

or destroyed by shewing only that such way . . . was first enjoyed at any time prior to the period of 20 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated."

This section applies to a claim at common law, and does not change the common law characteristics of the prescriptive enjoyment necessary in order to create a right: *Sturges v. Bridgeman*, 11 Ch. D. 863. And the question therefore is, whether the nature of the enjoyment by plaintiff and his predecessor in title was such as at common law would, if of sufficient duration, have created a right in him, and, if so, whether such enjoyment has existed for a period of 20 years next before the commencement of this action, as required by secs. 35 and 37 of the statute: *Goddard's Law of Easements*, 5th ed., p. 212, and cases cited in notes (g) and (h). The words "enjoyed by any person claiming right thereto" in sec. 35, and "the enjoyment thereof as of right" in sub-sec. 2 of sec. 38, following the language of the Imperial statute 2 & 3 Wm. IV. ch. 71, secs. 2 and 5, have been the subject of frequent judicial interpretation. . . .

[Reference to *Bright v. Walker*, 4 C. M. & R. at p. 219; *Monmouth Canal Co. v. Harford*, 1 C. M. & R. 631; *Tickle v. Brown*, 4 A. & E. 382; *Earl de la Warr v. Miles*, 17 Ch. D. 591; *Hollins v. Verney*, 13 Q. B. D. 315; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. at p. 570; *Dalton v. Angus*, 6 App. Cas. 805.]

Construing plaintiff's conduct, which also binds his wife, in the light of these decisions, it appears to me impossible to reconcile it with that of a person enjoying an easement as of right. For a period of about 10 years he allowed his daily passage over the strip to be interrupted, in manner above described, by occupants of stables on the lands now owned by defendants. If one of the occupants were present, and his horse or vehicle were in the way, it was his practice to request him to remove it sufficiently to enable him to pass, and his requests were complied with. On these occasions he was enjoying the privilege not as of right but by leave and license of the occupant, without which he would have been a trespasser. At other times, in the absence of the occupant, it was his practice to remove and replace any vehicle that interrupted his passage, thus recognizing the right of the occupants to the use which they were making of the strip, and at no time during all these years, when the strip was being