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Elements of an Adverse User Sufficient to Start the Statute of Limitations Running - Prescriptive Easement - Wilson v. Waters

ELEMENTS OF AN ADVERSE USER SUFFICIENT TO START THE STATUTE OF LIMITATIONS RUNNING—PRESCRIPTIVE EASEMENT

Wilson v. Waters[1]

This was an appeal from the Circuit Court of Howard County, as to three judgments there entered against defendant Wilson. The controversy arose through a claim of easement by prescription over a dirt road running between two adjoining lots in North Laurel. The three plaintiffs owned houses situated on the northernmost lot; defendant owned the lot adjoining plaintiffs' property on the south. Both lots fronted on the same avenue. The road, described in the testimony as a country lane between 18 and 20 feet wide, began at the avenue and ran along the northern line of defendant's land. In their respective suits, which were consolidated and tried together, plaintiffs alleged that they had used the road, without asking permission of anyone, as a means of access to the rear of their houses, for a period in excess of 20 years. The testimony further showed that plaintiffs had undertaken to keep it in repair, by putting stones on it when necessary, and by the addition to it of a large amount of plaster. The defendant had erected a fence along the northern line, and a gate across the road at the intersection of the avenue, which gate was then locked. Subsequently, the defendant removed the gate and extended the fence across the road, thus depriving the plaintiffs of its use. Defendant's motions for directed verdicts were denied by the trial court, after which the jury awarded verdicts in favor of the plaintiffs for the sum of Five Dollars in each case. On appeal, the verdicts were unanimously affirmed by the Court of Appeals.

The Court pointed out that it is well settled that adverse possession, sufficient to give marketable title to land, must be open and notorious, continuous and exclusive, and that under the Statute of 21 James I, ch. 16 (1623), the Statute of Limitations,[2] no person having a right of entry into any land shall enter thereunto but within 20 years after the accrual of such right. This has always been the law in Maryland.

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[1] 64 A. 2d 135 (Md. 1949).

[2] This Statute is in force in Maryland, by virtue of the Md. Declaration of Rights, Art. 5, which adopted the common law and applicable statutes of England existing as of July 4, 1776. See 2 Alex. Br. Stat. 599.

The Statute of Limitations was designed by Parliament to apply solely to corporeal rights; there is nothing in the Statute itself which is *ipso facto* applicable to incorporeal interests. The Court states, however, that: "While the Statute of Limitations does not apply to adverse user of another's land by mere enjoyment of an easement, nevertheless the Statute applicable to re-entry into land has been made applicable by analogy to incorporeal rights."[3] On this point there is substantial unanimity among the authorities. A frequently cited work states: "In this country the courts have usually followed the analogy of the statute of limitations applicable to actions for the recovery of land, with the effect that one who has exercised as of right a user in another's land for the statutory period, is regarded as having a right of user to that extent, the length of the period of prescription changing as the statutory period is changed."[4] The Court of Appeals of New York, in *Klin Co., Inc. v. N. Y. Rapid Transit Corporation*[5] held that: "This court is committed to the view that the doctrine of prescription is to be treated as the application to incorporeal rights of the statutes of limitations within the limits of the strong analogy between the two rules."

Under this analogy to the case of adverse possession and the Statute of Limitations, the claimant, in order to acquire a prescriptive right, must prove an adverse, exclusive and continuous use of the way for the duration of the statutory period.[6] There is little if any disagreement among the courts and text-writers as to the theory of such a user. The doctrine of prescription is based on the theory that if one makes use of another's land, without permission, and the owner fails to interfere to prevent such use, such acquiescence, on the part of the landowner, in order to discourage litigation, and also to obviate the difficulty of proving title after lapse of time, is to be considered as evidence that the user is rightful.

The term "rightful" is commonly used in the sense that easements by prescription were originally based on the presumption that there had been a grant of the contested right, but that the grant had been lost. This was a legal fiction designed to confuse no one, being engendered as a

[3] *Supra*, n. 1, 137.

[4] 4 TIFFANY, REAL PROPERTY (3rd ed. 1939) sec. 1191.

