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FICTIONAL LOST GRANT IN PRESCRIPTION—
A NOCUOUS ARCHAISM

J. W. SIMONTON*

“In order to establish a right of way over the lands of another by prescription, it must appear that the use and enjoyment thereof by the claimant was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes, and that such use has continued for a period of at least twenty years. * * *

“Where a way has thus been used openly and uninterruptedly, continuously and exclusively, for a period of more than twenty years, the origin of the way not being shown, there is a presumption of a right or grant from the long acquiescence of the party on whose land the way is. This presumption of a right or grant is *prima facie* and may be rebutted by showing that the right of way originated in a permission, or a license, granted by the owner of the land for his neighbor to pass over it, or by showing that during the prescription period of twenty years the owner of the estate claimed to be servient denied the right of the owner of the dominant estate and converted the right of way into one of permission only.”¹

“The flight of the long time requisite to vest the right under the old law afforded a conclusive presumption that there had been an express grant of the easement, its evidence lost by the tooth of time, and no proof that it never existed could be heard; whereas, under the new rule user for the statutory period raises only a *prima facie* presumption of a grant, which may be repelled. * * * To establish a right of way under the modern law, it must appear that it has been exercised for the statutory period, with the acquiescence of the owner over whose land the way is claimed. True, such user without more, is taken to be with his acquiescence and knowledge, and *prima facie* gives the right; but if it appears that the user is against his protests, and that he denied the right, the right cannot become vested from the time of user.”²

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¹ *Williams v. Green*, 111 Va. 205, 206-7, 68 S. E. 253 (1910).

² *Woolbridge v. Coughlin*, 46 W. Va. 345, 348, 33 S. E. 233. (1899).

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In the above quotations the courts purport to express the law of Virginia and of West Virginia, there being but one important variation between them which seems to have arisen through a misconception of the Virginia court.³ That courts have long had a strong policy favoring the acquisition of easements by adverse user is apparent. Since legislatures have usually made no provisions for the acquisition of easements by adverse user, the courts have had to create the law as to prescription. When the time required to get title to land by adverse possession was reduced to twenty years in England, the courts, instead of applying this statute by analogy, took the ancient fiction of a lost grant based on proof of immemorial user, and adapted it by reducing the period of requisite user to the period of the new statute of limitations. The presumption of a lost grant from proof of immemorial user was said to be conclusive, but it could not well be otherwise since no evidence to the contrary could be available.⁴ But with the time of requisite user reduced to twenty years, the testimony of the servient owner and others who knew the real facts would often be available. Hence the question arose as to whether the presumption of a lost grant was still conclusive or whether the real facts could be shown in rebuttal. Most of the courts in this country eventually held that the presumption was conclusive,⁵ but some of them still insisted it was only a *prima facie* presumption and could be rebutted. Hence there came to be two alleged rules—the conclusive

³ In *Cornett v. Rhudy*, 80 Va. 710 (1885) the Virginia court held that user for statutory period was not enough but that the user must be for at least twenty years. The court relied on statements in *Lomax and Minor* and on English cases and evidently was not aware that the twenty year period in England was as it was, solely because that was the statutory period. This the Virginia court took to be the common law rule. As a result the West Virginia court, evidently puzzled, stated there was a common law rule requiring twenty years user, and a statutory rule requiring ten years user but the West Virginia courts have always followed the rule that ten years user is sufficient. As to the facts of the origin and effect of the English rule see TIFFANY, *REAL PROP.* (2nd ed.) 2028-9; JONES, *EASEMENTS*, §168.

⁴ True the statute of Edw. L. c. 39 (1275) fixed the time of legal memory at 1189 for the writ of right and at 1217 for other actions and it is possible evidence on the matter might occasionally have been adduced, yet the shortest period was fifty-eight years and each year that passed added a year to this time, so that soon no direct evidence could be produced.

