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**Adverse Possession of the State's Property**

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ADVERSE POSSESSION OF THE STATE'S PROPERTY

John W. Fisher, II

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I. INTRODUCTION

"At common law, no lapse of time barred the king's title, the maxium of the law being 'nullum tempus occurrit regi[.]'"\(^1\) and the common law rule was the rule in Virginia at the time West Virginia gained statehood in 1863, and was initially the rule in West Virginia.\(^2\) However, just five years later, West Virginia enacted a statutory provision which provided, "[e]very statute of limitation, unless otherwise expressly provided, shall apply to the state, but as to claims heretofore accrued, the time shall be computed as commencing when this chapter takes effect."\(^3\)

The successor of this statute is found in West Virginia Code section 55-2-19, which reads: "Every statute of limitation, unless otherwise expressly provided, shall apply to the State."\(^4\)

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\(^1\) See Raleigh Colston Minor, The Law of Real Property 1218 (Frederick Deane Goodwin Ribble ed. 1928).


\(^3\) Barnes' Code of W. Va. c. 35, s. 20 (1870).

\(^4\) W. Va. Code § 55-2-19 (2010). The phrase, "but as to claims heretofore accrued the time shall be computed as commencing when this chapter takes effect" was dropped in 1882.
In 1903, as the twentieth century dawned, the court, speaking of this statute, said,

Shall we always make a statute do what we are sure will work a result not intended by the Legislature, simply because to do so would be justified by its letter, when we know there are other instances where conformity to its letter will attain the real purpose, as if we give this statute application against the state as to its demands for money and property rights vested in it as a private owner, and not held in trust for actual use in the exercise of governmental functions?\(^5\)

However, nearly one hundred years later, as the twentieth century drew to a close, as to this same statute the court noted,

Indeed, this Court has recognized that we have no authority to construe a clear and unambiguous statute: '[w]hen a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.'\(^6\)

As it relates to the subject of this article, it is important to note that the court in Kermit Lumber further stated: "Because the matter now before us does not involve adverse possession, we decline to further address whether title of public lands by adverse possession may be obtained."\(^7\)

Why did the court in 1903 seemingly ignore the plain and unambiguous language of the statute to follow the unexpressed legislative intent and why did the court in 1997 leave the application of the statute to cases involving adverse possession of state-owned real property to another day? At best, we can only speculate as to the answer to these questions, but a reading of the cases applying this section of the Code provides an insight into the concern of the court and at a minimum provides a reason for the legislators of today to consider whether the statute should be amended to "protect" state-owned property held for governmental purpose from being "lost" to individuals through adverse possession.

II. STATEHOOD

Professor Robert M. Bastress provides a concise and very informative history of the constitutions of West Virginia, in his book on the West Virginia

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\(^7\) Id. at 910.
Constitution. In his work, he described the geographical, social, economic and political factors that helped to shape the three constitutions of Virginia and West Virginia's two constitutions. One of the "problems" that Virginia had struggled with for a number of years and that West Virginia inherited upon statehood were the numerous disputes over the land titles in many areas of our state. The early case of McClure v. Maitland provides a basis understanding of the problems that state government faced regarding the ownership of large segments of land in our West Virginia. As explained by the court in Maitland:

Shortly after the declaration of independence the General Assembly of Virginia by statute, passed in May, 1779, established a land office for the State and made provision for selling and granting the extensive domain of unappropriated lands belonging to the commonwealth and for ascertaining and fixing the rights of occupants and holders of lands theretofore settled and appropriated. Under this statute and the subsequent amendments thereto, nearly all the lands lying west of the Alleghany mountains in what is now the territory of West Virginia were granted. According to its provisions any person, upon the payment into the treasury of two cents per acre, could obtain from the register of the land office warrants for as much land as he might desire to enter. These warrants authorized the holders to locate the quantity therein specified upon any waste and unappropriated lands they might select; and they were required to enter and have their lands so located surveyed within a fixed time and return their surveys to the register. The Governor then issued a grant to the owner of the survey for the land therein described, and the title of the commonwealth was thereby transferred to and vested in her grantees.

The result of this loose, cheap and unguarded system of disposing of her public lands was, that in less than twenty years nearly all of them were granted—the greater part to mere adventurers, in large tracts, containing not only thousands but frequently hundreds of thousands of acres in one tract. The grantees were often non-residents and few of them ever saw their lands or expected to improve or use them for purposes other than speculation. The entries and surveys were often made without reference to prior grants, thus creating interlocks and covering land

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previously granted, so that in many instances the same land was granted to two or more different persons. Sometimes upon one survey actually located others were constructed on paper by the surveyors without even going upon or seeing the lands, thus making blocks of surveys containing thousands of acres none of which were ever surveyed or identified by any marks or natural monuments.  

The Maitland decision chronicles the various unsuccessful efforts of the Virginia General Assembly to collect taxes, re-grant the lands, and secure settlement and improvement on much of the land west of the Alleghany Mountains.

It was the system for the sale of forfeited and delinquent lands that was in force in Virginia at the time of West Virginia statehood that was implemented into our state's first constitution as article IX of the Constitution of 1863 and which was later incorporated and expanded in article VIII of the Constitution of 1872.

As will be seen in some of the cases discussed below, it is against this backdrop of the efforts of Virginia and then West Virginia to get forfeited and delinquent lands into the hands of taxpayers that the predecessor of West Virginia Code section 55-2-19 was enacted. West Virginia's first statutory provision applying the statutes of limitation to the State was enacted in 1868 in chapter 35, section 20 and stated, "[e]very statute of limitation, unless otherwise expressly provided, shall apply to the state, but as to claims heretofore accrued, the time shall be computed as commencing when this chapter takes effect."  

At the same time this statute was adopted, the legislature also enacted provisions dealing with methods to get forfeited, delinquent, waste and unappropriated lands out of the state and into taxpayers' hands.