[5] 271 N. Y. 376, 3 N. E. 2d 516 (1936).

[6] See: Waters v. Snouffer, 88 Md. 391, 41 A. 785 (1898); Hansel v. Collins, 180 Md. 209, 23 A. 2d 686 (1942); Smith v. Shiebeck, 180 Md. 412, 24 A. 2d 795 (1942); Condry v. Laurie, 184 Md. 317, 41 A. 2d 66 (1945), Note, *Ways of Necessity—Implied in Law or Implied in Fact* (1948) 9 Md. L. Rev. 84; Punte v. Taylor, 53 A. 2d 773, 777 (Md. 1947).

means of subverting the rule of pleading requiring profert. There has been in the past a considerable difference of opinion among the courts as to the conclusiveness of this presumption. In its infancy, the fiction was regarded as a presumption of fact only, and rebuttable as such. Gradually, however, many of the courts—perhaps a majority—began to hold that the presumption arising from this fiction was irrebuttable and conclusive.[7] The result of these decisions, in effect, was that the presumption came to be regarded as no presumption at all but as a positive rule of substantive law, thus raising the fiction of a lost grant to the level of a *praesumptio juris et de jure.*

Some jurisdictions, however, continued to consider the presumption of a grant rebuttable.[8] In the long run, it is this latter view which has prevailed, in the sense that it is now generally held that the presumption can be rebutted by showing that the use was by express permission, or that the owner of the servient tenement was under a legal disability, and could not, therefore, give consent or legal acquiescence, or, in other words, by the interposition of any of the excusatory pleas that are open to a plaintiff in ejectment against a plea by the defendant of the Statute of Limitations.[9]

There are no grounds of discord among the various courts as to the *indicia* of the individual elements of an adverse use. While it is true that the language used, as between any two given courts, is sometimes mildly different, the result is generally the same. It remains, however, difficult to find an exact statement of what is meant by the term "adverse". It is everywhere conceded that to be adverse the user must be inconsistent with the rights of the landowner, in the sense that there must be some actual invasion or infringement of the rights of another, which must not be accompanied by any express or implied recognition of the right of the landowner to put a stop to it, since an admission, by the person claiming the easement, of a superior right in the owner of the servient tenement is fatal to the claim. It is fundamental that the user must be such as to give rise to a cause of action, since if the landowner cannot interfere with it, he cannot be deprived

[7] See: Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, 619 (1881); Ward v. Warren, 82 N. Y. 265 (1880); Dalton v. Angus, L. R. 6 App. Cas. 740 (1881).

[8] See: Worrall v. Rhoads, 12 Whart. 427, 30 Am. Dec. 274 (Pa. 1837); Eells v. Chesapeake & O. R. Co., 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787 (1901).

[9] See: Boyce v. Missouri Pacific R. Co., 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442 (1920).

by it of any of his rights. There is frequently coupled with this requirement of adversity of use the additional requirement that the user be exercised under a "claim of right". The use of this term has not been fortunate. The courts have experienced some difficulty in defining it. Generally, it is dealt with by the application of the rule that it is sufficient if the assertion of such claim of right can be inferred from the nature of the user itself. Thus the Court of Appeals in the instant case stated: "It may be stated as a general rule that when a person has used a roadway over the land of another openly and continuously and without objection for twenty years, it will be presumed that the use has been adverse under a claim of right, unless it appears to have been by permission. To prevent a prescriptive easement from arising from such use, the owner of the land has the burden of showing that the use of the way was by license inconsistent with a claim of right."[10]

In requiring that the use be a continuous one, the courts imply a use continuing over the prescriptive period. It is by no means necessary that the use be a daily one, or one denoting regularity measurable in any other length of time. The general requirement is that the use be of such frequency as to put the landowner on notice as to its enjoyment. In *Cox v. Forrest*[11] it was held that: "Nor does the law mean by 'an uninterrupted and continuous enjoyment' that a person shall use the way every day for twenty years, but simply that he exercises the right more or less frequently, according to the nature of the use to which its enjoyment may be applied . . . and under such circumstances as excludes the presumption of a voluntary abandonment on the part of the person claiming it."

