 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; or
>
> (b) vest title to the land so encroached upon in the owner of the building upon payment of the value thereof as determined by the court; or
>
> (c) order the owner of the building to remove the encroachment.

As stated above, the question of adequate solutions to boundary and encroachment problems will be dealt with in a subsequent Report. It is sufficient to say here that the Commission does not believe that the law of prescription has an effective role to play in this area.

CHAPTER III THE RESTRICTION OF PRESCRIPTION IN BRITISH COLUMBIA

1. *General*

The application of the doctrine of the lost modern grant and the *Prescription Act* are expressly restricted by statute in three respects:

(i) Section 3 of the *Water Act* (R.S.B.C. 1960, C. 405) provides, in part, that "No right to divert or use water may be acquired by prescription.",

(ii) Section 6 of the *Land Act* (S.B.C. 1970, c.17) provides that "no person shall acquire by prescription" any rights in any Crown lands, or against the interest of the Crown in any lands, and

(iii) Sections 4 and 5 of the *Prescription Act* itself provide that no person shall acquire prescriptive rights to the access and use of light or air to and for any building. (This last exception was provided for by amendments to the *Prescription Act* in 1905 and 1930. *See* S.B.C. 1905, c. 25 and S.B.C. 1930, c. 56.)

In addition, and more significantly so far as the individual landowner is concerned, it would appear that a prescriptive easement or *profits-a-prendre* cannot arise with respect to land which has become the subject of a certificate of indefeasible title under the provisions of the *Land Registry Act*. This seems to have been established by the Supreme Court of British Columbia in *Morrison* v. *Weller* [1951] 3 D.L.R. 156, although the acquisition of prescriptive rights in such land is not expressly excluded by the *Land Registry Act* as is the case with the acquisition of rights by adverse possession.

The relationship of the *Land Registry Act* to prescription will now be discussed.

1. *The Land Registry Act*

(a) *General*

British Columbia has a highly developed land registration system. Under that system, title to land is not only registered for all to see, but is also guaranteed. The principle is that the register should reflect the state of the title. The register should show not only who is the owner but also what interests are existing in that land (such as mortgages, leases, agreements for sale, easements and restrictive covenants). The system enables land to be dealt with readily by providing a means of knowing the state of title.

It is inconsistent with this system that there should be kinds of interests in land which are outside the system and not reflected on the title. Thus, to the extent that title by adverse possession and prescriptive rights can arise, the system will be defeated.

It is for this reason that the *Land Registry Act*, in section 38 (3), abolishes the acquisition of title by adverse possession once a certificate of indefeasible title has been issued with respect to land. There is no similar provision, however, with regard to prescription, although section 38 (1) states that the registered owner of land is seised of an estate in fee simple against the whole world subject to certain specified

exceptions. These exceptions do not include prescriptive rights.

(b) *The problem of notice*

The imposition of statutory land registration systems alters the doctrine of notice as it exists at common law and equity.

If there were no *Land Registry Act* in this Province, the basic position would be this:

1. A person acquiring an interest in land would be bound by all prior legal interests, whether he had notice of them or not;

2. A *bona fide* purchaser for value of a legal estate in land would be bound by prior *equitable* interests of which he had notice (but not be bound by such interests of which he had no notice); and

3. A person acquiring an equitable interest in land would be bound by all prior *equitable* interests, whether he had notice of them or not.

Easements and *profits-a-prendre* are ordinarily *legal* (as opposed to *equitable*) interests in land. Thus, in the absence of any statutory provision to the contrary, any person who acquires land, or an interest in it, does so subject to any existing easements or *profits-a-prendre*, whether he has notice of them or not. Easements and *profits-a-prendre* which have arisen by prescription are legal interests just as those are which have been expressly created by deed.

A prescriptive easement or *profits-a-prendre* which has arisen in British Columbia, will normally be an unregistered interest in land. However, if the right is to arise under the *Prescription Act*, as it generally would, then it can only be established by the bringing of an action. If the action proceeds to judgment and the right is recognized in the judgment, then the prescriptive right could be registered under section 165 of the *Land Registry Act*. A person alleging that he was entitled to such a right could protect his position prior to registering the judgment in this way by lodging a caveat under section 209 or, once he had begun his action, by registering a *lis pendens* under section 181.

