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had not personally observed the details of the trial procedure. The Supreme Court held that the special judge had no discretion whatever in passing upon the assignments of error, explaining that whatever discretion reposes in a trial court upon such a motion is based solely upon the assumption that personal observation of trial details has created a peculiar competency in the trial court to pass upon questions of error. The court says:

> "Under our decisions, such discretionary power of a judge presiding at a trial is very limited. In such cases he has none at all, unless there is legal ground for a new trial. . . . . Observations respecting such discretion, found in the books, probably mean no more than that the judge's decision as to the sufficiency of a ground urged for a new trial, when there is a condition calling for judgment as to the existence thereof, will not be disturbed by the appellate court. If an apparent and prejudicial error was committed in the course of the trial, there is no discretion in the court to refuse a new trial. If, on the other hand, there is not so much as a shadow of error in the proceedings, there is no discretion to grant one."

The principles announced in this case, apparently sound, place very broad limitations upon the unqualified general discretion announced in the earlier decisions. Since the court may exercise a discretion only where personal observation of trial matters will aid that discretion, it necessarily follows that pure errors of law which are prejudicial ordinarily can not be mitigated by any discretionary view that the trial court may take of them. It is believed that the recent case merely states in definite formula a rule which has long been tacitly assumed and applied by the court.

—L. C.

EFFECT OF MERE PROTESTS BY SERVIENT OWNER ON ADVERSE USER.—In order to permit the acquisition of easements by long continued user the English courts (probably after the passage of the statute of 21 Jac. I. c. 16) resorted to the fiction of a lost grant instead of solving the problem directly by applying the Statute of Limitations by analogy as had probably been done under prior statutes. This has become the law quite generally. In many jurisdictions the result of the adoption of this fiction has been to accomplish substantially the effect of applying the Statute of Limitations by analogy. This is certainly true in those jurisdictions

where it is held that proof of continuous adverse user for the period required to acquire title by adverse possession raises a conclusive presumption of a lost grant of the easement in question. It would have been better had the fiction been repudiated and the Statute of Limitations applied by analogy but as was stated by Thesiger, L. J., in *Angus* v. *Dalton*:

> "Whatever strictures may have been made upon this method of judicial legislation, the fiction has been promotive of beneficial results, and forms the basis of prescriptive titles, and it is now too late to question the validity of its introduction. The doctrine of a lost grant forms a part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority."[1]

A considerable number of decisions go at least so far as to hold that adverse user continued throughout the requisite period will give rise to the presumption of the fictional grant, provided that at the time the user began the landowner was capable of making a grant, and assuming, of course, such user was sufficiently open and notorious.[2] This constitutes a fairly clear rule of law (though it does involve a fiction) where the presumption is held conclusive, and perhaps also where it is held rebuttable by certain limited classes of evidence only. Unfortunately there is a respectable body of authority which has adopted the theory that the presumption of a lost grant in any case is one which may be rebutted by any evidence tending to show that no grant was in fact made, and whether it is rebutted is left to the jury to decide.[3] Under these authorities various kinds of evidence have been held admissible as tending to rebut the presumption. It would seem that the field is left entirely open for the introduction of any sort of evidence which the court might conclude had such a tendency. A somewhat typical statement of the essential elements of adverse user—a sort of

[1] 4 Q. B. D. 160, 171 (1878). See also Lehigh Valley RR. Co. *v.* McFarlan, 43 N. J. L. 604, 617 (1881).

[2] Lehigh Valley RR. Co. *v.* McFarlan, *supra;* Morris Canal & Banking Co. *v.* Diamond Mills Paper Co., 71 N. J. Eq. 481, 64 Atl. 746 (1906), affirmed 73 N. J. Eq. 414, 75 Atl. 1101 (1907); Okeson *v.* Patterson, 29 Pa. St. 22 (1857); Jordan *v.* Lang,22 S. C. 159 (1884); Ferrell *v.* Ferrell, 60 Tenn. 329 (1872); Kimball *v.* Ladd, 42 Vt. 747 (1870).

[3] Chicago & Northwestern R. Co. *v.* Hoag, 90 Ill. 339 (1878); Powell *v.* Bagg, 74 Mass. 441 (1857); Dartnell *v.* Bidwell, 115 Me. 227, 98 Atl. 743 (1916); Nichols *v.* Aylor, 7 Leigh 546 (Va. 1836); Field *v.* Brown, 24 Gratt. 74 (Va. 1873); Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182 (1903). See Wooldridge *v.* Coughlin, 46 W. Va. 345, 33 S. E. 233 (1899); Eels *v.* Chesapeake & Ohio R. Co., 49 W. Va. 65, 38 S. E. 479 (1901).

rule as to the minimum evidence which will justify the presumption of a lost grant is as follows:

> "In order to establish a private right of way by prescription over the lands of another, the use and enjoyment thereof by the claimant must be shown to be adverse, under claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it is claimed."[4]

Probably most of these elements would be regarded as more or less essential to show adverse user in jurisdictions which have adopted the conclusive presumption theory. Most of them appear to have been borrowed from the rules of law as to adverse possession of land. There is, however, one notable exception, namely, acquiescence of the owner of the land in the user. According to the usual meaning of these words, they would seem to be inconsistent with the requisite that the user must be adverse or hostile to such owner. Evidently the word acquiesce must have a limited meaning when used in this connection.

