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McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

McLAUGHLIN v. VALE OF CLWYDD COAL MINING CO. LTD. (No. 2).

GRIFFITH, C.J. There is no doubt that the Court has power to stay execution of its judgments, but in this case the Constitution has provided that the Court's decision shall be final and conclusive. It is true that the Judicial Committee may give leave to appeal from our judgment. Under the system of appeals from State Courts to the Privy Council the appeal lay as of right, but it is absolutely unheard of to stay proceedings upon the judgment of a Court from which there is no appeal as of right. To stay execution because the Court doubted whether it had given a proper judgment would be unworthy of a Court of appeal. The applications must be refused.

Solicitor, for appellant, *W. Morgan.*

Solicitors, for Daily Telegraph Newspaper Co., Ltd., *Laurence & Laurence.*

Solicitor, for Vale of Clwydd Coal Mining Co., Ltd., *Mark Mitchell.*

Appl Connellan Nominees Pty Ltd v Camerer [1988] 2 QdR 248

[HIGH COURT OF AUSTRALIA.]

DELOHERY . . . . . APPELLANT;
PLAINTIFF,

AND

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES . . . . RESPONDENTS.
DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 30, 31. *May* 30.

Griffith, C.J., Barton and O'Connor, JJ.

Prescription—Ancient lights—Enjoyment for twenty years and upwards—Presumption of lost grant—Rebutting evidence—Laws of England introduced into New South Wales by first colonists—Laws and Statutes of England capable of being applied in New South Wales—9 Geo. IV., c. 83, sec. 24.

At the time of the passing of the Act 9 Geo. IV., c. 83, the English law of prescription as to ancient lights was a law which could be applied in New South Wales within the meaning of sec. 24 of that Statute, and, therefore, became part of the law of that colony by virtue of that section, even if it had not been brought with them to the colony by the first settlers.

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The appellant, in a suit brought by him, claiming damages or an injunction to restrain the respondent company from diminishing the light coming to some of his windows by the erection of a building, moved for an interlocutory injunction. In his statement of claim the appellant claimed to be entitled to the free and uninterrupted access of air and light to his windows by prescription, having enjoyed the easement for more than forty-five years, and having had the right to the easement granted to him or his predecessors in title by the respondents or their predecessors in title by a grant, since lost. The respondents demurred *ore tenus*, and it was agreed that the motion for an injunction should be turned into a motion for decree. The demurrer was allowed.

Held, that the demurrer should have been over-ruled, but that as the foundation of the appellant's right was a grant or agreement on the part of the owner of the adjoining land, to be implied by law from proved or admitted facts, it was still open to the respondents to show such a state of facts as would exclude the implication.

Decision of *A. H. Simpson*, C.J. in Equity, (1904) 4 S.R. (N.S.W.), 1, reversed.

THIS was an appeal from the decision of *A. H. Simpson*, C.J. in Equity of the Supreme Court of New South Wales.

The appellant had brought a suit against the respondents, in which he prayed for an injunction to restrain them from diminishing the light coming to some of his windows by proceeding with a building, which at the date of the motion for decree was in course of erection. In the alternative the appellant asked for damages in lieu of an injunction. The substance of the pleadings sufficiently appears from the judgment delivered by *Griffith*, C.J. (*post*). The appellant moved for an interlocutory injunction, and on the hearing of the application the respondents demurred *ore tenus* to the statement of claim. After argument on the demurrer, evidence was gone into as to the facts, and the Judge made an inspection of the premises. As a result of his inspection he found that there was a substantial diminution of the access of light to some of the appellant's windows. Judgment on the demurrer was delivered on 21st December, 1903, the demurrer being allowed with costs. The parties having consented to the motion for an injunction being turned into a motion for a decree, the appellant's suit was dismissed with costs: (1904) 4 S.R. (N.S.W.), 1.

Knox, *Delohery* and *Hope Johnston* for appellant.

Gordon, K.C., and *Rich*, for respondents.

Gordon, K.C., took the objection that the matter at issue was not of the value of £300.

GRIFFITH, C.J.—In that case the proper course would have been for the respondents to apply to strike out the appeal. If the amount in dispute is over the value of £300 there is an appeal as of right, but, if it is not, the other side can have the appeal struck out.

Knox, for the appellant. There are two points for the decision of the Court: (1) whether the English law as to ancient lights is in force in New South Wales; and (2) if it is in force, whether the appellant is entitled to a remedy by injunction or by damages. As to (1), the English rule of law is applicable here. The law as to perpetuities, though not binding on the Crown, is in force in New South Wales; *Cooper* v. *Stuart*, 10 N.S.W.L.R. (Eq.), 172-175; L.R. 14 A.C., 286, 291. That case was discussed in *Nicholls* v. *Anglo-Australian Land Co.*, 11 N.S.W.L.R., 354, at p. 359, where it was held that the English law as to pretenced titles, and the Statute declaratory of it, were in force in New South Wales. Other branches of the English law of prescription have been held to be in force in New South Wales. The *Mortmain Act* was held not to be in force here, because, its object being political, it was intended to have merely a local application, and therefore did not come within 9 Geo. IV. c. 83, s. 24, which only dealt with procedure; *Whicker* v. *Hume*, 7 H.L.C., 124.

[GRIFFITH, C.J.—That was a narrow interpretation to put upon 9 Geo. IV. c. 83, and I do not think that that limitation has been accepted.]

Nicholls v. *Anglo-Australian Land Co.* (*supra*) dissented from it. *Manning*, J., in that case says that the test to be applied is to regard the mischief which the Statute in question was intended to guard against. The *Nullum Tempus Act*, 9 Geo. III. c. 16, another branch of the law of prescription, was held to be in force here; *Attorney-General* v. *Love*, 17 N.S.W.R., 16; affirmed on appeal by the Privy Council; 19 N.S.W.R., 205. In that case *Darley*, C.J., said that, where there has been a certain trend in decisions extending over many years, the Courts will hesitate to disturb the impression to be gathered from those decisions.

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[O'CONNOR, J.—That is particularly true in matters concerning titles.]

The law as to ancient lights is on the same footing as the legislation dealt with in that case. The right is enjoyed by a "quasi-possession," and rests partly on principles of public policy, and partly on natural justice; *Best on Evidence*, 9th ed., p. 314. In all cases of prescription there is presupposed a lost grant. It is not peculiar to the law of ancient lights. At the date of the passing of 9 Geo. IV. c. 83, it was established law in England that 20 years uninterrupted enjoyment of rights capable of being acquired by prescription was sufficient to confer an absolute right. In *Lewis* v. *Price* (1761) referred to in the notes to *Yard* v. *Ford*, 2 Wms. Saunders, 172, at p. 175, and in *Darwin* v. *Upton*, (1786) *ibid.*, p. 175b, it was laid down that so long enjoyment was evidence of a grant without resorting to the fiction of enjoyment from time immemorial. Lord *Mansfield* in the last case said that the enjoyment of lights with the defendant's acquiescence for 20 years was such decisive presumption of a right by grant or otherwise that it could only be rebutted by direct evidence in explanation. That was a case of highway, but there is no substantial difference between that and the case of lights. In *Bass* v. *Gregory*, L.R. 25 Q.B.D., 481, *Pollock*, B., at p. 481, said, "Now, although a good deal has been said from time to time against the doctrine of lost grant, yet almost all civilised countries have adopted it."