The effect of the provisions of the *Land Registry Act* on prescription was not altogether clear, but the Morrison case, referred to above, appears to settle the matter with respect to lands for which a certificate of indefeasible title has been issued.

(c) *Specific provisions*

The provisions of the Act which appear to be relevant to this problem are discussed briefly below.

(i) *Section 35*

This section provides that no instrument (taking effect after June 30, 1905) purporting to affect land shall become operative until registered, except as against the person making the same. Such instruments confer a right to registration.

A right to a prescriptive easement or *profits-a-prendre* is considered as being based on a *presumed* grant. It is presumed that the claimant had been *granted* the right in the first place: it is presumed that there was a deed (whether in fact there was one or not).

Whether section 35 applied to such presumed grants is doubtful owing to the wording of the section. Is a presumed grant an "instrument" within the meaning of the Act? "Instrument" is defined *inter alia* as "any document in writing" dealing with an interest in land. (*See* section 2 (1).) Certainly, a presumed grant is not in itself a registrable instrument and perhaps should be regarded as outside section 35 which clearly contemplates unregistered, but registrable, instruments.

(ii) *Section 38 (1)*

A person who is shown on a certificate of indefeasible title as the registered owner of land is presumed conclusively to be seised of an estate in fee simple in the land, subject to a number of specified overriding interests. His position is also subject to a title of a person established by adverse possession at the time the application for the certificate was made, if that latter person has continued in possession.

Section 38 (1) states that the registered owner's position is that he is seised of an estate in fee simple *against the whole world* subject to certain specified exceptions. The provision does not say "subject only to" but just "subject to". Does this mean that there may be other interests which the registered owner may be subject to? While the section does state that the registered owner is seised of an estate in fee simple against the whole world, there may be interests, outside the enumerated list, which may exist yet at the same time still leave the registered owner seised of an estate in fee simple. Implied and prescriptive easements are examples of that kind of interest. The registered owner may be seised of an estate in fee simple yet his lands are subject to an implied or prescriptive easement.

However, in *Morrison* v. *Weller* [1951] 3 D.L.R. 156, Coady J., regarded section 38 (1) as if it read "subject only to". He stated (at p. 160):

> ... no declaration of an easement of the nature here claimed, by prescription, could be secured as against the holder of a certificate of indefeasible title when that certificate has once been issued bearing no endorsement thereon referring to the easement claimed. No rights, in other words, accrue to the claimant of an easement until some filing has been made in the Land Registry office claiming the easement. Some claim must appear on the register ...

Coady J.'s remarks, which were not necessary to his decision, as he held that the required period of adverse use had not been established, were apparently directed at situations where the required period had existed prior to the issuance of the certificate. In the case before him, there was no claim on the register and that fact, in his view, would bar a successful reliance on the *Prescription Act*. The result would appear to be that a claimant could never obtain a declaratory judgment for the purpose of registration. If Coady J. was correct, then the issuance of a certificate title effectively eliminates prescriptive rights existing at the time of issuance, unless endorsed on title, as well as precluding the acquisition of such rights after the issuance.

(iii) *Section 38 (2) and (3)*

Subsection (3) provides that, once a certificate of indefeasible title is issued with respect to a parcel of land, title to that land cannot be acquired by adverse possession.

Subsection (2) provides that certificates of indefeasible title are void against title acquired by adverse possession before the certificate of title was applied for if the person claiming by adverse possession was

(a) in actual possession when the certificate of title was applied for, and

(b) continues in possession.

Neither of these subsections apply to prescriptive easements and *profits-a-prendre*. These rights arise as a result of adverse use, as opposed to adverse possession.

