

# The Bright and Brave New World of Covenants and Easements

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## Iolanthe

When Strephon is revealed to be the son of Iolanthe – a fairy - the plot is already complicated enough. However the Queen of the Fairies decides that Strephon is to go into Parliament against the better wishes of the House of Peers. When their Lordships show some resistance the Fairy Queen explains the new ground rules (as the Law Commission is explaining to us lawyers) ...



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## Headlines

- Complete statutory regime replaces common law.
- Prescription Act 1832 abolished.
- Section 62 LPA 1925 emasculated.
- Acquisition by user retained.
- Multiple periods abolished.
- Crown – no special periods.



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## The Repeal

- The new code is complete and designed to mesh with Land Registration.
- All existing methods are abolished when the Act comes into force.
- Transitional – if on the Act coming into force a person is within a year of acquiring an easement or profit by the 1832 Act, prescription at common law or lost modern grant (or has already done so) then the old law continues in force.



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## Prescription Act 1832

### Completely chopped

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"Don't think of it as a problem —  
think of it as an *opportunity*."



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## Section 62 LPA 1925

Emasculated – no longer can one acquire an easement or profit via Section 62.

However, under the new sections perhaps even wider rights can be acquired in a similar way – as below.



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### Old friends in the tumbrels...

- *Wheeldon v Burrows*.
- Lost Modern Grant.
- Prescription at common law - proving user back to 1189.
- Unity of seisin (in its pure form).



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### The Raison D'Être

To simplify:

- One new consistent and coherent set of rules.
- Add to efficacy of registered land system (and encourage its use).



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### Oddities

- A negative aspect is creating a second class system in leaving unregistered land without the new advantages.
- Rights of light are to have a most mysterious status – including those related to local usages still retained.



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### Acquisition by User - User time periods

- Just one – 20 years.
- It must be unbroken.
- Simple.



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### Primary Qualification to claim via user

- It is of a kind which could be granted as an easement – which is interesting since the class of easements is not closed (or was not).
- Nec vi, nec clam, nec precario retained (in English).
- Must be no unity of ownership or possession of the dominant and servient tenements.



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### Further Qualifications

- Competent grantor needed.
- Reversioners to leases protected if cannot prevent dominant user's use or could not reasonably know of it etc.
- Onus of proof as to disqualifications on person resisting implied grant.
- Special position for Crown & Duchy on Light.



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## What User will do?

Simple answer – the sort of use that could be granted as an easement.

Draft Bill:

“Driving down a road or sending water through a pipe”  
but not “enjoying a view over a neighbour’s land”

In short – use existing law tests.



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## Poor Profits

Post Act – can grant or reserve a profit a prendre...

BUT they cannot be acquired by implication!



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## Implied Easements

Collecting together ideas from S 62, *Wheeldon v Burrows*, easements of necessity and existing implied easements.

All existing methods to imply expressly abolished –  
just in case any wise acres were thinking...



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## New two way street

Any grant of land can include:

- Easements over retained land necessary for “reasonable use” of land granted away; and
- Reservation of easements over land granted away.



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## Test to apply

- What does “necessary for the reasonable use of land” mean?
- Statute sets out non-exclusive list.
- Query items that converse of listed but not mentioned?



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## Court “shall have regard to”...

Paraphrase:

- Use of dominant and servient at time of grant.
- Physical features on servient land.
- Intended use of dominant land known to both parties to grant.
- Available routes for easement.
- Extent easement will interfere with servient land or inconvenience servient owner.



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## Unity of Seisin

Basic rule – if ownership and possession of both tenements vest in one person then the easement is extinguished.

Exception – if only possession so vests then the right is suspended, but re-animated when unity of possession ceases.

This can in practice be very inconvenient.



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## New Sections 27A & 116A LRA

### Section 27A:

- Owner of parcel A can register easements or profits over his own Parcel B.
- Only effective at registration.

### Section 116A:

- Registered easements and profits are no longer extinguished by unity...but
- A registered owner can expressly release existing easements.



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## Ouster – Parking etc

- Common law – “There is no easement known to law which gives exclusive and unrestricted use of a piece of land.”
- Commonly a problem with parking and storage.
- Effectively abolished as bar to acquisition: “...the fact that it prevents the person in possession of the land making reasonable use of it.”



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## Fencing easements

- Chopped as well.
- Query walls?



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## Abandonment

- Unusual in practice.
- Authorities very mixed as to evidence and time for non-use.
- Now a statutory presumption of abandonment if not used for a continuous period of 20 years.



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## The New World

- Simply parts.
- Retain some old friends
- Raise new questions.
- Malcolm Warner.



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