Thesiger, L.J., in *Angus* v. *Dalton*, L.R., 4 Q.B.D., 162, at pp. 172, 173, 176 and 177, said that proof that the dominant and servient tenements were once in the same hands does not rebut the presumption of a lost grant if a sufficient time has elapsed while the lands were in different hands; that the fiction is in the nature of estoppel by conduct. He referred to *Campbell* v. *Wilson*, 3 East., 294, to show that, although there may be not the least reason to suppose that there ever was a grant, and the enjoyment of the user may have had a known origin in fact a little more than 20 years before the action, the presumption of the grant might still be raised. In *Dalton* v. *Angus*, L.R., 6 A.C., 740, Lord *Blackburn*, at p. 814, in dealing with *Penwarden* v. *Ching*, Mood. & M., 400, a case on ancient lights before the

Prescription Act, said that the presumption arose at the end of 20 years, independently altogether of the question whether there could have been a grant in fact, and that the effect of the *Prescription Act* was to base the rule upon a definite user for 20 years, instead of upon the fiction which presumed a grant from the fact of such user, otherwise the doctrine stood exactly as before. Consequently the argument that it cannot apply here because there can be no time immemorial or period of legal memory, and no consequent presumption of lost grant, fails. At the date of the settlement of this colony, and therefore at the time when 9 Geo. IV. c. 83 was passed, the fiction as to time immemorial had sunk into insignificance in England, and uninterrupted enjoyment of lights for twenty years was sufficient to raise the presumption of a lost grant, even though such a supposition was manifestly at variance with the facts. The rule, therefore, as part of the English law, must be applied in New South Wales. In *Robinson* v. *Hoskins*, reported in "S.M. Herald" of 21st March, 1883, *Innes*, J., at *Nisi Prius*, directed the jury in accordance with the English rule. In *Real Estate Bank* v. *Union Bank* (October, 1888), *Owen*, J., expressed the opinion that the rule was not in force, and in *Sheehy* v. *Edwards, Dunlop & Co.*, 13 (N.S.W.) W.N., 166, *C. J. Manning*, J., expressed the same opinion, that it was not reasonably applicable to the conditions of a new country, but in neither case was the point decided, and the Victorian cases which adopted the rule were not cited. In Victoria the rule as to presumption of a lost grant was assumed to be in force in *Johns* v. *Delaney*, (1890) 16 V.L.R., 729, as to the easement of support, and in *Drew* v. *Moubray*, *ibid.*, 484; *Thwaites* v. *Brahe*, (1895) 21 V.L.R., 192; and *Green* v. *Walkley*, (1901) 27 V.L.R., 503, as to ancient lights. In South Australia it was expressly decided that the rule was in force, *per Boucaut*, J., in *White* v. *McLean*, (1890) 24 S.A.R., 97. In *Acraman* v. *King*, reported in "S.A. Register" of 17th June, 1880, *Way*, C.J., at *Nisi Prius*, directed the jury that the law as to presumption of lost grant in the case of support to land applied in that colony. South Australia was originally part of New South Wales, and was constituted a separate colony by an Act of 4 & 5 Wm. IV. Consequently the same parts of the common law would be in force there as in New South

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Wales. In *New Zealand Loan and Mercantile Agency* v. *Corporation of Wellington*, 9 N.Z.L.R., 10, it was held by the Full Court of New Zealand (*Williams*, J., *Dennistoun*, J., and *Conolly*, J.), that the *Prescription Act*, 2 & 3 Wm. IV. c. 71, which was passed before the establishment of the colony, was in force there, both as part of the general law of England introduced by the first settlers, and under the *English Laws Act* of 1858. The applicability of the law embodied in 2 & 3 Wm. IV. c. 71 is no greater than that of the common law which it adopted. It does not depend upon the question whether the theory on which the rule is based is applicable or not, but on the applicability of the rule itself. In New Brunswick, a colony still older than this, English common law as to ancient lights was expressly held to be in force; *Ring* v. *Pugsley*, (1878) 18 New Bruns. R., 303. The Full Court of Victoria (*Madden*, C.J., *Williams*, J., and *a'Beckett*, J.), held that the presumption was raised in a case of user of an easement over a drain. In *Vickery* v. *Marr*, (1865) 4 S.C.R. (N.S.W.) Eq., 66, the point was left uncertain, *Hargrave*, J., and *Manning*, J., being doubtful whether, as there could be no such thing as time immemorial here, and the *Prescription Act* was not in force, the presumption of lost grant could arise, though *Stephen*, C.J., thought in some cases the rule might apply. In *Municipality of Waterloo* v. *Hinchcliffe*, 5 S.C.R. (N.S.W.), 273, an action for nuisance, the plea was the form adopted for setting up a lost grant, and it was held a good answer. Again, the term "ancient lights" is used by the New South Wales legislature in *Leases Facilitation Act*, 11 Vic. No. 28, sec. 2; and *Selborne*, L.C., in *Dalton* v. *Angus*, L.R., 6 A.C., at p. 794, says that the use of the term "ancient" light seems to imply that such a right can be acquired by prescription. It is clear, therefore, that in other parts of Australia which are similarly situated as regards the application of the English common law, and in the colonies of New Zealand and New Brunswick, this rule has been held or assumed to be in force; that it was part of the law of real property in England at the date of 9 Geo. IV. c. 83; that other branches of the law of prescription, depending upon a similar fiction, *e.g.*, the *Nullum Tempus Act*, have been applied in New South Wales. Therefore the onus is on anyone who disputes its existence here to make out his case.

It will be argued that the rule is inapplicable to the circumstances of a young and growing community, but there are towns and districts in England which are progressing as rapidly as any towns or districts in New South Wales; and it was held by *Page Wood*, V.C., in *Dent* v. *Auction Mart Co.*, L.R., 2 Eq., 238, that the same rule applied in country districts and in towns. In *Martin* v. *Headon*, *ibid.*, 425, at p. 434, *Kindersley*, V.C., said that the easement of light was as much part of a man's property as his land or his house. In *Turner* v. *Walsh*, L.R. 6 A.C., 636, the Privy Council held that long-continued user could be relied on to prove dedication of a highway in this colony. The arguments that will be used here by the respondents as to the inapplicability of such a rule, were pressed by the appellants in that case, but the Privy Council disregarded them, holding that there was no valid reason why the common law of England should not be considered applicable. The objections to holding that the rule is in force here, put by *C. J. Manning*, J., in *Sheehy* v. *Edwards* (*supra*), would apply equally to great and growing cities in England as to the conditions in New South Wales, but there is no question about its being in force there.

[O'CONNOR, J.—The test cannot be what law is applicable to the simple state of society when the first settlers came here.]

The fiction is founded upon expediency, for the public good and the quieting of titles, and that applies with the same force here as in England. In America some of the States were not bound to adopt the rule whether applicable or not, because the English common law was never in force within their borders, but in New York State the common law as to easements, as it existed on 19th April, 1775, was adopted, *per Bronson*, J., in *Parker* v. *Foot*, 19 Wendell (N.Y.); *Gale on Easements*, 7th ed., p. 297. In *Robeson* v. *Pittenger*, 32 Am. Dec., 412, in 1838, an injunction was granted in New Jersey restraining a defendant from interfering with ancient lights by building, the English rule being in force in that State.

(2) As to the form of remedy, *Cosens-Hardy*, L.J., in *Home and Colonial Stores Ltd.* v. *Colls*, (1902) 1 Ch., 302, at p. 311, states the principle upon which redress will be granted, that there must be a "substantial interference" with the access of light.