It was argued in the Morrison case that section 38 (2) did extend to prescriptive rights because an easement over land amounted to quasi-possession. This argument was, however, rejected by the court, which stated (at p. 158):

This subsection, it appears to me, is intended to protect the rights of persons actually in possession of and rightly entitled to the land at the time mentioned, and as against such persons the certificate of indefeasible title is void. It cannot be suggested, I think, that the section is wide enough to include persons such as the defendants who claim an easement, or the enjoyment of a servitude over the land. They are not persons who, in the words of the statute, are in actual possession of and rightly entitled to the land, or persons who continue in possession.

(iv) *Sections 41,44 and 45*

Section 41 states that the registered owner of a charge shall be deemed to be entitled to the interest in respect of which he is registered, subject only to such exceptions as appear existing on the register.

Section 44 provides that a person dealing with either the registered owner of land or the holder of a registered charge will not be affected by notice of an unregistered interest, with certain exceptions that are not relevant.

Section 45 provides protection for the registered owner of a charge, who is enforcing that charge, against unregistered interests of which lie receives notice.

3. *Summary*

It is clear that prescriptive rights cannot arise:

1. in respect of Crown lands or against the interest of the Crown in any lands, (s. 6 of the *Land Act*);

(b) so as to create a right to divert or use water, (s. 3 of the *Water Act*)

© so as to create a right to the access and use of light or air to and for any building (ss. 4 and 5 of the *Prescription Act*)

In addition, it would appear that prescriptive rights cannot be established against lands for which a certificate of indefeasible title has been issued providing the *obiter* of Coady J. in *Morrison* v. *Weller* is correct), even if the right were acquired prior to the issuance of the certificate.

CHAPTER IV THE RELEVANCE OF PRESCRIPTION

1. *In British Columbia*

The law of prescription developed in England in centuries gone by in a system of land ownership which was based on possession. There was no land registration system. In those times it was reasonable that a long period of adverse use should, in the absence of some explanation, be recognized as having a lawful basis. Prescriptive rights are based on the notion that there must have been a grant a long time ago. The courts would presume that such a grant had been made once a sufficient period of adverse use was established and that the deed making the grant must be lost.

What relevance could this law of prescription have in British Columbia in the 1970s? The Province has had for many years a land registration system under which easements and *profits-a-prendre* could be easily registered.

The availability of registration is no doubt one of the main reasons that one rarely hears of prescriptive claims having been made. In addition, the history of provincial land law for this purpose only goes back a little more than one hundred years and during that period the survey and legal description requirements for land registration have led to substantially different system of conveyancing than existed in England.

In any event, since 1951, with the view expressed in the *Morrison* case, it appears to have been generally accepted in practice that prescription could only operate with respect to lands for which no certificate of indefeasible title has been issued.

The fact of the matter is that the law of prescription has had little, if any, utility in this Province. Only one of the seven Registrars of Title and only five of the twenty-two conveyancers who responded to our questionnaire had ever dealt with a claim for a prescriptive easement. None of these claims for prescriptive easements were successful. Not one of the Registrars or conveyancers had ever dealt with a claim for a prescriptive *profits-a-prendre.* The questionnaire therefore elicited not one instance of a successfully claimed prescriptive right.

In so far as the law of prescription operates in this Province, it exists outside our land registration system and detracts from its efficacy. Writing of the *Land Registry Act,* Victor DiCastri has stated (*Thorn's Canadian Torrens System*, 2nd ed. (196211, at p. 191):

> In any event the Act itself providing for a conclusive register, containing a sterility section denying any effect to an existing unregistered instrument except as between the immediate parties, and providing that the act of registration be generated by a genuine and not a fictitious instrument of transfer, is hardly compatible with prescription at common law and the doctrine of lost modern grant or even legislation analogous to *The Prescription Act, 1832.*

The Commission agrees.

2. *Elsewhere*

In Alberta and Saskatchewan, which have similar land registration systems to British Columbia, it has never been possible to acquire prescriptive rights. The prohibitive legislation antedates the creation of the two provinces.

Alberta's *The Limitations of Actions Act* (R.S.A. 1955, c. 177, s. 49) provides:

> No right to the access and use of light or other easement, right in gross or *profits-a-prendre* shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired.