III. DOES THE STATE’S IMMUNITY ALSO APPLY TO MUNICIPAL CORPORATIONS?

The first case in which the court was asked to apply chapter 35, section 20, i.e. whether the statute of limitation would run against "the state," was City of Wheeling v. Campbell. The case involved a twenty-one inch encroachment for a distance of forty feet into Tenth Street in the city of Wheeling. Tenth Street was sixty-six feet wide. The landowners (the defendants) claimed title to

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10 Maitland, 24 W. Va. at 563–64.
11 BARNES' CODE OF W. VA. c. 35, s. 20 (1870). In 1882, the statute was shortened to the current working, i.e. "Every statute of limitation, unless otherwise expressly provided, shall apply to the state." BARNES' CODE OF W. VA. c. 3, s. 20 (1884).
12 See generally W. VA. CODE §§ 31-1-44 (1870).
13 12 W. Va. 36 (1877), overruled in part by Syl. pt. 6, Ralston v. Town of Weston, 33 S.E. 326 (W. Va. 1899) [hereinafter Ralston].
the twenty-one inch strip by adverse possession.\textsuperscript{14} The city’s response to the defendants’ claim of title by adverse possession was that the statute of limitations did not apply to the city under the maxim, \textit{nullum tempus occurrit regi}.\textsuperscript{15}

After reviewing the decisions in a number of our sister jurisdictions, and acknowledging there was a split of authority as to whether the maxim \textit{nullum tempus occurrit regi} applied to municipal corporations,\textsuperscript{16} the court opted to follow those jurisdictions which had held that the sovereign’s immunity did not extend to municipal corporations. In so holding, the court did recognize that the justification for the common law rule was still applicable to the “state.”\textsuperscript{17}

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\textsuperscript{14} \textit{Id.} at 46.
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.} at 66.
\textsuperscript{17} We see no reason why municipal corporations should not be held to the same degree of diligence in guarding their streets and squares from encroachments as natural persons are in protecting their property from the adverse claims of others. We do see great reason why no time should bar the sovereign power, because the officers of the sovereign, whether king or state, have such various and onerous duties to perform, that the rights of the sovereign may be neglected; and all the people of the kingdom or state are interested in having the rights of the sovereign preserved intact, and not subject to be impaired or lost by the neglect of officers; but the same reason does not apply to a municipal corporations. A city or town is a compact community, with its city or town council, its committee on streets and alleys, and its street commissioner, whose special duty it is to see that the streets and alleys and squares are kept in proper order and free from obstructions and encroachments. And if with all this machinery and power confined to so narrow a compass and the interest of the corporation to exercise it, the city authorities permit an individual to encroach upon the streets, alleys or squares of the city and hold, enjoy and occupy the same, claiming them as his own under his title, without interruption or disturbance in that right, for the period prescribed in the statute of limitations, the city not only does, but we think according to reason as well as authority, ought to lose all right thereto. In Virginia it has always been held that the maxim \textit{nullum tempus &c.,} applies to sovereignty, and Judge Lee in \textit{Levasser v. Washburn,} 11 Grat. 572, in giving the reason for the maxim said: “The reason sometimes assigned why no laches shall be imputed to the king is, that he is continually busied for the public good, and has not leisure to assert his right within the period limited to subjects. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. This reason certainly is equally if not more cogent in a representative government, where the power of the people is equally if not more cogent in a representative government, where the power of the people is delegated to others, and must be exercised by them if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country, when they succeeded to the rights of the king of Great Britain, and formed independent governments within their respective States.”
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\textit{Id.} at 66–68.
It is important to note that the court in Campbell opined that it was logical for the common law rule to still apply to the state, and as to the recently enacted statute, the court said:

This principle we approve, and regard the exemption from the effects of limitation statutes, as essential to the well-being of the government of the State; but this exemption belongs and appertains to sovereignty alone. The reason for it is very apparent. If the statute of limitations would run against the State, her public lands, if she had any, would be liable to be taken from her by squatters, who would hold them for the time prescribed by the statute, and defy the State; and in those portions of the State sparsely populated there would be few or none to complain, as it would be the cheapest way to obtain lands from the State. The highways of the State would be liable to be impaired or destroyed by encroachments, and the country not being thickly settled, and the neighbors all acquainted with each other, and the State officers being remote from those highways, there would perhaps be little complaint. But in a city or town, where so many people are to suffer inconvenience by such encroachments, and the officers of the city or town are on the spot, such encroachments are not apt to be tolerated for a long period; and they would be less likely to be tolerated, if it were known that an uninterrupted possession of a street, alley or square, would in a certain number of years give title to the occupier. The wholesome doctrine, that no time shall bar the State, has been abolished by a section in the Code of West Virginia, which if allowed to remain until ten years after it went into operation, may be fruitful of much mischief in this State. It is section 20 of chapter 35, and is as follows: “Every statute of limitation, unless expressly provided, shall apply to the State, but as to claims heretofore accrued, the time shall be computed as commencing when this chapter takes effect.” This statute has no application to this cause, because after the time commenced to run, ten years had not elapsed before the suit was brought. The right to bring suit to recover land in this State is barred in ten years. It is clearly proved in this cause, that the defendants and those under whom they claim, had prior to the institution of this suit forty years uninterrupted, open, notorious and continuous possession to the portion of Madison street in controversy, under claim of title thereto; and such adverse possession gives the defendant the right to hold the same.\textsuperscript{18}

\textsuperscript{18} Id. at 69.
It is interesting to note that in reviewing the decisions from our sister jurisdictions, the court discussed a secondary authority on municipal corporations which recognized a distinction between a municipal corporation’s property held in public trust as contrasted with such property held for private purpose. 19

Four years after deciding City of Wheeling v. Campbell, the court reaffirmed its holding in Forsyth v. City of Wheeling. 20 In Forsyth, the court held

19 Judge Dillon, in his work on Municipal Corporations, collects the cases on this subject in his notes, and comes to the following conclusion in section 533:

Upon consideration, it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, have in some respects a double character: one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on a contract or for tort, a municipal corporation may plead, or have pleaded against it, the statute of limitations. But such a corporation does not own, and cannot alien public streets or places, and no laches, on its part, or on that of its officers can defeat the right of the public thereto; yet there may grow up in consequence private rights of more persuasive force in the particular cause than those of the public. It will perhaps be found that cases will arise of such a character, that justice requires that an equitable estoppel shall be asserted even against the public; but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine, that as respects public rights municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estoppel or not, as right and justice may require.