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In that case a mandatory injunction was granted requiring the defendant to pull down anything erected in breach of the terms of the injunction. Here it was admitted below, and so found by the Judge, that the respondent's building did cause a substantial diminution in the light coming to the appellant's windows. In *Shelfer* v. *City of London Electric Lighting Co.*, (1895) 1 Ch., 287, *A. L. Smith*, L.J., lays down as a working rule that where a mandatory injunction is applied for, damages in substitution for an injunction will only be awarded in cases—(1) where the injury to the plaintiff's legal rights is small; (2) and is one which is capable of being estimated in money; (3) and is one which can be adequately compensated by a small money payment; (4) and the case is one in which it would be oppressive to the defendant to grant an injunction.

Gordon, K.C., for the respondents. As to the remedy, the case cited on this point, *Home and Colonial Stores Ltd.* v. *Colls* (*supra*), has gone to the House of Lords on appeal, and has been twice argued, but judgment has not yet been delivered. The Court reserved judgment, but stated that they were of opinion that the builder-owner could not be compelled to pull down the house; (*Law Times Journal* of 19th Dec., 1903). The remedy is in the discretion of the Court, and it is clear that the House of Lords would not grant an injunction. The respondents here are in the position of the defendant Colls. The buildings have been practically finished. The Court is not bound to grant an injunction, even though it may be quite justified in doing so. Although theoretically the rights of the plaintiff date back to the time when he first insisted upon them, the Court may still consider the circumstances and exercise their discretion as to the remedy.

On the main point (referring to the dictum of Lord *Watson* in *Cooper* v. *Stuart*, L.R. 14 A.C., 286, at p. 292, that *Blackstone's* statement of the rule as to the application of English law to the colonies in 1 Comm., 107, must be supplemented to the extent that "as the population, wealth and commerce of the colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it"), I contend that the question is what laws were applicable and in force at the

time of the foundation of the colony. Otherwise we should be driven to inquire at what point the particular part of the law contended for began to be in force. It would be impossible to say when the 20 years began to run.

[GRIFFITH, C.J.—The question is, was it the law at the time or not? If once the law it is the law always.]

[O'CONNOR, J.—The law may be, as it were, dormant, *i.e.*, not actually applied, but still in force all the time.]

The right ground is taken by *C. J. Manning*, J., in *Sheehy* v. *Edwards* (*supra*), at p. 168—"Can one say that a right of this nature is reasonably applicable to the condition of a colony in its early days? When people were looking forward," &c. In the light of those considerations it cannot be said that the law of ancient lights was applicable to the conditions of an infant colony, whether one regards the date at which the first settlers came, or that of the passing of the *Constitution Act*, 9 Geo. IV. c. 83. In either case this part of the English law cannot have been introduced here.

[BARTON, J.—Is it true to say that only that law is carried with the settlers which is applicable to the conditions of an infant colony? Did not Lord *Watson* mean that that part of the common law which is suited to a more advanced state lies dormant until occasion arises for enforcing it?

O'CONNOR, J.—Take for instance the arrival in a new colony of a shipload of convicts and officers as the first settlers. Is the amount of common law imported with them only that which is sufficient to regulate their simple relationships?]

The rule must have originated in thickly settled places, because the grant is only to be presumed from the fact of the adjoining owner not having asserted what is a valuable right, and therefore likely to have been asserted if it existed. It must be recognized here that all land at the first settlement was held by the Crown. There were only a few settlers, and the desire of the Crown, as grantor of the land, would be to encourage close settlement. The rules applicable to an old settled country would therefore be out of place. The lost grant would have to be presumed against the Crown. That would be absurd when the date of their acquiring the land was known and recent, and they

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were the first owners, not by grant, but by seizure. The American cases (referred to later) point out that the doctrine is not applicable to a new country, as it must check settlement. It is in a sense a question of fact in each colony whether the law is applicable or not; whether the inconvenience or the convenience of adopting it would be the greater. Again, the Crown, as grantor, cannot derogate from its own grant; *Gale on Easements*, 7th ed., p. 137, citing *Wheeldon* v. *Burrows*.

[GRIFFITH, C.J.—In *Birmingham Dudley and District Borough Council* v. *Ross*, L.R., 38 Ch. D., 295, *Bowen*, L.J., speaks of the right to ancient lights as arising from implied covenant. The position in that case is somewhat analogous to that of the Crown selling land in this colony.]

[*Knox*—The right we claim is by prescription, not what is reasonable to be implied, but what has actually been enjoyed.]

The object of the rule was to settle property in England at a certain period when many rights and possessory titles long enjoyed were involved. In the lapse of years the means of proof might have been lost, even in the case of the soundest of titles. For the quieting of titles it was therefore held sufficient to show user from time immemorial. The period of legal memory was then fixed as extending back to the time of Richard I. As time went on, the Courts allowed proof of this by the evidence of the oldest inhabitant, and later on evidence of actual user for a certain period was deemed sufficient to raise the presumption that the enjoyment had extended over the period of legal memory, and therefore, that a grant had been given and lost. But the basis of the rule was the possibility of enjoyment or user from a date before the period of legal memory. But in the case of this colony, which was founded at a much later date, possessory titles and the enjoyment of easements cannot have sprung from anything that happened before that date. There cannot therefore be an inference drawn from 20 years enjoyment that that enjoyment had continued from time immemorial. That being so, the presumption of lost grant cannot arise.

[O'CONNOR, J., referred to *Walker* v. *Solomon*, 11 N.S.W.L.R., 88, in which it was decided that the English law as to Sunday observance was in force in New South Wales.

GRIFFITH, C.J.—It has lately been held by the Privy Council, in regard to Canada, that the *Sunday Observance Act* relates to Criminal Law. That must in any case be taken to have come with the settlers.]

The law relating to property is on a different footing. A line must be drawn somewhere. Some parts of it must be inapplicable.

[GRIFFITH, C.J.—If the real foundation of the doctrine is implied agreement, the question would be what agreement must be taken to be implied under the circumstances of the colony.]

In conveyances of land there never has been any requisition of title on this question. The easement has never been asserted, though there must have been many cases where it could have been. To hold that the rule exists will therefore seriously affect many holders of land. The right of support is distinguishable, because it is limited to support for the building that is actually there, not for an extended building.

The provisions of the various Registration of Deeds Acts in New South Wales are quite inconsistent with the doctrine of lost grant: See secs. 1, 2, 3, 8, 10, 12 of 6 Geo. IV. No. 22; secs. 2, 11, 14 of 5 Vict. No. 21; secs. 10, 11, 12, 13 of 7 Vict. No. 16 (all consolidated as No. 22 of 1897). A lost grant such as is presumed here could not possibly be registered, because it might never have existed. No copy of it could be made. The easement of lateral support is not analogous; *per Thesiger*, L.J., at p. 167, in *Angus* v. *Dalton*, L.R. 4 Q.B.D. That does not require the fiction of lost grant, but is an absolute grant always implied. In England there is no general Registration Act, and the local acts are all of recent date, since the establishment of the 20 years' rule. My argument applies equally to all cases, whether the land is under the *Real Property Act* or not. Sec. 40 of that Act, 26 Vict. No. 9 (sec. 42 of Consolidating Act, No. 25 of 1900), seems to exclude easements from the operation of the Act in regard to conclusiveness of certificate. *Turner* v. *Walsh*, L.R. 6 A.C., 636, relied upon by the appellant, is not in point. The question there was whether user could be relied upon to prove dedication, and *Sir Montague Smith*, at p. 642, said: "You refer the whole of the user to a lawful origin rather than to a series of trespasses."