An almost identical statutory provision is contained in *The Land Titles Act* of Saskatchewan (R.S. 1965, C. 115, s. 74). These prohibitions contained in the Alberta and Saskatchewan statutes date back to an 1903 ordinance of the NorthWest Territories (N.W.T.O. 1903 (2nd Session), c. 7, s. 1).

In Ontario, there are two land registration systems, one governed by *The Land Titles Act* (R.S.O. 1960, c. 204), which is similar to the British Columbia system, and the other governed by *The Registry Act* (R.S.O. 1960, c. 348), where documents are registered rather than title. Under the *Registry Act* system, registration provides notice but no guarantee of title. Lands governed by that Act are subject to the law of adverse possession and the law of prescription. However, title based on adverse possession or prescriptive rights cannot arise with respect to land within the *Land Titles* system. Section 57(1) of the *Land Titles Act* provides:

> Notwithstanding any provision of this Act, *The Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription, but this section is not binding upon a judge in respect of any order made by him under section 154.

It has been recently stated, in *Aluminum Goods Ltd.* v. *Federal Machinery Ltd.* (1970), 10 D.L.R. (3d) 405, that this provision does not have the effect of extinguishing a prescriptive, right that became established over land prior to the registration of that land under *The Land Titles Act*, i.e., at the time when the lands were governed by *The Registry Act*.

Thus, the recommendation of the Ontario Law Reform Commission that prescription be abolished is directed at lands governed by *The Registry Act*. Titles to some of those lands, particularly in eastern Ontario, nearly go back two hundred years, and survey requirements under *The Registry Act* until recently have been virtually non-existent.

CHAPTER V CONCLUSION

1. *Abolition*

In its working paper, the Commission tentatively concluded that the law of prescription should be abolished. The response to the working paper has convinced the Commission of the soundness of that initial view. All seven Registrars of Title and twenty out of twenty-two experienced conveyancers agreed with our tentative proposal. The Society of Notaries, Public and the Real Estate Institute of British Columbia also expressed agreement with our proposal, as did Professor Todd of the Law Faculty at the University of British Columbia.

The reasons for abolition are, in the view of the Commission, compelling:

1. There is no need for a law of prescription in a system of land-holding like British Columbia's, which has been developed in comparatively recent times and that has an advanced land registration scheme under which easements and *profits-a-prendre* can be easily registered.

2. The register under the *Land Registry Act* should reflect so far as possible the state of title to land. If it does, land can be readily dealt with and the public will benefit.

3. The law of prescription has little practical application in this Province. It does not apply to Crown lands nor, assuming the *Morrison* case is right on the point, does it apply to lands for which a certificate of indefeasible title has been issued. There are also exceptions in respect of the use of water, light and air.

4. The law of prescription is both complicated and obscure. There were two conveyancers who did not agree with our proposal. One gave as his reason that "... the history of England shows that the lost grant doctrine was necessary". No doubt it was necessary in England at one time. But even in that country, the Law Reform Commission has recommended its abolition. In any event the conditions in England that made necessary the doctrine do not exist here.

The other objection was that repeal might create occasional hardship, without any benefits. As pointed out in this Report, the law of prescription does not appear to be providing relief for anyone, as no one we have consulted has ever dealt with a successful claim for a prescriptive right. Indeed, it may well be that whatever hardship is created is done by retaining the law. In those few instances where prescriptive claims have been made - the persons against whom the claims have been made have probably been put to considerable legal expense to defend their positions.

It is true, of course, that a landowner may acquiesce in some adverse use of his property by a nearby landowner, as crossing over the property. The landowner enjoying such adverse use carried out *without permission*. If permission was given to carry on the adverse use, the prescriptive claim will be defeated. The only exception is that oral permission will not defeat a claim based on the longer periods under the *Prescription Act*. Thus, if one cottage owner informs an adjacent cottage owner by letter that the latter may have access across the former's property, no matter how many years that access is subsequently used, a prescriptive right to cross the property cannot be acquired

since the adverse use will be based on permission. For a prescriptive right to arise, there must be acquiescence that falls short of permission.