Campbell, 12 W. Va. at 50.

As to the author of the work on “Municipal Corporations,” the Court in Campbell noted Judge Dillon’s inconsistency as the justice who wrote the opinion in City of Pella v. Scholte, 24 Iowa 283 (1867), which held the statute of limitation applied to Municipal Corporation, and his opinion as author as follows:

This is the same Judge Dillon, who not long after the above opinion was announced published his excellent work on “Municipal corporations,” in which he says, in sec. 533: “The author cannot assent to the doctrine, that as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle.” What new light had dawned upon the distinguished judge after had had written his lucid opinion in Pella v. Scholte? He certainly had not ascertained that the current of the decisions on the subject was against him; for the review we have made of the authorities cited in his notes shows, that to sustain his opinion they are as a river, while to support his text in his work they are as a rivulet. We think he was right in his opinion, and wrong in his text book. The judge in this case is better than the author.

Campbell, 12 W. Va. at 65.

20 19 W. Va. 318 (1882). “I consider the case of the City of Wheeling v. Campbell as conclusive of this case. There it was held, that the statute of limitation applied as well to municipal corporations as to individuals.” Id. at 322 (citation omitted).
that injunctive relief was appropriate to prevent the city from opening a street until it had obtained the right to use and possess the plaintiff's property, acquired by adverse possession, by regular condemnation proceeding, and that the city was liable for damage it had caused by wrongfully opening and using the street.  

The statute was again before the court in Calwell's Executor v. Prindle's Administrator, a case involving a judgment obtained by the State of Virginia prior to West Virginia's statehood. For present purposes, the relevant portion of the opinion involves the discussion of the status of the law in West Virginia at the time it obtained statehood. As to the statute of limitations applying to the state, the court explained:

No statute of limitations could, or did run, against the State of Virginia as to said judgments certainly prior to the 20th day of June, 1863; for the Statute of Law of Virginia provided, that no statute of limitations, which shall not in express terms apply to the Commonwealth, shall be deemed a bar to any proceedings by, or on behalf of, the same. Code of 1860, ch. 42, sec. 23. This, however, was the settled law in the absence of such statute law (citations omitted). The Code of Virginia of 1860 so far, as not repugnant to the Constitution of this State and not amended or repealed by the Legislature, continued to be law in this State until the Code of 1868 of this State took effect on the 1st day of April 1869.

After explaining the status of the judgments involved in the case before it, the court noted:

This continued to be the law in this State in reference to the Statute of Limitations as against the State, until the Code of 1868 of this State took effect. The 20th section of chapter 35 of this Code provides, that "every statute of limitations, unless otherwise provided, shall apply to the State, but as to claims heretofore accrued the time shall be computed as commencing when this chapter takes effect."

Since West Virginia had filed its petition on November 16, 1877, there had not been ten years since the statute became effective. The first suggestion

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21 See id. at 322.
22 Calwell's Ex'r, 19 W. Va. 604 (1882).
23 Id. at 651–52.
24 Id. at 653.
25 Id.
that the statute of limitations does not run against real property "owned" by the State as a result of forfeiture for non-entry or delinquency in the payment of taxes was \textit{Hall v. Webb};\textsuperscript{26} while the particular issues in the \textit{Hall} case involved the exclusion of time under a Reconstruction Era statute,\textsuperscript{27} the court did note the statute did not run during the time the state held title to the land.

\textsuperscript{26} 21 W. Va. 318 (1893).

\textsuperscript{27} Chapter XXVIII §§ 1 and 2 was approved by the legislature February 6, 1873 and provided:

\textbf{CHAPTER XXVIII.}

AN ACT to exclude a specified period from the computation of the time within which certain suits, proceedings and appeals may be brought, instituted and taken.

Approved February 6, 1873.

Be it enacted by the Legislature of West Virginia;

1. That in computing the time within which any civil suit, motion to recover money, proceeding or appeal shall be brought, instituted or taken, or petition filed to have proceeding reheard, by persons who could not truly make the attachment prescribed by section twenty-seven of chapter one hundred and six of the code of West Virginia, the period from the twenty-eighth of February, 1865, to the passage of this act, shall be excluded from such computation, and upon any proper issue, the affidavit of a party that he could not truly take such oath, shall be prima facie evidence thereof; and in all such suits, motions and proceedings, if the defendant had any claim or cross demand against the plaintiff or plaintiffs on the said twenty-eighth day of February, 1865, which he desired to set up against the plaintiff's demand, the period from the said twenty-eighth day of February, 1865, to the passage of this act, shall, in like manner, be excluded from the time within which such set-off or demand would be barred by operation of the statute of limitation.

2. All acts or parts of acts inconsistent with this act, are hereby repealed.

\textit{W. VA. CONST.} chapt. XXVIII §§ 1–2 (1873).