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That rule can have no application to the enjoyment of lights, because the user in that case does not involve any encroachment on the rights of others, and therefore requires no fiction to excuse it.

In the United States the law as to presumption of lost grant has been generally held inapplicable. *Keats* v. *Hugo*, 15 Am. Rep., 80 (Massachusetts); *Gale on Easements*, in his statement that the rule had been adopted in Illinois. In 1854 it was thought to be in force there, but later on it was decided that it was not. It is only in force in Delaware and Louisiana; *American Encyclopædia*, p. 19. Other cases in which the rule was rejected are *Guest* v. *Reynolds*, 18 Amer. Rep., 570 (Illinois); *Turner* v. *Thompson*, 24 Amer. Rep., 497 (Georgia); *Stein* v. *Hauck*, 26 Amer. Rep., 10 (Indiana); *Morrison* v. *Marquardt*, 92 Amer. Dec., 444; *Ray* v. *Sweeney*, 29 Amer. Rep., 388 (Kentucky). In *Parker* v. *Foot* (*supra*) it was stated as the opinion of the Court that the 20 years' rule was not established in the English Courts at the date at which the existing body of English law was introduced to the American colonies. They considered the doctrine on its merits, in the light of natural justice and general applicability. In *A.G.* v. *Stewart*, 2 Mer., 143, the *Mortmain Act* was held inapplicable to the Isle of Granada, a conquered colony in the West Indies. It was laid down by the Master of the Rolls that the question was whether the law was one of local policy adapted to the circumstances of the country where it was made, or a general regulation of property equally applicable to all countries where English law was in force.

[O'CONNOR, J.—If it is part of the English law of real property, how can it be severed from the rest ?]

I contend that, as was put by *Bowen*, L.J., in *Angus* v. *Dalton* (*supra*), this rule is not incident to the law of property in the same sense as for instance the rules concerning the alienation of property. It is merely a canon of evidence. The only ways of granting an easement are by written agreement, covenant, or deed of grant. The judges laid down the rule that, when user for 20 years had been proved, it would be presumed that whatever was necessary to grant the easement had been executed and lost. That is to say, that proof of 20 years user was sufficient evidence

of the fact of a grant having been made. The intermediate link of enjoyment from time immemorial had dropped out, but the possibility of it must have been pre-supposed, for otherwise neither the enjoyment nor the inference to be drawn from it could be proved by evidence. *Gale on Easements*, shows that the proof of 20 years user is only a method of proving that the user existed during the period of legal memory. It does not give the right, but is conclusive evidence of the existence of the lost grant. That being so, it need not be adopted here as a part of the English law of real property. The applicability of the doctrine may therefore be considered, and in considering that the hypothesis upon which it is based is important. As that hypothesis, enjoyment from time immemorial, cannot exist here by reason of the circumstances of the colony, the rule ought to be rejected. There is no other ground upon which the adoption of the rule can be supported. It is not dependent upon the *Statute of Limitations*.

[GRIFFITH, C.J.—The question is whether a new rule had not been laid down that this presumption of a lost grant was based, not upon immemorial usage, but upon 20 years' enjoyment unexplained. Was the period of prescription shortened in fact to 20 years ?]

Even so the rule may not be applicable. It may be a purely artificial and arbitrary rule, or based upon some reasons that could not exist here.

[GRIFFITH, C.J.—Even if it is a purely artificial rule, it may yet be applicable, and I can see no sound reason which would make it inapplicable any more than any other arbitrary rule of law.]

Rich followed. As to the use of the term "ancient lights" in the *Leases Facilitation Act* (*supra*), that was not done with the intention of extending the law or of declaring that it applied in New South Wales. The object of the Act was to provide a shortened form for leases. Before that Act a prudent man, in taking a lease, would see that it provided for ancient lights, and by the Act the legislature enabled him to secure such rights in a simple form in a conveyance, but it cannot be inferred from that that such rights could be acquired by prescription. It is a mere recital of terms in use, and of methods of indicating them in leases.

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A mere recital in an Act is not conclusive as to the law, and the Courts may consider the fact of law alleged, apart from the Act; *Maxwell on Interpretation of Statutes*, 3rd ed., p. 440.

Knox in reply. It was held that 21 Jac. I., c. 16, was introduced into the colony by the settlers. Even if the common law and statute law were on the same footing in this respect it would be illogical to hold that one part was brought here and another not. But common law is on a stronger basis than Statute; the latter may have a local application, but the former belongs to and controls the relations of all Englishmen as such. The presumption is that Englishmen, wherever they may go, agree to be bound by English laws in all matters that govern their private relations as fellow citizens; *Webb, Imperial Law and Statutes*, p. 4, citing from *Westlake on Private International Law*, p. 137. The New South Wales law of real property consists of what was introduced here from England, modified by subsequent Statutes. The respondents have shown no sufficient reason for excluding this particular part of the common law. It is an integral part of the law, and it is immaterial how it arose. It is impossible to divide up the common law of easements, and say that this part was introduced and that not. If all that depended on the lost grant fiction were rejected, there would be practically nothing of it left. The rule is not a mere canon of evidence. It is a rule that after 20 years enjoyment a man has acquired a right, presumably by grant, to the continued enjoyment. At p. 760, in *Dalton* v. *Angus*, L.R. 6 A.C., *Field*, J., says:—"But upon principles of public convenience, this period of antiquity has been clearly departed from, and the necessary limit has by successive stages been reduced to an enjoyment of 20 years, which is clearly sufficient to make a building or window ancient."

The American cases are no guide, because there the Courts held that English law never was in existence in the States where the rule was rejected, except in so far as it was based upon sound principles and natural justice, and they have laid down a rule for themselves as to the acquirement of easements by user. Here the Courts must either recognize common law, or, there

being no Statute law, hold that there is no law at all. As to the remedy, the evidence shows that, before anything was done in connection with building, notice was given to the respondents that this claim would be made.

Cur. adv. vult.

30th May.

The judgment of the Court was delivered by

GRIFFITH, C.J. This case, which is an appeal from a decree of the Chief Judge in Equity, allowing the defendants' demurrer, and dismissing the plaintiff's suit with costs, raises the important question whether the law of England as to ancient lights is part of the law introduced into New South Wales, either upon the settlement of that colony, or by the Statute, 9 Geo. IV. c. 83 (passed in 1828), which provides (sec. 24), that all laws and Statutes in force within the realm of England at the time of the passing of the Act "shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively, so far as the same can be applied in the said colonies." The question is, therefore, one of interest, not only to the State of New South Wales, but also to the States of Victoria and Queensland, which in 1828 formed part of New South Wales, and to the State of Tasmania, to which the Act also applies.

The plaintiff by his statement of claim alleged that he was entitled in fee to a parcel of land on which was erected a building, having in it windows for which he had enjoyed the free and uninterrupted access of light for more than 45 years over adjoining land now belonging to the defendants, and upon which the defendants had begun to erect buildings, which would have the effect of substantially interfering with the access of light to the plaintiff's windows.

Paragraph 4 is as follows :—

"The plaintiff further says he has a prescriptive right to the said free and uninterrupted access of light and air to the said windows and openings over the defendant company's land, and that such right was granted to the plaintiff or his predecessors in title by a grant from or agreement with the defendant company or their predecessors in title, but the said agreement has been lost, and save as aforesaid the plaintiff is unable to state the particulars of the said grant or agreement."