In cases where there is acquiescence not amounting to permission, why should such acquiescence enable the creation of a right merely by the passage of time?

We agree with the philosophy of the English Law Reform Committee:

> ... there is little, if any, moral justification for the acquisition of easements by prescription, a process which either involves an intention to get something for nothing or, where there is no intention to acquire any right, is purely accidental. Moreover, the user which eventually develops into a full-blown legal right, enjoyable not only by the dominant owner himself but also by his successors in title 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 maybe withdrawn if a major change of circumstances ever comes about.
>
> There is no reason why a person who wishes to acquire an easement over someone else's land should not adopt the straightforward course of asking for it.

Accordingly, the Commission recommends that the law of prescription should be abolished in this Province. In order to ensure that this is effectively done, the Commission considers that the statute enacted to accomplish this purpose should:

1. *Abolish all existing methods of acquiring prescriptive rights.*

2. *Positively state that prescriptive rights should not arise in the future.*

2. *Transitional Provisions*

Assuming that prescription were to be abolished there would be two problems relating to transition

1. Should a person who had not acquired a prescriptive right at the time of abolition, but who had had some period of adverse use, be entitled to some further time for his rights to ripen?

2. Should persons who had acquired prescriptive rights at the time cf abolition be required to register them in the appropriate Land Registry office within a specified time, with failure to register resulting in the loss of their rights?

(a) *Ripening rights*

In recommending the abolition of prescription, both the English Law Reform Committee and the Ontario Law Reform Commission recommended a transitional period to allow persons an insufficient period of adverse use further time for their rights to ripen. The English Committee recommended a twelve-year period for this purpose and the Ontario Commission a ten-year period.

In this Commission's working paper, we tentatively proposed that the Ontario approach be adopted here, although we felt that it was arguable that persons should not be given further time to acquire prescriptive rights once abolition took place. We specially invited comment on this point.

One consequence of having a transition period for ripening rights would be to lengthen the period that the law of prescription would remain applicable in British Columbia. The advantages of retaining the law for such a time must be weighed against the advantage of its earlier abolition.

Both in England and Ontario, the law of prescription has some practical application and there are undoubtedly many persons in those jurisdiction who might have had periods of adverse use insufficient to establish prescriptive rights. To such persons, a transitional period would be of value.

In British Columbia, however, the number of such persons, if there are any at all, is insignificant. It will be recalled that the circulation of our working paper did not elicit one single instance of a successfully claimed prescriptive right. Since the Commission has no evidence that there are any existing prescriptive rights, it follows that there is little likelihood of there being ripening rights in existence.

The response to our questionnaire on this point was fairly evenly divided. Three Registrars were against such a period and four were for it. Twelve conveyancers were against it and eight for it. Professor Todd was opposed to it and Professor McClean seemed in favour of it, although he recognized that it would be only relevant to unregistered land assuming the *Morrison* case was rightly decided and remained applicable to registered land. The Commission believes that the response would have been more strongly in rejection of a transition period for ripening rights if the respondents had been aware that, as the answers to the questionnaire revealed, prescriptive rights appear to be virtually, if not completely, non-existent.

Accordingly, the Commission has concluded that there should be no transitional period in which prescriptive rights could come into existence. The practical advantage of eliminating the law of prescription at an earlier time outweighs any theoretical advantage to having, say, a ten-year transitional period for ripening rights. If there was such a ten-year transitional period, it would be fifteen years before the law of prescription would be eliminated owing to the five-year registration period that is subsequently recommended.

(b) *Registration requirements*

The problem here is how to deal with prescriptive rights, if any, that are in existence at the time of abolition. There are three approaches:

(1) To abolish them:

(2) To require their registration in the appropriate land registry office as a charge against the land within a specified time, with failure to register resulting in the cessation of the right; or

(3) To allow them to exist independent of registration.