The affidavit referenced was required by a Reconstruction Era statute which provided:

The said petition, when not presented on behalf of a corporation, shall be accompanied by the affidavit of such defendant or his personal representative, stating the following facts: First, that such defendant never voluntarily bore arms against the United States, the reorganized government of Virginia, or the State of West Virginia. Second, that such defendant never voluntarily gave aid or comfort to persons engaged in armed hostility against the United States, the reorganized government of Virginia, or the State of West Virginia, by countenancing, counseling, or encouraging them therein. Third, that such defendant never sought, accepted, nor attempted to exercise the functions of any office or appointment whatever, civil or military, under any authority or pretended authority, hostile to the United States, the reorganized government of Virginia, or the State of West Virginia. Fourth, that such defendant never yielded any voluntary support to any government or pretended government, power, or constitution, within the United States, hostile or inimical thereto, or hostile or inimical to the reorganized government of Virginia or the State of West Virginia: provided, nevertheless, that if the judgment or decree be against several defendants upon a demand founded on contract, the court may order a rehearing, and permit defense to be made on behalf of all the said de-
The court, in syllabus points 1 and 2, stated the law to be:

1. The Statute of Limitations does not commence to run in favor of an occupant of land, while the title thereto is vested in the State. But the statute does commence to run in favor of such occupant against the grantee of the State from the date of the grant of the land so occupied.

2. Where land had been granted by the State, and an adversary possession had commenced to run against the true owner, and subsequently such land became forfeited to the State under the delinquent land laws, such possession would not be adversary to the State or her grantee after the forfeiture, except from the time the land was regranted or sold by the State.28

In the early 1890s, the court “followed” the City of Wheeling v. Campbell decision in two more cases. In Taylor v. Town of Philippi,29 while holding that the plaintiffs had failed to prove the elements of adverse possession,30 the court did cite the Campbell case as holding the statute of limitations did apply to a municipal corporation.31 In Teass v. City of St. Albans, the court held the plaintiffs had acquired title to a portion of a street in St. Albans by adverse possession, rejecting the city’s argument that the statute of limitations did not run against the city.32

...fendants, if the petition be accompanied by the affidavit of any one of them stating the facts above mentioned. If the petitioner claims to be a citizen of this state, he shall also make and file an affidavit that he will support the constitution of the United States and the constitution of West Virginia, and that he takes such obligation freely and of choice, without any mental reservation or purpose of evasion. Upon the filing of such petition and affidavits, a summons shall be awarded by said court against the plaintiff or his personal representative, commanding him to show cause, if any he can, at the next term of such court, why the defendant, or his personal representative, shall not be permitted to make defense against such judgment or decree, which summons shall be issued by the clerk of such court, and served upon the plaintiff, or his personal representative, at least thirty days before the return day thereof.

28 Hall, 21 W. Va. at 318.
29 14 S.E. 130 (W. Va. 1891).
30 See id. at 133.
31 “If the statute of limitations, in the absence of an express provision to the contrary, runs against a municipal corporation the same as against a natural person. And now, by express provision, it runs also against the state. Section 20, c. 35, Code.” Id. at 131 (citations omitted).
32 “[I]t is contended that there cannot be adverse possession of the street in a city or other highway; that the statute does not run, as to such right, against a municipal corporation. But it is settled otherwise in this state. See City of Wheeling v. Campbell . . . .” Teass v. City of St. Albans, 17 S.E. 400, 405 (citation omitted).
In 1875, the legislature passed a statute which provided that "[t]here shall be no limitation to proceedings on judgments on behalf of the State, or any claim due the State." In 1881, the legislature amended and re-enacted the section of the Code concerning the collection of taxes and left out the provision passed in 1875 providing there was no statute of limitations barring action by the State to collect its judgments or claims due the state. In State v. Mines, the court considered the effect of these legislative actions on section 20 of chapter 35 of the Code, and concluded:

So that we may say that section 20, c. 35, was never repealed by the act of 1875, but that the act of 1875 simply qualified or made an exception to it; and thus section 10 of chapter 13 does not hinder the operation of section 20 of chapter 35 on the repeal of the act of 1875. Thus, I come to the conclusion that when in 1881 the act of 1875 was repealed, section 20 of chapter 35 of the Code at once applied to this judgment, and the statutory bar of 10 years began to run against it on 12th March, 1881, and had fully run when, on 19th November, 1891, this execution issued.

IV. HAVING SECOND THOUGHTS

By 1899, City of Wheeling v. Campbell had been the law in this State for twenty-two years, and its holding had been reaffirmed by the court twice in the preceding ten years.

However, as is evident from the cases discussed below, by the end of the century the court was starting to have some second thoughts as to the soundness of its decisions that cities could lose title to their streets by adverse possession. In 1899, the court handed down its decision in the case of Ralston v. Town of Weston ("Ralston I"), in which Justice Dent, speaking for the court, observed:

It requires great labor and expense to grade, curb, and pave the streets of a town, and it is never done until the exigencies of the public demand it, and unused streets are allowed to lie idle until such requirement, and in the meantime there is no good reason why abutting lot owners may not use unoccupied portions of

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35 Id. at 472.
36 See Taylor v. Town of Philippi, 14 S.E. 130 (W. Va. 1891); Teass, 17 S.E. 400 (W. Va. 1893).
37 33 S.E. 326 (W. Va. 1899).
such street for private purposes, so long as such use does not interfere with, but is entirely subordinate to, the public use thereof. Such has long been the custom, and would continue so, to the benefit of individuals and without hurt to the public, were it not for the baneful effect of the conclusion arrived at by this court in the case of City of Wheeling v. Campbell . . . .

While the court's holding that "on the question of adverse possession, plaintiff has failed to make out his title" decided the case before it, the court observed that "the court would be derelict in its duty not to squarely meet the issues raised, and fearlessly settle them for the public good." The issue to be addressed for the public good was "whether the law justifies the court in reviewing, disapproving, or modifying the doctrines enunciated, and conclusion reached, in the case of City of Wheeling v. Campbell, followed in the cases of Forsyth v. City of Wheeling and Teass v. City of St. Albans, and recognized in the cases of Taylor v. Philippi and Jarvis v. Town of Carlton . . . ."