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It was admitted that this last allegation was not an allegation of fact but of law, *i.e.*, that the Court ought, after the lapse of 20 years, to presume the former existence of a lost grant. On a motion for injunction the defendants demurred *ore tenus*, and it was agreed that the motion should be turned into a motion for decree. The learned Judge, in his judgment, after stating the facts, goes on to say—"This raises the question whether the doctrine of lost grant applies in this State, that is, whether the Court ought to hold that after 20 years' use a man has a right to the passage of light to his house over the land of his neighbours;" and, after quoting sec. 24 of the Act 9 Geo. IV. c. 83, proceeds:—"As there is no local law dealing with the matter, the question is whether the doctrine of lost grant is applicable to this State. It is purely a legal fiction, for, in almost every case, I suppose, when a jury is asked to find, or the Judge finds, a lost grant, it is perfectly well-known that no such grant ever existed. The employment of such a fiction may be beneficial or otherwise, according to the circumstances of time and place . . . . . This particular fiction really amounts to making a law that after 20 years' enjoyment of access of light over adjoining land the landholder shall have a right to such access. In England it must be taken that the employment of the legal fiction was beneficial, for the legislature has removed the necessity for having recourse to it by making the law as above indicated. See 2 & 3 Wm. IV. c. 71, sec. 3. . . . . But in this State no such Act has been adopted. It is left, therefore, to the Court to say whether the use of the fiction in this country would be beneficial or not; and, on the whole, I think that it would not." The learned Judge then referred to the case of *Sheehy* v. *Edwards, Dunlop & Co.*, 13 W.N. (N.S.W.), 166, before *C. J. Manning*, J., in which that learned Judge decided against the plaintiff's claim to an ancient light, and the case of *Robinson* v. *Hoskins* (heard at *nisi prius* before *Innes*, J., in 1883), in which the plaintiff recovered damages for interruption to light, and to the fact that the doctrine had been rejected in a large number of the American States, and added, "In my opinion it ought not to be adopted here."

If the question for our determination were only whether the legal doctrine or fiction of a lost grant in such cases is part of the

substantive law introduced into New South Wales, either on settlement, or by the Act of 9 Geo. IV. c. 83, we might have some difficulty in coming to a different conclusion from that arrived at by the learned Chief Judge.

There is indeed ground for saying that the doctrine of a lost grant never formed part of the substantive law of England, but was, at best, and for a short time only, adopted as an artificial rule of pleading, as will appear from the history of the law on the subject of ancient lights to which we shall presently refer. And the doctrine has of late years been much discredited in England, even if it is not now definitely discarded. In *Angus* v. *Dalton* (L.R., 3 Q.B.D., 85, a case of an easement of lateral support) *Lush*, J., spoke of it as a "revolting fiction." In *Earl de la Warr* v. *Miles* (17 Ch. D., 535) *Brett*, L.J., said (p. 590-1):—"The doctrine with regard to the presumption of lost grants is at the present moment the subject of much controversy. For my part, I have always been of opinion, and until corrected I must hold to that opinion, that if a Judge is asked to find the fact of a grant, and to say that it has been lost, he must have ground for believing that it was so." In *Wheaton* v. *Maple & Co.* (1893, 3 Ch., 48) *Lopes*, L.J., said (p. 67):—"For convenience sake the fiction of a lost grant is very often pressed into the service; but to presume a grant made by the Crown since 1852 and lost, would be overtaxing the credulity of the most credulous, and would be making a demand too extravagant even for the elasticity of this patient and accommodating fiction."

But the rejection of the fiction of a lost grant does not conclude the question whether the law of ancient lights is part of the law of New South Wales. The law as to the acquisition of the right to light is a branch of the law of prescription, and the real question for our decision is whether this branch of the English law of real property became part of the law of New South Wales, either on settlement, or by the Statute of Geo. IV. If it was part of the substantive law of England in 1828, there is, *primâ facie*, no reason why it should form an exception from the general rule, which has never been in controversy, that the English law relating to real property, as regards its acquisition, disposition, and devolution, became part of the law of New South Wales. It has never,

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for instance, been doubted that in New South Wales incorporeal hereditaments can be created, or that they lie, as it is said, in grant, or that a highway may be effectually dedicated without a written instrument (see *Turner* v. *Walsh*, L.R. 6 A.C., 636). And very different considerations must weigh with the Court in determining whether a particular branch of the substantive law of real property was introduced on settlement, or by the Act of 9 Geo. IV., from those which would affect its judgment on a question whether a particular fiction of law was so introduced.

Now, title by prescription is a very ancient branch of the real property law of England (see *Blackstone's Commentaries*, Book II., c. 17): as it was a well-known branch of the Roman law from which the English law on the subject was, undoubtedly, to a great extent, derived. In the Roman law it was called "*Usucapio*," which is defined in the Digest (Lib. 41, tit. 3, *De usurpationibus et usucapionibus*, Art. 3) to be "*adjectio dominii per continuationem possessionis temporis lege definiti*," *i.e.*, the acquisition of a right of property by the continuance of possession for a time prescribed by law. In Art. 1 of the same book and title the reason is given: "*Bono publico usucapio introducta est, ne scilicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium*," *i.e.*, title by prescription is introduced (into the law) for the public benefit, that is to say, in order that the rights of property with respect to certain things may not remain uncertain for a long time and practically for ever, when the space of a definite and prescribed time would be sufficient to enable the true owners to ascertain their rights."

The English common law is thus stated by *Sir Edward Coke*: —"Both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage, and time. Possession must have three qualities, it must be long, continual, and peaceable; for it is said, "*transferuntur dominia, sine titulo et traditione, per usucapionem, scilicet per longam, continuam, et pacificam possessionem. Longa, i.e., per spatium temporis per legem definitum. Continuam, dico, ita quod non sit legitime interrupta. Pacificam, dico quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. Longus usus, nec per vim,*

nec clam, nec precario" (1 Co. Lit., 113b, 114a). The Latin, which is a quotation from *Bracton*, may be thus translated :—"Rights of property may be transferred, without instrument of title and without actual delivery of possession, by means of prescription—that is, by long, continual, and peaceful possession. Long, that is, for a space of time prescribed by law. By continual I mean in such a manner that it is not lawfully interrupted. I say peaceful, for, if it was contentious, things will be as before, if the contention was justifiable. Long use, neither by force, nor secretly, nor casually." And, commenting on Littleton's words, "Time out of mind, &c., and of title by prescription which is all one in law," he says :—"So as the time prescribed or defined by law is time whereof there is no memory of man to the contrary" (114b.)