In our working paper, we tentatively proposed a similar period to that recommended by the Ontario Commission. The Ontario Commission recommended a ten-year transitional period for ripening rights and that registration of all prescriptive rights take place within two years of the end of the transitional period. Thus, a person with a prescriptive right existing at the time of abolition would have twelve years in which to register. Failure to register within the necessary period would result in the loss of the right, although an extension procedure was recommended where the loss

of the right would result in substantial hardship and the person claiming the right was unaware of the registration requirement.

Since this Commission has now changed its position from that in its working paper on the need for a transitional period for ripening rights, it is not necessary to take that transitional period into account in determining what would be a suitable period for registration, should a registration requirement be thought desirable.

There are a number of points.

First, we recognize that the number of existing prescriptive easements must, at the most, be very small and that some persons may question whether it is worthwhile making while special provision for their registration. However, unless existing rights were abolished, a registration requirement would be necessary if the full benefit of abolishing prescription is to be realized. Otherwise, undetermined rights may exist indefinitely.

Second, the Commission does not believe that existing prescriptive rights should be abolished. Remedial legislation of this kind should be prospective and not retrospective.

Third, if there is to be a registration requirement with failure to register resulting in the loss of the right, the Commission has concluded that there should be no extension procedure as recommended by the Ontario Commission. That Commission recommended that there should be an extension of time procedure, available indefinitely, where the loss of the right would result in substantial hardship and the claimant had been unaware of the registration requirement.

We prefer a final cut-off point so that the law of prescription can be completely eliminated as a possible complicating factor in future dealing. Unlike Ontario, the number of possible applications here would be few. It would not surprise us if there were none. Nevertheless, we cannot guarantee that there will not be some. If there are prescriptive rights extant, persons owning them should be entitled to establish their rights by registration.

We have considered what would be the appropriate length of the registration period and have concluded that five years would be sufficient.

The response to our questionnaire on the problem of a registration requirement was overwhelmingly in the affirmative. Six Registrars of Title stated that there should be registration with loss of rights if there was failure to register, and five believed that there should be no extension procedure. Nineteen out of twenty-two conveyancers were in favour of a registration requirement and, if there were to be a registration requirement, twenty-one were in favour of the proposition that failure to recaster should result in the loss of the prescriptive right. Fourteen of the conveyancers were opposed to the extension provision, believing that there should be a final cut-off.

One suggestion that we received is that persons who lost their right by failure to register should receive compensation should hardship result. As it would not be fair at that stage to require the owner of the servient tenement to pay compensation, any award would have to come from other sources, perhaps from Provincial funds, or out of the Assurance Fund established under the *Land Registry Act.*

If we though that there was any real probability of losses of that kind being incurred, the Commission would consider it worth while to provide for a procedure

and a formula under which compensation could be paid. But, as already indicated, the Commission believes that the question of existing prescriptive claims is a theoretical one and its position is supported by those with experience in real estate transactions. The Commission considers it has gone far enough in recommending a period of registration. It is opposed to keeping the law of prescription alive unnecessarily.

3. *Summary of Recommendations*

The Commission therefore recommends:

1. *All existing methods of acquiring prescriptive rights should be abolished by the enactment of statutory provisions:*

   (A) repealing the Prescription Act;
   (B) abolishing the common law doctrine of prescription and the doctrine of the lost modern grant;
   (C) prohibiting the acquisition of rights by prescription in the future.

2. *(1) 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 prescription rights, in the appropriate Land Registry Office.*

   (2) No such judgment shall be registered or notice of claim filed unless it contains

      (A) an adequate description of both the dominant and servient lands; and
      (B) the names and addresses of the owners of the dominant and servient lands.

   (3) Registration or filing shall be effected by entry on the records relating to both the dominant and servient lands.

   (4) Where such a judgment or notice of claim has been entered, the Registrar shall forward a notification of such entry to the owner of the servient lands.

   (5) The owner of the servient lands may apply to cancel the entry of a notice of claim on the register and the Registrar shall cancel the entry, if the owner of the dominant lands has not commenced an action to establish his claim within sixty days of filing the notice of claim.

   (6) A judgement pursuant to an action commenced in accordance with paragraph (5) above may be registered on the on the application of any party to the action.