An examination of the term "exclusive" points up the one instance in which the general affinity between the rules of adverse possession and adverse user breaks down. "Exclusive", in its application to the doctrine of adverse possession, has always meant that to acquire title the disseisor must demonstrate an intent to exclude all and sundry, *i.e.*, he must claim as against the world at large. But it has long been recognized that such is not the connotation of the term when it is applied to adverse user. As to this, the Court states: "We recognize, however, that while adverse possession . . . must be absolutely exclusive, the

[10] *Supra*, n. 1, 138; Hansel v. Collins, *supra*, n. 6; Smith v. Shiebeck, *supra*, n. 6.

[11] 60 Md. 74, 80 (1883); see also, Stuart v. Johnson, 181 Md. 145, 149, 28 A. 2d 837 (1942); Annot., 98 A. L. R. 1291.

user essential for establishing an easement is exclusive in the limited sense that the claimant's right must not depend for its enjoyment upon a similar right in others, and, though claimant may not have been the only one who used it, he used it under a claim of right independently of all others."[12] This is the doctrine strongly pronounced in *Cox v. Forrest,* a leading case on the subject. In the instant case, the evidence showed that no one had been denied the use of the road, and that tradesmen had used it for their respective purposes. The Court held that the physical acts of the plaintiffs, previously alluded to, in repairing the road, indicated a use sufficiently distinguishable from the general use,[13] and that the tradesmen were visitors whose right of passage was based upon the claim of right of the owners of the houses. This position is further strengthened by adoption of the rule announced in *Hall v. Backus,*[14] to the effect that if a road led at its start only to the premises of the persons using it, such circumstance is sufficient to prove their user under a claim of exclusive right, in the absence of proof to the contrary, and if user of a road is commenced in such a manner as to make it adverse and exclusive, it does not lose its adverse character as a result of the joinder of the public therein.

The result of this decision, and of the other Maryland cases cited, is to place Maryland in line with the growing modern tendency to disregard the fiction of a lost grant. By analogizing the rules of adverse possession and adverse user as to the application of the statutes of limitations the courts have wisely avoided the necessity of resort to the earlier fiction, and have developed a more positive rule with which to work. The doctrine of a lost grant may have served a useful purpose, in its time and place, but no justification for its continued existence remains when the courts have developed a simpler and more direct approach.

It is sometimes said that prescriptive rights do not enjoy the particular favor of the law, in that the law does not favor forfeitures.[15] While it is true that the law in no way favors adverse possession, it does not follow from this that the doctrine of prescription is viewed with disapprobation. The Court of Appeals stated: "An ease-

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[12] *Supra,* n. 1, 137; see also TIFFANY, *op. cit., supra,* n. 4, sec. 1199; 28 C. J. S., 657; WASHBURN, EASEMENTS (4th ed. 1885) 164; Annot., 111 A. L. R. 221; Marta v. Trincia, 22 A. 2d 519 (Del. Chan. 1941); DeShields v. Joest, 109 Ind. App. 383, 34 N. E. 2d 168 (1941).

[13] See: Pirman v. Confer, 273 N. Y. 357, 7 N. E. 2d 262 (1937).

[14] 92 W. Va. 155, 114 S. E. 449 (1922).

[15] See, *e.g.,* Long v. Leonard, 191 Wash. 284, 71 P. 2d 1, 4 (1937).

ment over (the defendant's) land by prescription is sanctioned by public policy."[16] Though the granting of a prescriptive easement is determinative of a corresponding loss or forfeiture of right by another, there is no great hardship in a rule which dictates that the owner of a servient tenement may not successfully sleep on his rights. This is especially apparent in those states in which the prescriptive period is quite long, as in Maryland. There can be little quarrel with the rule that long-continued peaceful enjoyment of property rights should not be disturbed, and with direct rather than fictional justification for its application.

[16] *Supra*, n. 1, 139; Lehigh Valley R. R. Co. v. McFarlan, *supra*, n. 7; Board of Education, etc. v. Nichol, 70 Ohio App. 467, 46 N. E. 2d 872 (1942).