

pend upon and is limited and defined by the user that is proved."

In *Crossley v. Lightowler*, L. R. 2 Ch. at p. 481, Lord Chelmsford, L.C., says: "The user which originated the right must also be its measure."

Graham, B., in *Bealy v. Shaw* (1805), 8 East 208, speaking of the right to enjoy or divert water, charged the jury that "every such exclusive right was to be measured by the extent of its enjoyment;" and his direction was upheld by the full Court. In *Calcraft v. Thompson* (1867), 15 W. R. 387, Lord Chelmsford, L.C., speaks of the easement of light in language which is applicable to an easement such as this, i.e., a right which is gradually ripening—and which after twenty years is absolutely acquired—and continues: "When the full statutory time is accomplished the measure of the light is exactly that (neither more nor less) which has been uniformly enjoyed previously."

This is the rule in this province. The head-note of *McNab v. Adamson* (1849), 6 U. C. R. 100, is as follows: "The right which a party has acquired by twenty years uninterrupted user to pen back the water of a stream, in certain quantities, for the purposes of his mill, will be strictly confined to the right as actually exercised. Robinson, C.J., in *Bechtel v. Street* (*supra*), says at p. 17: "The important question of fact is not how high the dam was for twenty years, but how high the water has been backed up on the plaintiff's land during that time."

*Cain v. Pearce*, 16 O. W. R. 846; 18 O. W. R. 595; 19 O. W. R. 904; 22 O. W. R. 174, is I think quite to the same effect.

From the above authorities I conclude that, even granting that the use of summer water when it came down is proved, the prescriptive right to use it is limited by the actual user (neither more nor less), and that to use it in prolongation of the spring freshets is a different and more oppressive use, considering the season of the year and the right of the plaintiffs to cultivate their land. In *Hall v. Swift* (*supra*) the right had been established by a long course of enjoyment, and the cesser during the dry season was only urged as an interruption destroying the right. It must be borne in mind that one of the elements of a prescriptive right is that the servient tenement shall be burdened with some right openly and continuously exercised, and that it cannot be gradually and insensibly increased.