The court began its discussion stating:

The case of City of Wheeling v. Campbell, while ably considered in following the supposed weight of authority, is a plain and palpable misapplication of the statute of limitations to the sovereign rights of the people. That the statute of limitations applies to municipal corporations there can be no question; that it now applies to the state in like manner as to individuals, by express statutory provision, there can be no question; but it does not apply to the sovereign rights of the people, except as they are restricted in the constitution by their manifest will therein contained. In the case of Levasser v. Washburn, quoted and approved by Judge Johnson in the case of City of Wheeling v. Campbell, Judge Lee says: "It is a maxim of great antiquity in the English law that no time runs against the crown, or, as it is expressed in the early law writers, 'Nullum tempus occurrat regi.' The reason sometimes assigned why no laches shall be imputed to the king is that he is continually busied for the public good, and has no leisure to assert his rights within the period limited to his subjects. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. This reason certainly is equally, if not more, cogent, in a representative government, where the power of the people is delegated to others, and must

38 Id. at 327.
39 Id.
40 Id.
be exercised by these, if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country, when they succeeded to the rights of the king of Great Britain, and formed independent governments in their respective states. And, though it has sometimes been called a prerogative right, it is, in fact, nothing more than an exception or reservation introduced for the public benefit, and equally applicable to all governments.\textsuperscript{41}

The court in \textit{Ralston I} next explained:

The constitution of this state clearly shows in whom all sovereign rights reside. Section 2 of article 2 declares: “The powers of government reside in all of the citizens of the state and can be rightfully exercised only in accordance with their will and appointment.” Section 2, art. 3, declares: “All power is vested in and consequently derived from the people. Magistrates are their trustees and servants and at all times amendable to them.” The people, in their collective capacity, are sovereign. To them all so-called “prerogative rights” belong, and from them they cannot be taken, or in any wise diminished, except in accordance with their own appointment. This state has no so-called “crown lands” or public domain, except its public highways, including roads, streets, alleys, and other thoroughfares devoted to the use of the general public, and also probably a few public squares and buildings. There are no parks which belong exclusively to the general public. State lands are only held temporarily, until they can pass into the hands of private individuals, who will pay the taxes hereon. So that we can say that its highways are the only property the people of West Virginia hold in their sovereign capacity, and in these every individual has the same right, from the least to the greatest, and from which no one, however weak or small or mean, can be excluded. These are dedicated to the public business of the country, to its traffic and commercial interests, and without which the same could not thrive, if even exist. They are the pathways of communication from house to house, town to town, city to city. They are absolute necessities for the happiness, comfort, and well being of the people. The man who would destroy them, if he could, is an enemy to the community, fit only “for treason, stratagem, and spoils.” It matters not whether they be in the town or country, the same protecting ægis watches over

\textsuperscript{41} \textit{Id.} at 327–28.
them, and this is the sovereignty of the people. The public do not hold the title in fee. It may be in the original owner, the abutting lot owners, the municipality, or state, and there it rests in abeyance as long as the land is needed by the public, who hold only an easement therein. This easement is more potent because of its sovereign character, and while it exists entirely suspends the title, or renders it temporarily nonexistent; for no man dare assert it.\footnote{Id. at 328.}

To explain why the statute, i.e. chapter 35, section 20 of the Code is not applicable to the present situation, the court noted:

The word "state" is generally used to denote three different things, and often without discrimination: First, the territory within its jurisdiction; second, the government or governmental agencies appointed to carry out the will of the people; and, third, the people in their sovereign capacity. The state is not the sovereign in this country. The people who make it are sovereign, and all its officers are but their servants. So, statutes of limitations, which are made to apply to the State, do not apply to the people or their public rights. But they only apply to the state in the same cases that they apply to individuals. The entry upon, or recovery of, lands held for sale, suits on bonds, contracts, evidences of debt, or for torts,—all these, though the state is a party, are subject to bar. As to all such things, there is no reason why the state should have any longer time than individual. Such is not the case with the right of taxation, the right of eminent domain, the right to use the public highways, and other rights, which pertain only to the sovereignty of the people. None of these can ever be lost by the negligence of the public servants, who have no power of disposal over them in any way whatever, except according to the express will of the people. It would be a strange thing for an individual to plead the statute in bar of the right of eminent domain, which is said to be the right of the people to take private property for public use. The right to keep it for public use should be as extensive as the right to take it; for one would be useless without the other. The former is said to be an attribute of sovereignty, and why not the latter?\footnote{Ralston \textit{I.}, 33 S.E. at 328.}
The court explained that the error Justice Johnson made in *City of Wheeling v. Campbell* was “his failure to distinguish the municipality in its private, ministerial, and local governmental capacities from the municipality in its higher governmental capacity as the agent of the public, charged with the duty of preserving the sovereign rights of the people.”

Having recognized that while the term “state” includes within its meaning the people in their sovereign capacity, the court noted that the term “state” as used in the statute meant in the same type of “cases that they apply to individuals,” and concluded its opinion stating:

The doctrine of stare decisis cannot be invoked to perpetuate public nuisances or destroy the sovereignty and welfare of the people. The cases of *City of Wheeling v. Campbell*, *Forsyth v. City of Wheeling*, and *Teass v. City of St. Albans*, in so far as they hold that public easements in the public highways can be destroyed by private individuals contrary to the sovereign will of the people, are hereby disapproved as erroneously propounding the law.

The case was

[R]emanded to the circuit court, with direction that the plaintiff’s injunction be dissolved, and that a mandatory injunction be awarded the defendant, at the plaintiff’s costs, directing the plaintiff to abate the nuisance maintained by him thereon, and that the strip of ground in controversy be restored to Water street, and made subject to the public easement therein, and to be further disposed of according to the principles of equity.