What does the term acquiesce mean? The courts which hold that the presumption of a lost grant is rebuttable say it means merely absence of dissent.[5] The idea apparently is that a lost grant cannot be presumed unless during the time of the user the parties' acts are consistent with a grant which both respect. Hence it is said that evidence of dissent on the part of the landowner tends to rebut the presumption of a lost grant, and sometimes we find expressions to the effect that one cannot acquire a right by prescription if the landowner protests against the use.[6] It is submitted that such protests ought to be considered immaterial. Certainly protests by a grantee of the one who owned the land when the user began do not tend to indicate there was no grant; and when made by one who has owned the land throughout the user they can hardly be said to have more than a slight tendency. Furthermore, the one using the right might deny that protests were in fact made, but he would be unable to produce evidence to overcome the effect of the protests when they are once proved. That is, he cannot make out a case in spite of the protests. The reason is that we are dealing with proof of a fiction instead of a fact. The object of the invention of this fiction was to permit the acquisition of an ease-

[4] Reid *v.* Garnett, *supra,* 48, 182.
[5] Note 3, *supra.*
[6] Wooldridge *v.* Coughlin, *supra,* 348, 235.

ment by long continued user. Apparently these courts concern themselves too greatly with the evidence which tends to prove a pure fictional thing and too little with the purpose of the invention of the fiction. A certain sort of user might be held to establish the fictional grant but confusion results from treating this fiction as if it were a fact to be established by evidence like other facts.

The doctrine that the presumption of a lost grant may be rebutted by any sort of evidence which tends to show there was no grant, seems to have had its origin in the cases of *Nichols* v. *Ayler*[7] and *Powell* v. *Bagg*.[8] The former was decided over twenty years before the latter, but is not cited in the latter. Both cases hold that actual interruption of the user is not essential, but that evidence of verbal protests is admissible because such evidence rebuts the presumption of a lost grant by showing the landowner did not acquiesce in the user. A number of authorities are cited in each case, and while in some of these authorities statements to the effect that the user must be with the acquiescence of the owner may be found, none of them define the word when used in this connection or even give any indication as to its meaning. That this was not the sense in which the expression was used in the English authorities on prescriptive rights is indicated by the great case of *Angus* v. *Dalton*. In that case as many as seven of the eighteen judges who handed down opinions concluded that such evidence was immaterial,[9] while the other judges, with one possible exception,[10] expressed no opinion on the point. There seems to be very little in the English decisions to justify the admission of such evi-

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[7] 7 Leigh 546 (Va. 1836).

[8] 74 Mass. 441 (1857).

[9] "I conclude, therefore, that the mere absence of assent, or even the express dissent of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, . . ." 3 Q. B. D. 93, *per* Lush, J.

"neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment." 4 Q. B. D. 172, *per* Thesiger, L. J.

"In such case mere dissent by the owner of the alleged servient tenement will not be sufficient to rebut the presumption." 4 Q. B. D. 186,*per* Cotton, L. J.

"Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right." 6 App. Cas. 766, *per* Lindley, J. Lopes, J., fully agreed with Lindley, J. See 6 App. Cas. 767.

In 6 App. Cas. 771, Manisty, J., after holding the presumption was one of law, said: "If the presumption be one of law, it follows that neither positive acquiescence, nor a grant of support as a matter of fact, by the owner of the neighboring soil is requisite for the acquisition of the right in question."

Fry, J., in the case of a right of way was of the opinion that acquiescence involved the power to prevent the act either by an act on his part or by action in the courts and the abstinence by him from such interference for the requisite period. See 6 App. Cas. 774.

[10] See opinion of Bowen, J., 6 App. Cas. 779.

dence, particularly where the owner has power to interrupt the user both by physical acts and by suit at law.