⁵ See TIFFANY, *REAL PROP.* (2nd ed.) 2030; 19 C. J. 873-4; JONES, *EASEMENTS*, §162.

presumption rule, and the *prima facie* presumption rule.⁶ The Virginia and West Virginia courts are adherents of the *prima facie* presumption rule, but the fact is that the law of these states does not differ materially in this respect from that of the conclusive presumption jurisdictions. Our courts are merely talking about a different thing without seeming to be aware of it.⁷

A presumption is a conclusion drawn from proof of certain facts and circumstances. It is so drawn because in most cases where certain facts are established the thing presumed is true, but the other party may show by evidence that this case is the unusual or exceptional case—that the presumed thing is not true in the particular case. He may rebut the presumption. But the presumption of a lost grant is not a true presumption, because the thing presumed is admittedly a fiction—is admittedly not true in a majority of cases. Proof of adverse user of a way for ten years or for twenty years does not justify the inference that there was a grant of the easement which has been lost. We know well that that is not true in one per cent of the cases. That is not the reason for the presumption. The real reason is the desire to apply the statute of limitations to adverse user by analogy, hence the courts resorted to make-believe—they invented a fiction, but as is the case with other fictions they cannot permit a direct attack to be made on it. So, though the presumption is said to be rebuttable in Virginia and West Virginia, the servient owner is not in fact permitted to rebut the presumption at all.⁸ He cannot show that the thing presumed from the evidence is not true, namely, that no grant was ever made. The courts erroneously assert that he may rebut the presumption, but all he is permitted to do is to attack the character of the user which the evidence tends to prove in order to show there was not the kind of user necessary to raise the presumption. The claimant, for example, proves he has used the way more than ten years, without any explanation as to the origin of the user. That raises a presumption the

⁶ See note to THE BAR, April 15, p. 42; 27 W. VA. LAW QUAR. 265.

⁷ JONES, EASEMENTS, §163.

⁸ At least there seems to be no cases in which this was permitted.

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user is under a claim of right, and that it is adverse to the owner. The claimant has thus made a *prima facie* case.⁹ The owner is not permitted to testify he never made any grant of the alleged easement for that would attack the fiction directly. But the owner may prove that the user began by permission, thus showing there was in fact no user of the sort required to raise the presumption of a lost grant.¹⁰ Or he may show he made protests at various times against the use, thus showing, under the peculiar doctrine of our law, that the user was not of the character required to raise the presumption.¹¹ Or presumably he may show that at the time the user began, the landowner was an infant or insane so as to be incapable of making a grant, but again the effect of this proof is to show the requisite user has not been proved, since it is usually held the user must be against one *sui juris*, at least at its beginning.¹² All

⁹ *Foreman v. Greenburg*, 88 W. Va. 376, 106 S. E. 876 (1921); *Roberts v. Ward*, 85 W. Va. 474, 102 S. E. 96 (1920); *Staggers v. Hines*, 87 W. Va. 65, 104 S. E. 768 (1920); *Mitchell v. Bowman*, 74 W. Va. 498, 82 S. E. 330 (1914).

¹⁰ *Bartrug v. Edgell*, 80 W. Va. 220, 92 S. E. 438 (1917); *Graham v. Thompson*, 143 Va. 29, 129 S. E. 272 (1925); *Pruitt v. Shaffer*, 137 Va. 658, 120 S. E. 275 (1923).

¹¹ *Gwinn v. Gwinn*, 77 W. Va. 281, 87 S. E. 371 (1915); *Woolbridge v. Coughlin*, *supra*, n. 2; *Nichols v. Aylor*, 7 Leigh 546 (1836).

The doctrine that the adverse user could be effectively interrupted by protest by the landowner seems to have originated in the latter case, the court holding this showed he did not acquiesce in the user. This has been consistently followed in Virginia and West Virginia. It is very difficult to see why verbal protests which are disregarded by the claimant should have any other effect than to show the user was under a strong claim of right. See good discussion of this in *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605 (1881). The great weight of authority is *contra* to the doctrine. The Virginia court in the *Nichols* Case seemed to believe the word "acquiesce" must have some meaning other than that accorded to it by most courts.