Mr. Ralston did not give up easily nor did the Circuit Court of Lewis County readily comply. As the Supreme Court of Appeals explained in the second *Town of Weston v. Ralston (“Ralston II”)* case,

The circuit court not only failed and refused to award the mandatory injunction directing the plaintiff to abate the nuisance maintained by him on said street, as required by said decree, but, on the other hand, when the municipal authorities undertook to abate the nuisance the said circuit court entertained an action by said plaintiff of trespass on the case for damages

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44 Id. at 329–30.
45 Id. at 330.
46 Id. at 332.
47 36 S.E. 446 (W. Va. 1900).
against said town for removing the obstructions from said street, and also another action by him against said town of unlawful entry and detainer for the possession of said strip of ground upon which plaintiff had maintained the said nuisance, and which strip was by the decree of the supreme court ascertained to be a part of the said Water street; said plaintiff having, after the decree of the supreme court aforesaid, obtained two deeds conveying said strip of ground,—one from W. B. McGary, special commissioner in the case of George C. Cole, trustee of James P. Cole, and others, dated May 15, 1899, and the other from James P. Cole, dated May 13, 1899,—and under which plaintiff claimed that he had a right and title to said strip of land, and to the possession thereof, notwithstanding said decision adverse to his rights as they existed when the case was heard, and also adverse to any and every title and claim of any and every person whomsoever.48

Following the summary of Mr. Ralston’s action since the decision in the earlier case, the court said the only question was whether Ralston could be successful in his efforts to re-litigate the case “by procuring paper titles, which never pretended to claim the particular strip of ground in controversy, and under which possession of said strip was never held for a single hour, successfully contest the rights of the town.”49 Justice McWhorter, who had been on the court when the case was before it in 1899, speaking for the court stated:

The decision in the case of Ralston v. Town of Weston forever settled the question that the town has an easement over the strip of land inclosed by Ralston, and which was in said cause in controversy, which, under the rulings in said case, is good against any and all titles, and is binding on the world. I deem it wholly unnecessary to enter into a discussion of the many questions argued in the briefs. It seems to me that a statement of the case alone is sufficient, the matters at issue having been fully and finally disposed of in the said case of Ralston v. Town of Weston . . . . The decree of the circuit court is set aside, reversed, and annulled, and, this court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that the injunction granted in this cause on the 12th day of June, 1899, by the Honorable G. W. Farr, Judge of the Fourth judicial circuit of West Virginia, be, and the same is hereby, made perpetual; that the actions of trespass on the

48 Id. at 447.
49 Id. at 448.
case and of unlawful entry and detainer brought by Er. Ralston against the town of Weston, as set out in the bill, be dismissed; and that said deeds from James P. Cole to Er. Ralston, dated May 13, 1899, and from W. B. McGary, special commissioner for Er. Ralston, dated May 15, 1899, conveying the strip of land in controversy, be, and they are hereby, set aside and annulled in so far as they becloud the public easement over said strip of land, and said Er. Ralston is perpetually enjoined from further litigating the public right to said easement, as an effort to maintain and continue in force a public nuisance, in derogation of the sovereignty of the people of the state.\(^{50}\)

Judge Brannon, who had also been a member of the court when the case was decided the first time, wrote a concurring opinion in which he noted:

We are asked to reconsider and overrule the decision of this court in *Ralston v. Town of Weston*; holding that the statute of limitations, under adverse possession, does not bar the right of a town or city to its streets. I have carefully examined this subject, and the opinion has constantly grown upon me that that decision is only the expression of sound law—law that is held all over the United States, with the exception of 4 or 5 states. At least 30 states have considered this question, and announced the same law as that stated in *Ralston v. Town of Weston*. I consider the exposition of the law given in the opinion by Judge Dent as a correct, able, and unanswerable one. He bases it upon the sovereign right of the people to retain, against private claim without title, the use of their streets and roads for public and necessary easement. . . . It is of the highest public interest to preserve such public right for the many over the claim of the few. Against this public interest there is no statute of limitation. Sovereignty is not barred by limitation, and ought not to be. You must show a statute infallibly applying to it. And in addition to this sovereign right, to which no statute applies in terms, there is the consideration that the obstruction of a street or other highway is a public nuisance, which no length of time will ripen into a right, because that would be to make a public offense give good title against the public right. Statutes of limitation, operative upon the private right of individuals, are wise, to prevent private strife and litigation; and they largely proceed on the theory that the private individual who has the better right has been sleeping, and allowed his adversary, by possession, to

\(^{50}\) *Id.* at 448–49.
take away his right. But that cannot be said of cities and towns,—there being no private right, no private vigilance, to watch and protect the public weal,—and it cannot be said that the public right has been abandoned. No one but the officers can act, and their negligence should not destroy the public right, and cannot justify the claim that a party has slept upon his rights, as in the case of a private individual. The books all tell us that this is the very reason why time does not run against the king or commonwealth. In this state the statute makes limitation run against the state, but that does not apply to the public interests in its highways; and, moreover, a town is not the state, and that statute does not apply the bar of limitation to the public right held in trust by the town for the people. I repeat that the occupation of a street or other highway by an individual is a public nuisance, and no time gives right to continue a public nuisance. The supreme court of the United States, in Fertilizing Co. v. Hyde Park, only expresses what all the books have long said, and continue to say, in defense of the public interest, in speaking of a public nuisance, that: "In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offense." How, then, can a public nuisance ripen into vested title against public weal, the public right,—against sovereignty itself?\(^51\)

In contrast to the summary way in which Justice McWhorter disposed of Mr. Ralston's arguments in the majority opinion, Justice Brannon addressed them. For example, he noted that West Virginia's overruling of its earlier decision was following the lead of other states which had reversed the earlier decisions the court had relied upon in the *City of Wheeling v. Campbell*.\(^52\)

After noting that a number of jurisdictions had reversed earlier decisions holding that the statute of limitation applied to permit individuals to obtain title to municipal corporation streets, Justice Brannon added

"This Court has received, to some extent, criticism for its action in *Ralston v. Town of Weston*, overruling *City of Wheeling v. Campbell*; but it would seem, from cases just cited from other states, that courts considered worthy of authority have chosen to assume the responsibility of overruling their former decisions because, in their opinion, on re-examination of the subject, they deemed it proper that unsound law, hurtful for all future time to the public weal, and law which did not spring from the legisla-"

\(^51\) *Id.* at 449.