There has never been any controversy as to the accuracy of this statement of the law. But there have been considerable changes in the interpretation put by the Courts upon the word "long." At first, as *Coke* says, "long" possession meant possession from the time of legal memory. This was for some time held to be the same as that limited by the *Statute of Westminster* (A.D. 1275) for bringing a writ of right, namely, the accession of Richard I., A.D. 1189. As early as the time of Edward IV. this, it is said, was found to be an inconvenient rule. In A.D. 1606 it was held, in the case of *Bedle* v. *Beard* (12 Co. Rep., 5), (a case of advowson), that possession for 303 years was sufficient ground for presuming a grant of the advowson from the Crown. In 1587 (31 Eliz.) the possibility of acquiring a right to light by prescription had been recognized, (*Bury* v *Pope*, Cro., Eliz. 118, S.C., 1 Leon., 168), in which case, however, a window made in the reign of Queen Mary, *i.e.*, not less than 30 years before, was held not to have acquired the status of an ancient window. In the same year, in the case of *Bland* v. *Mosely* (cited in *William Aldred's Case*, 9 Rep., 57a) the right of an owner of an ancient house to prevent obstruction to his light was declared. These cases were decided before the *Statute of Limitations*, 21 Jac. I., c. 16 (A.D. 1623). Easements were not within that Statute; but soon after it was passed the Courts appear to have thought that the period of limitation pre-

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scribed in cases of ejectment might properly be adopted as a guide to what would be a reasonable period to be considered "long" possession under the doctrine of prescription. The later history of the development of this branch of the subject, so far as regards the easement of light, is to be found in the notes to *Yard* v. *Ford* in 2 Wms. Saund., p. 175a, which I will read. "In *Lewis* v. *Price*, Worcester Spring Assizes 1761, which was an action on the case for stopping and obstructing the plaintiff's lights, *Wilmot*, J., said that where a house has been built 40 years and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties; and he said that 20 years is sufficient to give a man a title in ejectment, on which he may recover the house itself; and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house. So, in an action on the case for stopping up ancient lights, the defendant attempted to show that the lights did not exist more than sixty years. *Wilmot*, C.J., said that if a man has been in possession of a house with lights belonging to it for fifty or sixty years, no man can stop up those lights, possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I could not be disturbed even by a writ of right, the highest writ in the law. If my possession of the house cannot be disturbed shall I be disturbed in my lights? It would be absurd. But the action can only be maintained for damages as far as the lights originally extended, and not for an increase of light by enlarging the windows recently; and I should think a much shorter time than sixty years might be sufficient; but here there has been a possession of that time; *Dougal* v. *Wilson*, Sittings, C.B. Trin., 9 G., 3 (1769)."

"So in an action on the case for obstructing the plaintiff's lights, who proved an uninterrupted possession of them for twenty-five years past, *Gould*, J., who tried the cause, then called upon the defendant to show cause if he could answer this, because, if

unanswered, he thought it sufficient to establish the plaintiff's case. The defendant upon this offered a grant from the former owner of the defendant's premises to the plaintiff's predecessor, dated June, 1750, by which he granted him liberty to put out a particular window, and argued that, having this grant and no other, it must be presumed that plaintiff never had any other, and this would be an answer to the presumption arising from length of possession. The Judge thought the grant would not alter the case, as it related to a particular window, which was not included in the present action, and no exception of any other or reference was mentioned in the grant. The defendant then relied on the possession previous to these twenty-five years; but the Judge said that would not avail him; he thought that twenty years' possession unanswered was sufficient, and if the defendant had any evidence to explain the possession within 20 years, to show it was limited or modified, or bad in its commencement, that would be material; the defendant offered none such, and there was a verdict for the plaintiff; the Judge, however, reserved the point of law if the defendant thought fit to move the Court. Afterwards a rule to show cause why there should not be a new trial was obtained on the ground of a misdirection, because the Judge told the jury that so long an enjoyment was sufficient to give the plaintiff a right to them, although the defendant offered to prove that there were no lights there previous to that time; but that this evidence was not received, and the counsel for the rule insisted that the Judge had called the 25 years' possession an absolute bar, incapable of being overturned by any contrary proof, where it was only a presumptive proof which might be explained away; that it was a matter of fact for the jury, but the Judge left nothing to the jury, treating it as a matter of law. Lord *Mansfield* said:—"I think there must be some mistake in the statement of what passed at the trial. The enjoyment of lights, with the defendants acquiescence for 20 years, is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an absolute bar, like a Statute of Limitations; it is certainly a presumptive bar which ought to go to a jury. Thus in the case of a bond

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there is no Statute of Limitations that bars an action upon it, but there is a time when the jury may presume the debt to be discharged, as if no interest appears to have been paid for 16 or 20 years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence, for so it was held in the case of the *Mayor of Kingston-upon-Hull* v. *Horner*, 1 Cowp., 102. In a case before me at Maidstone, I held length of time, when unanswered and unexplained, to be a bar." *Willes*, J.—"There was a case before me at York where I held uninterrupted possession of a pew for 20 years to be presumptive evidence merely, and that opinion was confirmed afterwards in the Court of Common Pleas." *Ashurst*, J.—"I should have thought that it was the duty of the counsel for the defendant to have told the Judge that this evidence was only a presumptive, not an absolute bar" (to which it was answered by *Coke*, of counsel for the defendant, that it was so, and a case was cited where 40 years were held not to be an absolute bar). *Buller*, J. —"I incline very much to think that the Judge was misunderstood, for he never could call it an absolute bar. In the *Wells Harbour Case* this Court went fully into the doctrine, and the rule of law is clear, that length of time is presumptive evidence only." The Judge said:—"I think 20 years' uninterrupted possession of these windows is a sufficient right for the plaintiff's enjoyment of them." Now that expression is open to a double construction. If the Judge meant it was an absolute bar he was certainly wrong; if only a presumptive bar, he was right. The Court seemed much inclined to discharge the rule, but the counsel for the defendant pressing it much, it was made absolute. However, the next day, *Buller*, J., said that *Ashurst*, J., had waited on Mr. J. Gould, who said he never had an idea but it was a question for a jury, and would have left it to the jury, if the counsel for the defendant had asked it; that he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion. Rule discharged. *Darwin* v. *Upton*, Mich., 26 Geo. III., K.B. (1786)."

In *Read* v. *Brookman* (1789, 3 T.R., 151) the question was whether a plea setting up a release which had been lost, and could not therefore be produced and put upon the record (as was

required under the then existing rules of pleading), was good. *Buller*, J., said (p. 159)—"It would be a strange contradiction to say that the law allows a right, and yet precludes the party from taking the benefit of it. Pleading is the formal mode of alleging that on the record which would be the support or defence of the party on evidence. Now the law has said that a grant may be presumed from length of usage; then if a party were permitted to give evidence on the general issue in support of that presumption, and were refused the liberty to plead it, where pleading is necessary, it would be the grossest contradiction. Whether the evidence in each particular case is a sufficient foundation for such a presumption is a question that does not arise upon pleading, but upon the trial of the issue afterwards. And in some cases a rule has been laid down respecting the length of time which shall be sufficient to raise a presumption: As in the case of *Darwin* v. *Upton*, where 20 years' quiet and uninterrupted possession of ancient lights was deemed a sufficient ground from which the jury might presume a grant."

In *Cross* v. *Lewis* (1824, 2 B. & C., 686), which was an action for disturbance of lights which had been enjoyed for 38 years, *Bayley*, J., said: "I do not say that 20 years' possession confers a legal right, but uninterrupted possession for 20 years raises a presumption of right; and ever since the decision of *Darwin* v. *Upton*, it has been held that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it. It has been argued that in order to found such a presumption it must be shown that the first act was illegal. If so, the doctrine of presumption can never apply to windows; for a person building a house, even at the extremity of his own land, may lawfully open windows looking towards the adjoining property. If his neighbour objects to them he may put up an obstruction, but that is his only remedy; and, if he allows them to remain unobstructed for 20 years, that is a sufficient foundation for the presumption of an agreement not to obstruct them."

In *Moore* v. *Rawson*, 3 B. & C., 332, also an action for obstructing lights, and decided in the same year, *Littledale*, J. said (p. 339): "There is a material difference between the mode of acquiring such rights" (*i.e.*, rights of common or of way) "and a right

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to light and air. The latter is acquired by mere occupancy; the former can only be acquired by user, accompanied with the consent of the owner of the land; for a way over the lands of another can only be lawfully used, in the first instance, with the consent, express or implied, of the owner. A party using the way without such consent would be a wrong-doer; but when such a user, without interruption, has continued for twenty years, the consent of the owner is not only implied during that period, but a grant of the easement is presumed to have taken place before the user commenced. The consent of the owner of the land was necessary, however, to make the user of the way (from which the presumption of the grant is to arise) lawful in the first instance. But it is otherwise as to light and air. Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his own land, buildings with as many windows as he pleases. . . . After he has erected his building the owner of the adjoining land may afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant, for although a right of common (except as a common appendant) or a right-of-way, being a privilege of something positive to be done or used in the soil of another man's land, may be subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air."

