used practically as a private yard, did he raise any objection to such user, or intimate that he was entitled to a right of way which was being unlawfully interfered with. Thus acquiescing in the user these various occupants were making of the strip, his enjoyment was not open and notorious, manifest to the world, and would not have conveyed to the mind of the owner of the servient tenement the fact that plaintiff was asserting a claim that would, if acquiesced in, ultimately ripen into a right. Rather it was calculated to create the opposite impression, that plaintiff made no claim, but by the favour of others was willing to enjoy a privilege which might at any moment be terminated, if he were to manifest an adverse attitude. Such conduct appears to me wholly irreconcilable with the theory of a lost grant, presumption of which is necessary in order to his succeeding, but lost grant is presumed only where the circumstances are such as would have existed if, in fact, there had been a grant; per Field, J., in Dalton v. Angus (supra) 756.

When the circumstances are not such, or when it appears very improbable that a grant ever was made, then in either case the presumption does not arise: Goddard's Law of Easements, 5th ed., p. 191; and title by prescription to a way resting upon the legal fiction of lost grant, the absence of such presumption defeats the claim.

To give rise to such presumption it was necessary for plaintiff to have shewn continuous actual enjoyment "as of right" for a period of 20 years next before the commencement of this action. Having failed to do so, he has failed to establish a title by prescription, and his action fails.

Further, plaintiff's testimony was to the effect that he used the strip in the belief that it formed part of the public street.

Therefore he was enjoying it as one of the public, and not as of right, within the meaning of the statute, which applies only to a case of dominant and servient tenement.

His form of action, as at present constituted, being based upon the statute and the doctrine of lost grant, he is not entitled to set up a case resting upon a different kind of enjoyment: Shuttleworth v. Le Fleming, 19 C. B. N. S. 709. Even if this difficulty in plaintiff's way were removable by amendment, I am unable to see such merit in his case as entitles him to leave to amend.