\(^52\) *See id.* at 450.
ture, but from erroneous rulings of the courts misapplying the statute of limitations, should no longer prevail, to the destruction of public right . . . We still think that decision is right, and we do not see our way to retract it. If the former rule had continued, private individuals would have, year after year, invaded the highways of the people, and held them forever from their use. The public would have to condemn and purchase, time after time, what justly belonged to it.\(^53\)

The year after Ralston II\(^54\) case, the town of Weston was back before the West Virginia Supreme Court of Appeals in McClellan v. Town of Weston\(^55\) on essentially the same issue. While the lawyers for all three of the Town of Weston cases were the same, Edward A. Brannon for the Town of Weston, and W.W. Brennan for Ralston and McClellan, Justice C.C. Higginbotham served as Special Judge for the circuit court of Lewis County in the McClellan case whereas Justice W.G. Bennett had been the judge in the two Ralston cases.

Most of the McClellan decision involves the discussion of the evidence as to the location of the respective streets involved in the litigation and the statutory provisions establishing the town of Weston.\(^56\) As to the applicable law, Justice McWhorter, who wrote the decision in Ralston II, noted:

Counsel for appellees, in a very elaborate and very able brief, reargues the case of Ralston v. Town of Weston, supra, to satisfy the court that its decision in that case was wrong, and should be overruled in deciding the case at bar, and thus return to what he terms the safe and sound position held in City of Wheeling v. Campbell. In the case of Ralston v. Town of Weston, supra, followed by that of Town of Weston v. Ralston,—especially in the concurring opinion of Judge Brannon in the latter,—the questions involved in the case at bar are so thoroughly consi-

\(^{53}\) Ralston II, 36 S.E. at 450. Other matters addressed in the concurring opinion include: the duty of the Court to overrule a bad decision; that in states which held the statute of limitation does apply to give individuals adverse possession of streets, the occupation had to be of the entire street and not just a strip or portion of the street noting in this case Ralston only occupied 13 1/2 feet of a forty foot street; that the city holds only an easement for the street as distinguished from the fee and the statute of limitation does not apply to an easement; abandonment does and there was no evidence of abandonment by the City; that the earlier Ralston decision was res judicata as between Ralston and the Town of Weston; as to why the purported deed to Ralston from Cole did not give Ralston a new or different basis on which to claim ownership; and why Ralston’s claim of a taking of his property without due process of law was without merit; and why a Court of Equity had jurisdiction of this case. See id. at 450–57.

\(^{54}\) Id.

\(^{55}\) 39 S.E. 670 (W. Va. 1901).

\(^{56}\) See id. at 671–73.
dered and discussed that very little new light can be thrown upon them.  

As to the statute of limitation application to the State, the court stated:

Again, it is contended that there is no reason why a state should not be barred of its right of action to recover property as well as an individual. One has not far to look for reasons why a state, in respect to its sovereign rights, should not be so affected. “Experience does not justify the presumption that the community at large will assert their rights with the same promptness with which individuals assert their private rights. [The opposite is notoriously true.] Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have sufficient interest to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right. The state is impersonal. The people do not and cannot legally act in a body. Their power must, of necessity, be exercised through agents. It cannot be expected that these agents will manifest the same diligence in detecting and resisting encroachments on public interests that individuals evince in the protection of their private rights.” State v. Franklin Falls Co. No man wishes to single out himself and be an actor against his neighbor. What is every man’s concern is no one’s, and hence it is that no time should bar the enforcement of a public right. Public easements belong to the people, and cannot be aliened or otherwise disposed of except in accordance with their will. To permit individuals to acquire title therein by prescription allows them to accomplish through the want of vigilance, or the indulgence of the public, or through their own mistake or cupidty, what they could not accomplish legitimately. The great weight of authority supports the proposition that title by adverse possession cannot be acquired in streets, highways, or other property dedicated to the use of the public.  

In McClellan, the court reaffirmed its earlier decisions relying upon syllabus points 3, 4 and 5 in Ralston I, reversed the decree of the circuit court of Lewis County, dissolved the conjunction and dismissed the plaintiff’s bill.

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57 Id. at 671.
58 Id. at 673–74 (citations omitted).
59 Id. at 676.
While the distinction of property owned in a governmental capacity, and property owned in a "proprietary" capacity was not explicitly discussed in the Ralston cases, such a distinction was consistent with the court's discussion and its underlying concerns.

What was implicit in the Ralston decisions became explicit in Foley v. Doddridge County Court. The issue in Foley was whether an individual had obtained title to a portion of the courthouse square by adverse possession. Justice Brannon, who wrote the concurrence in Ralston II seventeen months earlier, authored the decision in Foley.

Justice Brannon stated the issue as, "[t]his question is tested by the question whether one can, by encroachment upon a public street, get title against the public by adverse possession." The court began its answer to the question by noting:

Both a street and a courthouse lot are held in trust for public use, and no other purpose whatever, by town and county court. They are not in such cases private property owners. The county court has legal title, it is true, but solely for governmental purposes. As to streets this court has held that no one can by possession get the title against the public right. Ralston v. Weston;

In Ralston v. Town of Weston [Ralston I], 46 W. Va. 544, 33 S.E. 326, 76 Am. St. Rep. 834, it is held (Syl., point 3): (3) "The maxim, "Nullum tempus occurrat regi," applies to all the sovereign rights and property of the people of the state dedicated to public uses, and of which they cannot be deprived otherwise than according to their express will and appointment." (4) "The public easement in the public highways, including roads, streets, alleys and other public thoroughfares, dedicated to the use of the general public by individuals, or under the right of eminent domain, is such property, and cannot be lost to the people by the negligence of public officials or the unlawful acts of individuals." (5) "An individual cannot destroy such easement by setting up a claim by prescription, adverse possession under the statute of limitations, or equitable estoppel, as the people cannot be deprived of their sovereign rights in any of those ways." The layout of the town being thoroughly established, the appellee can only claim title by adverse possession by virtue of the statute of limitations, which, under the rule in the Ralston-Weston Case, cited, does not and cannot apply in this case; and, as she acquired no right by virtue of what she claims to be adverse possession, the question of due process of law cannot arise in this case. It is not a taking of private property for public uses; it is only the taking of that which belongs to the public by dedication, and of which the public cannot be deprived; such an easement as an individual cannot destroy "by setting up a claim by prescription, adverse possession, or equitable estoppel," as held in Ralston v. Town of Weston [Ralston I], cited. The decree of the circuit court will be reversed, the injunction dissolved, and plaintiffs' bill dismissed.