With reference to this last observation it may be remarked that, although the easement of light is often spoken of as a

negative easement, there would not seem to be much difficulty in framing a grant of a positive easement of light over the land of the grantor. The importance of the passage lies, however, in this, that it is apparent that that very learned Judge regarded the consent of the owner of the servient tenement as the substance of the matter, and the means by which it is to be presumed to have been given as a mere question of form.

This is the last of the reported cases on the subject of ancient lights before 1828, when the Act of 9 Geo. IV., c. 83, was passed, and, as the *Prescription Act*, 2 & 3 Wm. IV., c. 71, was passed in 1832, the question has not since come up directly for discussion in England. In the case of *Dalton* v. *Angus*, (1879) L.R., 6 A.C., 740, however, in which all the law on the subject of the acquisition of easements by prescription is reviewed, the rule as laid down in *Cross* v. *Lewis* is recognized as a correct statement of the law of England before the *Prescription Act*.

Reviewing, then, this line of decisions, it appears to have been settled in England long ago that the right to the uninterrupted access of light over the land of another may be acquired by a "long" and continual possession, without any formal instrument, and that the interpretation of the word "long" has by degrees been altered by judicial decisions, and had come by the year 1786 to mean unexplained enjoyment for a period of 20 years or upwards. It was said by *Lord Chief Justice Cockburn*, that thus to shorten the period of prescription without the authority of the legislature was a judicial usurpation. As to this Lord *Blackburn*, in his speech in *Dalton* v. *Angus* (L.R., 6 A.C., at p. 812), remarked: "Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of; even where it was originally a blunder and inconvenient, *communis error facit jus*. But to refuse to administer a long established law because it was based on a fiction of law, admitted to be for a purpose, and producing a result, very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the legislature as it was at first

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to introduce that fiction." The fiction referred to is that of a lost grant, which, however, as already shown, was not regarded by *Littledale*, J., as the substantial basis of the adopted rule.

No doubt, in some cases, where the matter came before a jury, the jury were directed to presume that a grant of the right had once existed and had been lost. But, if the distinction between the substance of the law and its temporary formal expression is borne in mind, the difficulty was never very formidable. The law of prescription says that a right of property in certain things may be acquired by long, continual, and peaceable possession. The reason of the law is given in the passage above quoted from the Digest. It was adopted on grounds of public policy, in order that the right of property in these things might not be for ever uncertain. But it was assumed that the origin of the title thus recognized by the law was itself lawful and not unlawful. And, since an easement over the land of another could only be lawfully created by his consent, the law, as pointed out by *Littledale*, J., implied that that consent had been given. This was the substance of the law. The mode of giving the consent was an accident. But, as the usual mode of creating an easement was by grant, it was not a great step to take to say, when the conditions which conferred the right were proved to exist, "Here is an incorporeal hereditament in lawful existence and of lawful origin. There must therefore at one time have been a grant." In the case of *Bedle* v *Beard*, the assumption, after a lapse of 303 years, of the existence of a grant which had been lost was not in itself absurd. But in the later cases no one pretended to believe in the actual existence of such a grant. It appears, however (see *per* Lord *Blackburn* in *Dalton* v. *Angus*, at p. 813), that as a matter of pleading it was the practice, if it was not absolutely necessary, to allege a lost grant (as was done in the present case). The issue of the existence of such a grant having been formally raised, it was necessary to leave it to the jury, but with a direction to the effect that if the facts proved showed 20 years' continuous possession, unexplained, the law inferred a lawful origin for the possession, and that, as the formal way of alleging that origin was by alleging a grant, they should accept the allegation in that sense, and, having regard to

the substance of the law and not to its mere form, should find that the plea was proved. It is quite plain, when all the cases are considered, that the doctrine of lost grant was never regarded as anything more than an artificial and subsidiary rule designed for the purpose of giving effect to a substantial right.

With regard, however, to the suggestion that the shortening of the period of legal prescription was a judicial usurpation, it may be remarked that at the time when we first find the law of prescription formulated in England it was thought by lawyers that the period of prescription was what was called "time immemorial." The first statutory limitation of actions had been made by the *Statute of Merton* (28 Hen. III., c. 8), which prescribed various limits for bringing writs in real actions; that for a writ of right being the time of Henry II., and the limits for others being fixed at later dates. By the *Statute of Westminster* the First (3 Ed. I., c. 39), the limitation for a writ of right was reduced and fixed at the accession of Richard I. (A.D. 1189), and the limitations for others again at later dates. When Littleton wrote, the Courts appear to have thought themselves bound to act upon this expression of the will of the legislature, and to hold that the longest period allowed by law in cases governed by Statute law should be regarded as "time immemorial" in cases in which the Statute did not apply, but which were analogous in principle. And, although this rule was perhaps departed from in *Bedle* v. *Beard*, it would not have been surprising if, when the statutory limit was again altered by the *Statute of Limitations* of 1623, the Courts had felt themselves bound to substitute for "time immemorial" as the test of "long" enjoyment, the new periods of limitation fixed by that Statute, or, to put the same idea in other words, had thought that the latter periods should themselves be considered to be "time immemorial" for the purposes for which that term was used in the law of prescription. Regarding the matter from this point of view, the Courts, so far from usurping the legislative function, would only have been reverting to the principle which had been the foundation of their original decisions, *i.e.*, to follow with regard to easements, which may be considered as accessories to land, the positive rule laid down by the legislature with regard to the land itself. This idea, though

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not distinctly expressed, may be collected from the opinion of *Wilmot*, C.J., in *Dougal* v. *Wilson*, 2 Wms. Saund., 175a. But, however the law came to be settled, whether by judicial usurpation or by renewed adherence to a principle for a time lost sight of, it is clear that before 1828 the law of England was clearly settled so far as judicial decision could settle it.

Was then this law part of the common law introduced into New South Wales on settlement? Or, if not, was it, in the words of the Act of 9 Geo. IV., a law "which can be applied" in the administration of justice in New South Wales?

In *Attorney-General* v. *Stewart* (2 Mer., 143), a case in which the question was whether the English *Statute of Mortmain* had been introduced into the colony of Granada, *Sir W. Grant*, M.R., said: "Whether the Statute be in force in the Island of Granada will, as it seems to me, depend on this consideration, whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed." Applying this test, which has been generally accepted, we think that the law of prescription, which is, in various forms, part of the law of most civilized countries, cannot be regarded as a law of local policy adapted solely to the locality in which it was made, but must be regarded as a general regulation of property. In this regard we are unable to draw any distinction in principle between prescription at common law and prescription by Statute. It has never been doubted that the *Statute of Limitations* of 1623 (21 Jac. I., c. 16) applied to New South Wales (*Devine* v. *Holloway*, 14 Moo. P.C., 290), and it was expressly decided in *Attorney-General* v. *Love*, (1898) A.C., 679), that the *Nullum Tempus Act* (9 Geo. III., c. 16) is in force there. The learned Chief Judge appears to have thought that, in determining whether any particular part of the law of England was introduced into New South Wales by the Statute of 1828, the test to be applied is to consider whether the law is beneficial, by which we understand him to mean suitable to the existing conditions of Australia. But whether a law is suitable or beneficial to a country or not is a question for the legislature, and not for a Court of law. Moreover, the test prescribed by the Statute is

not whether the law is suitable or beneficial, but whether it can be applied. It is plain that a law may be applicable in the sense that it can be administered, although it may, as a matter of opinion, be considered not "applicable," in the sense of being suitable or beneficial. The Statute does not, indeed, itself use the term "applicable," from the use of which in a double sense confusion has arisen.