If legislation is enacted abolishing prescription generally, as recommended above, consideration should he given to:

(A) amending section 6 of the *Land Act* so as to delete the words "by prescription, or"; and
(B) amending section 3 of the *Water Act* so as to remove the sentence. "No right to divert or use water may be acquired by prescription."

E. D. FULTON
Chairman
R. GOSSE
Commissioner

R. U. COLLIER
Commissioner

December 17, 1970.

APPENDICES

APPENDIX "B"

Concordance of statutory provisions relating to prescriptive easements and *profits-a-prendre* in British Columbia, Ontario, and England

British Columbia	Ontario	England
Prescription Act	The Limitations Act	Prescription Act, 1832
1	—	—
2	30	1
3	31	2
4	33	3
5	33	—
6	32	4
7	—	5
8	34	6
9	39	7
10	40	8

NOTES:

1. Section 3 of the English Act makes special provision for the acquisition of easements of light. Similar provisions in the Ontario and British Columbia statutes were repealed in 1880 and 1906 respectively and replaced by provisions prohibiting acquisitions of this kind by prescription, well as prescriptive easements to the access and use of air. *See* S.O. 1880, c. 14, s. 1 and S.O. 1926, c. 21, 17; S.B.C. 1905, c. 25 and S.B.C. 1930, c. 56.

2. Section 35 of the Ontario Act provides that prescriptive easements cannot be acquired in respect of wires and cables. There is no similar provision in the British Columbia statute. Section 35 was enacted in 1904. *See* S.O. 1904, c. 10, s. 74.

3. Section 41 provides that the prescriptive *profits-a-prendre* and easement shall not arise against the Crown in respect of unsurveyed Crown lands. This provision was inserted in the Ontario prescription legislation when it was first adopted. *See* S.O. 1947, c. 5, s. 8. No similar provision has covered the same ground in British Columbia until 1970. *See Land Act*, S.B.C. 1970, c. 17, s. 6, which rules out prescription (and apparently acquisition of title by adverse possession) against all Crown lands.

4. There are minor differences between the Ontario and British Columbia provisions. The terminology in the former has been updated to some extent. Comparing, for example, section 2 of this Province's Act, with section 30 of the Ontario statute:

   (1) The reference to "right of common" in the former does not appear in the latter.
   (2) The reference to land "of any ecclesiastical or lay person, or body

corporate" in the British Columbia statute is reduced to "of any person" in the Ontario enactment.

APPENDIX "D"

LAW REFORM COMMISSION OF BRITISH COLUMBIA

QUESTIONNAIRE

1. (a) How often have you dealt with a claim for a prescriptive easement?

   (b) How many of these claims were successful?

2. If you have dealt with prescriptive easements, what was their nature (e.g., was it for a right-of-way?)?

3. (a) How often have you dealt with a claim for a prescriptive *profit-a-prendre*?

   (b) How many of these claims were successful?

4. If you have dealt with prescriptive *profits-a-prendre*, what was their nature?

5. To what extent, if any, were the successfully claimed prescriptive rights, referred to in questions 1 (b) and 3 (b), registered under the *Land Registry Act* and, if they were, what was the documentary basis for registration?

6. Do you agree with the tentative conclusions of the Commission that the doctrine of lost modern grant be abolished and the *Prescription Act* repealed?

7. If you do not agree, please give reasons.

8. If prescription were abolished, do you think that persons who have had some period of adverse use, being insufficient to give them a prescriptive right at the time of abolition, should be allowed further time, say a transition period of ten years, during which their rights could ripen, or should they be precluded from acquiring prescriptive rights?

9. (a) Should persons with prescriptive rights be required to register them in the appropriate Land Registry Office within a specified time, say twelve years from the date of abolition?

   (b) Should failure to register within that time result in the lapsing of the prescriptive right?

   (c) If failure to register was to result in lapse, should there be an extension of time procedure available if

(i) loss of the enjoyment of the right would result in substantial hardship,

and

(ii) the claimant had been unaware of the registration requirement, or should there be a final cut-off point?

10. Any other comments?