¹² It is said that where the landowner is an infant or under such disability that he could not have made a grant at the commencement of the user, the user will not give rise to the presumption. There must be the requisite user from a time when the landowner is not under disability. Some courts require the requisite period of user while the owner of the land is *sui juris* deducting all periods during which the owner is under disability. Others hold that if the landowner is able to make a grant at the beginning of the user the fact the land subsequently comes into the hands of one under disability does not prevent the prescriptive time from running. See *TIFFANY, REAL PROP.* (2nd ed.) 2068. The latter accords with the application of the statute of limitation by analogy. There seem to be no cases in this state. It may be questioned whether the twenty year absolute limit of W. VA. CODE ch. 104, §4, would also be applied in this state to adverse user. That is, whether adverse use for over twenty years would give the right regardless of the disability of the landowner.

these so-called means of rebutting the presumption do not rebut it, but all of them attack the facts from which the presumption arises and tend to prove the proper facts do not exist. Clearly all our courts mean by the rebuttable presumption is that the landowner may overcome the claimant's *prima facie* case by showing there was not the necessary kind of user for the proper period. What the courts usually mean when they say the presumption of a grant is conclusive, is that if the requisite kind and length of user is established on all the evidence introduced at the trial, then the presumption is conclusive. This seems to be the established law in Virginia and West Virginia because the landowner does not attack the fiction by direct evidence but only attacks the character of the user proved by the claimant.¹³

It has taken centuries to build up the statement of law quoted above. The reluctance of the English courts to admit they were actually making law, seemingly caused them to adopt the fiction and thus pretend they were merely applying law already existing. Whether this was justifiable at the time need not concern us now, but now our courts frankly admit they are applying the statute of limitations by analogy. It is therefore time the whole archaic structure was swept away and the simple straight-forward course adopted. The courts of some jurisdictions have done this and no apparent disaster has followed such radicalism.¹⁴

It may be noted that not only is the above statement of law based on an admitted fiction, but in the course of time it has gathered a lot of barnacles, which serve to slow down and clog the administration of justice in this sort of cases. For example, the term "exclusive" does not mean exclusive but proprietary.¹⁵ In nearly every case it is contended with great vigor that the use was not exclusive because one or

¹³ "Whenever therefore there has been such use for a long period, the bona fides of the claim is established, and the owner of the servient estate must rebut the presumption of right, by showing leave or license from him, or protest and objection under such circumstances as to repel the presumption." *Walton v. Knight*, 62 W. Va. 223, 227, 58 S. E. 1025 (1907). Note he cannot rebut by showing he never made a grant. The same may be noted in the excerpt from the Virginia case at the head of this paper.

¹⁴ See cases cited in 27 W. VA. L. QUAR. 265.

¹⁵ *Muncy v. Updyke*, 119 Va. 636, 89 S. E. 884 (1916).

more other persons had also used the way, and the courts have again and again spent time disposing of this contention.¹⁶ The term "acquiescence" does not mean with consent or permission as one might suppose, but means that the landowner did not consent nor did he openly object.¹⁷ If he actually did acquiesce in the user at the beginning this would usually be fatal to the plaintiff's case, and our courts also hold verbal protests against the user is fatal. In almost every case it is contended the landowner did not acquiesce and the court must carefully explain what this term means.¹⁸ The "knowledge" of the landowner is immaterial. All that is essential is the user be open and notorious. The "claim of right" is presumed from continued and unexplained user.¹⁹ In fact an open adverse user for the requisite period without objection of the landowner, he being a person *sui juris*, is all that is essential. Yet in order to understand the statement of the rule of law given above one is compelled to delve deeply into the history of prescription, and then to determine the peculiar and extraordinary legal meanings of the terms above referred to. There is no good reason for preserving such archaisms. Frankly applying the statute of limitations by analogy would simplify and clarify the law and could not but prove beneficial. Courts if so disposed could do much to clarify the law at such points as this bringing about a great simplification of the language in which it is expressed, without making any change at all in its effect.

¹⁶ The question is discussed in *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020 (1895); *Walton v. Knight*, *supra*, n. 13; *Roberts v. Ward*, *supra*, n. 9; *Foreman v. Greenburg*, *supra*, n. 9.

¹⁷ See cases in n. 11, *supra*.

¹⁸ *Bartrug v. Edgell*, *supra*, n. 10; *Turner v. Improvement Co.*, 118 Va. 720, 88 S. E. 85 (1916).

¹⁹ *Woolbridge v. Coughlin*, *supra*, n. 2 (1899); *Roberts v. Ward*, *supra*, n. 16.