In America it has been held by the Courts of most of the States that the law of prescription as to ancient lights, as now declared, was not part of the common law of England at the time of settlement, or at the later dates at which the existing English common law was adopted in the several States. For the reasons already stated we are of opinion that it was part of the common law of England in 1828. American Judges have also thought that the law was not in force as a law based upon sound principles and natural justice. This, however, is not a matter on which we are called upon to express any opinion.

We cannot see that there would be any difficulty in administering the law of prescription, so far as it regards ancient lights, in a new country, so soon as occupation had proceeded to such an extent as to allow of a continued enjoyment for 20 years. Possibly in determining whether the enjoyment was unexplained, some different, and, indeed novel considerations might arise, but this would not render impracticable the administration or application of the law itself.

So far as regards Australian authority on the subject, it is noteworthy that by the "*Act to Facilitate the Granting of Leases*" passed in 1847 by the Legislative Council of New South Wales, which then included some eminent lawyers among its members, it is enacted (sec. 2) that leases made in the form given in the schedule should be construed to include *inter alia* "all ancient and other lights" to the lands and tenements therein comprised belonging or in any wise appertaining. This is a legislative recognition of the possibility, at least, of the existence in New South Wales of ancient lights, and, as they could only come into existence by virtue of the law of prescription, of the existence of that law.

The old *Registration Act* of New South Wales, 7 Vict. No. 16,

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conferred priority upon deeds and other instruments (wills excepted) affecting lands or hereditaments executed *bonâ fide* or for valuable consideration according to the priority of registration, and not according to the dates of the instruments (sec. 11); and by sec. 22 the term "instrument" was defined as including all instruments in writing whereby real or leasehold estates should be affected or intended to be affected. There might be some difficulty in reconciling the law of prescription with this provision, if the doctrine of lost grant were to be taken literally as assuming the actual existence of an unregistered instrument. But, for the reasons already given, this does not seem to be necessary. The Real Property Acts of all the States, however, under which the register is the only evidence of title to interests in land, so that an unregistered instrument is ineffectual to create any estate or interest, expressly mention easements, and provide that as to them the register is not conclusive evidence of title. This is a plain recognition of the existence of a law under which interests can be created otherwise than by written instruments, since there could have been no difficulty in providing for the registration of grants or agreements for the creation of easements if it had been desired to do so.

In *Thwaites* v. *Brahe*, (1895) 21 V.L.R., 729, the Supreme Court of Victoria held that the presumption of a lost grant of an easement to light and air arises after uninterrupted enjoyment of the easement for twenty years, but may be rebutted by showing that the presumed grantor was under a legal incapacity to make the grant. The first proposition does not seem to have been disputed at the bar. In *Green* v. *Walkley*, (1901) 27 V.L.R., 503, in which the question was when the *Statute of Limitations* began to run in respect of a right of action for obstructing lights, the acquisition of an easement of light by 20 years' enjoyment was not disputed.

In *White* v. *McLean*, (1890) 24 S.A.R., 17, *Boucaut*, J., following a decision of *Way*, C.J., in *Acraman* v. *King* (17th June, 1880, a case of support), held that the English *Prescription Act*, 2 & 3 Wm IV. c. 71, as to light, was in force in the Province of South Australia, which was founded after the passing of the Act. In *New Zealand Loan and Mercantile Co.* v. *Wellington*, (1890) 9

N.Z.L.R., 10, the Court of Appeal in New Zealand held that the same Act was in force in that colony. *Williams*, J., delivering the judgment of the Court, said: "If these substantive enactments (Prescription Acts) are applicable to the circumstances of the colony, then they are in force in the colony, both by the general law and under the *English Laws Act*, 1858. These enactments, at the time New Zealand became a separate colony, formed part of the general English law of real property. As we undoubtedly took over the general branch of law, there is nothing to justify the exclusion of this part of it. It seems to me as fully applicable to the circumstances of the colony as the *Statute of Limitations*, the Statute 3 & 4 Wm. IV., c. 106, amending the law of inheritance, or the *Wills Act*."

The *English Laws Act*, 1858, referred to by the learned Judge, declared and enacted that the laws of England existing on 14th January, 1840, should, so far as applicable to the circumstances of the Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and should continue to be therein applied in the administration of justice accordingly.

In New Brunswick it has been held by the Supreme Court that the law of prescription as regards ancient lights is part of the common law introduced into that province on settlement; *Ring* v. *Pugsley*, (1878) 18 New. Br., 303. It is common knowledge that the early conditions of New South Wales did not differ materially from those of New Zealand or New Brunswick.

On full consideration we are of opinion that the law of prescription as to ancient lights was a law which could be applied in New South Wales within the meaning of the Statute 9 Geo. IV. c. 83, and therefore became part of the law of the colony at that time, even if it had not been brought with them by the first colonists.

We think, therefore, that the defendant's demurrer *ore tenus* should have been over-ruled. The foundation, however, of the plaintiff's right being a grant or agreement on the part of the owner of the adjoining land, using those terms in the sense, not of an actual document which has been lost, but in the sense of a contractual obligation which is implied by law from proved or

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admitted facts, it is, of course, still open to the defendants to show such a state of facts as will exclude the implication.

For these reasons we think that the appeal should be allowed, and the demurrer over-ruled, with such costs as would have been payable if it had been over-ruled with costs in the first instance. The cause must be remitted to the Supreme Court to do what is right in execution of this judgment. The respondents must pay the costs of the appeal.

Appeal allowed. Demurrer over-ruled, with such costs as would have been payable if it had been over-ruled with costs in the first instance. Cause remitted to the Supreme Court to do what is right in execution of this judgment. Respondents to pay the costs of the appeal.

Attorney for appellant, *A. H. Delohery.*

Attorneys for respondents, *Perkins & Fosbery.*

Foll *Nile v Wood* 76 ALR 91

Foll *Hickey v Tuxworth (No2)* 47 NTR 44

Appl *Hickey v Tuxworth* 87 FLR 161

Cons *R v Pearson; Ex parte Sipka* 152 CLR 254

Dist *Tanti v Davies (No2)* [1996] 2 QdR 591

Foll *Rudolphy v Lightfoot* (1999) 167 ALR 105

[HIGH COURT OF AUSTRALIA.]

NORMAN CAMERON . . . . . PETITIONER;

AND

SIR PHILIP FYSH . . . . . RESPONDENT.

DENISON ELECTION PETITION.

COURT OF DISPUTED RETURNS.

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HOBART, *April* 18.

Griffith, C.J.

Commonwealth Electoral Act—Amendment of Petition—Crosses on ballot-paper—Irregularities—Evidence—New case sought to be made at hearing.

A new fact relied on to invalidate an election will not be allowed to be set up by amendment of the petition after the time allowed by law for presenting a petition.

The requisites of the cross prescribed by the *Commonwealth Electoral Act* to be put upon the ballot-papers considered.

A petitioner will be kept strictly to the case made by the petition.