The great difficulty in considering this question is the fact that the lost grant is a fiction. It would be just and proper to consider the protests of the alleged grantor if the lost grant were being proved as a reality, but it seems somewhat absurd to try to determine whether or not certain evidence tends to prove a fictional grant. If the purpose of resorting to the fiction was to establish a method by which prescriptive rights may be acquired by long continued user, it would seem far better to have a fixed arbitrary rule of law as to what is essential to create such right than to submit a lot of miscellaneous evidence to the jury under directions which authorize them to find a lost grant where everyone concerned knows none in fact existed. The difficulties of the English courts have been chiefly due to the so-called negative easements such as the right of support of buildings and the easements of light and air. The reason for their embarrassment in these cases is the servient owner's inability to interrupt the user either by physical acts or action by law. In this country such easements cannot be acquired by adverse user.[11] In the case of user which involves actual trespass the landowner can lawfully obstruct the user at any time. He is in a more advantageous position even than is one who is ousted from possession of land, for the latter can seldom regain possession without resorting to an action at law. Hence in this country the landowner can always bring an action at law and in most cases he can obstruct the use in such a way as to cause interruption. While verbal protests by the landowner may tend to show a weak objection to the user, yet, on the other hand, if the user is continued in spite of such protests it shows a strong claim of right which should more than counteract the effect of the protests. As was well stated by the Supreme Court of Tennessee:

> "The mere fact of making an objection, would not interrupt the adverse character of the user by the party claiming it; on the contrary the principles we have cited, showing that the holding must be adverse to the owner of the land, would favor the view, that if there had been a holding notwithstanding the objection made, that it would thereby be shown more distinctly to be adverse, than if no such objection had been made. It would certainly serve to show satisfactorily that

[11] 2 TIFFANY, REAL PROPERTY, 2 ed., 2039-40.

> the right had been asserted and enjoyed, with the knowledge of the owner of the land, and as such, adverse to any claim he had to prevent it."[12]

The same argument was made in the leading New Jersey case:

> "Protests and remonstrances by the owner of the servient tenement against the use of the easement, rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruption or obstruction of the enjoyment."[13]

Clearly in cases where there is no actual dissent by the landowner the recognition and assent to the user is only apparent and resulting litigation usually shows there never was any real assent. Where the claimant persists in the user in spite of objections of the servient owner the claim of adverse right is vigorously asserted. This claimant insists on the right and acts accordingly. Why should mere protests without other action have such great weight? In most cases the landowner can stop the user without even bringing a suit by merely obstructing the user.

In a recent case in West Virginia[14] the servient owner had put up gates across the way and kept them locked for about a year, but it appeared that persons accustomed to use the way, including the owner of a part of the claimant's land, broke the locks and passed through whenever they desired so there was no actual interruption of the user. The court held that the prescriptive right had been acquired. This seems inconsistent with the doctrine that mere protests are enough to prevent the presumption of a lost grant, for obstruction of the way by means of locked gates certainly ought to be more effective than mere protests against the user even though no actual interruption of the user resulted. It is submitted that under the doctrine under discussion this constituted strong proof of lack of acquiescence for the period of a year and consequently no presumption of a lost grant should arise until after ten years user subsequent thereto. On principle, in so far as the decision indicates a tendency on the part of the court

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[12] Ferrell *v.* Ferrell, *supra*, 336.
[13] Lehigh Valley RR. Co. *v.* McFarlan, *supra*, 630.
[14] Staggers *v.* Hines, 104 S. E. 768 (W. Va. 1920).

to limit or overrule the doctrine that mere protests against the user are sufficient to prevent the acquisition of prescriptive easement, the decision is to be commended. However, the result reached would probably have been quite justified under the evidence had the point above discussed been disregarded, because the prescriptive right was probably complete before the gates were erected across the way. —J. W. S.

DUTY OF AN INFANT TO RETURN CONSIDERATION AS A PREREQUISITE TO DISAFFIRMANCE.—The natural incapacity and improvidence of an infant, due to his immature years, has caused the law to hedge him around with certain legal protections. Among the chief of these is the power to disaffirm his contracts. That the use of this extraordinary power, under any circumstances, contains the possibility of great hardship upon the adult who has ventured to contract with the infant is obvious. The law, therefore, should allow its exercise only to the minimum extent necessary to carry out the purpose of the law in granting it to him. In other words, the law should be careful to see that the adult who has contracted with him suffers no more harm than is requisite to protect the infant from indiscretions due to his unripe judgment. Approaching the question from this viewpoint the inquiry becomes this: In what cases is it essential to the protection of an infant that he be allowed to avoid his contract without, as a condition precedent, returning the consideration?

In discussing this point it has been common to draw a distinction between contracts wholly executed and those executed only on the part of the adult.[1] In the latter case it is said that return of the consideration is not a prerequisite to disaffirmance; in the former it may be. There seems to be no sound reason for such a distinction.[2] There is just as much hardship on the infant where he is prevented from getting back what he has given unless he disgorges what he has received as where he is compelled to hand over the same thing if he does not disgorge. The fact that he is not the acting party seems immaterial.

Assuming, then, that there is no difference between wholly ex-

[1] See Eureka *v.* Edwards, 71 Ala. 248, 249 (1881); Mustard *v.* Wohlford, 15 Gratt. 329, 343 (Va. 1859); Bedinger *v.* Wharton, 27 Gratt. 857, 871 (Va. 1876). See also PECK, DOMESTIC RELATIONS, 224. These cases do not apply the distinction where the infant no longer has the consideration.

[2] See Gillespie *v.* Bailey, 12 W. Va. 70, 92 (1877).