Id. at 676.

60 46 S.E. 246 (W. Va. 1903).

61 Id. at 251 (citations omitted).
Weston v. Ralston; McClellan v. Weston. The town does not own the streets, nor do the people of a town, "but the public at large." In Norfolk v. Chamberlaine, one reason for this position is based on a general rule, hoary with age, founded on public policy and necessity, that the obstruction of a public way is a public indictable nuisance, and that no lapse of time will legitimate it. Encroachment upon courthouse ground is a public nuisance, because it affects the public, which has a right to its unrestricted use. Such public nuisance prevents the public use, and where even the property, the very title, is vested in the state, county, or municipality, such wrong prevents the state, county, or municipality from freely using the property to accomplish the only purpose of its ownership; that is, its application for governmental purposes in its public use. If such were not the law, then the governing power would lose property essential for government purposes because of the inattention of officials or their ignorance of hostile possession. But it is said by some that this rule is changed in this state from the fact that section 20, c. 35, of the Code of 1899, says that "every statute of limitations, unless otherwise expressly provided, shall apply to the state." The books say that the statute runs as to property held by the government merely as owner in private ownership, but not as to that held for purposes of government in its actual use. That exception applies even where the statute runs against the state, for, if there were no statute making limitation apply to the state, there would be no need of such exception. The well-considered Georgia case of Norrell v. Augusta Railway Company meets this objection pointedly as do other authorities, holding that even where there is a statute making adverse possession apply to the state, the statute is to be construed as intended to apply only to such property as is held by the state like an individual proprietor, and operate only on its property interest, and as not intended to apply to property held by the state for purely governmental purposes. The court said, "Prescription does not run against a municipal corporation in regard to land held for the benefit of the public." This is a fair construction of such a statute, and is only an instance of the rule often applied in the construction of statutes; that is, that we must not too closely and literally follow the letter, but must follow the spirit; for statutes have a spirit and intent as well as a letter. Shall we always make a statute do what we are sure will work a result not intended by the Legislature, simply because to do so would be justified by its letter, when we know there are other instances where conformity to its letter will attain the real purpose, as if we give this statute application against the state as to its de-
mands for money and property rights vested in it as if a private owner, and not held in trust for actual use in the exercise of governmental functions?  

The court illustrated the purpose of West Virginia statute, which example, as we shall see, becomes the issue in cases discussed below. The example provided by the court is that:

West Virginia owns thousands of acres of wild land forfeited for taxes. This property is not itself used in the exercise of government. Its proceeds only are so used, but not the very land. If one claiming title seat himself upon this land, he gets a good title from the lapse of time, because the statute cited makes limitation run against the state in such a case. As state officers cannot possibly watch lands in all sections of the state, we may well doubt the wisdom of the statute giving benefit of limitation to the occupant in such case, and thus causing the state to lose its property. But the Legislature has seen proper to do so; but can we say that it intended to deprive the state of property which in its very self is held for government purposes, and essential to enable the public authorities to carry on government? We cannot think so. Suppose one should hold for 10 years the state capitol, or an annex or subsidiary building, or a part of the capitol ground, or any ground or property used in actual government, could we think the Legislature intended the state to lose it by adverse possession? Suppose the state owned a turnpike, can we think the Legislature designed by the act in question to lose to the state that turnpike by adverse possession? Reason, necessity, the public welfare, and legal authorities deny such result. But if you contest this position, and say that the letter of the act covers all property, and every right of the state, then we take you at your word, and fall back on the very letter of the statute, and say that it applies only to "the state." A county or town is not the state. The state does not own a courthouse lot or street or road. Indeed, I go further and say that, as to a highway, neither the county nor town owns it; nobody owns it; only that noncorporate, indefinable "public" owns it, if ownership anywhere there is.  

62 Id.
63 Id. at 251–52.
V. THE PROBLEM OF FORFEITED & DELINQUENT LANDS

As discussed above in the introductory material on statehood, many of the titles to lands west of the Allegheny Mountains were in disarray. What had previously been Virginia's problem, upon statehood, became West Virginia's problem and a basic goal of Virginia, adopted by West Virginia, was to get title to the land into the hands of taxpayers. In the furtherance of this goal, land titles were dealt with in six sections of article IX of the Constitution of West Virginia of 1863.64

64 Article IX. Forfeited and Unappropriated Lands.

1. All private rights and interests in lands in this State, derived from or under the laws of the State of Virginia, prior to the time this Constitution goes into operation, shall remain valid and secure, and shall be determined by the laws heretofore in force in the State of Virginia.

2. No entry by warrant on land in this State shall be hereafter made; and in all cases where an entry has been heretofore made and has been or shall be so perfected as to entitle the locator to a grant, the Legislature shall make provision by law for issuing the same.

3. The Legislature shall provide for the sale of all lands in this State heretofore forfeited to the State of Virginia for the non-payment of the taxes charged thereon for the year one thousand eight hundred and thirty-one, or any year previous thereto, or for the failure of the former owners to have the same entered on the land books of the proper county and charged with the taxes due thereon for the said or any year previous thereto, under the laws or the State of Virginia, and also of all waste and unappropriated lands, by proceedings in the Circuit Courts of the county where such lands are situated.

4. All lands within this State, returned delinquent for non-payment of taxes to the State of Virginia since the year one thousand eight hundred and thirty-one, where the taxes, exclusive of damages, do not exceed twenty dollars; and all lands forfeited for the failure of the owners to have the same entered on the land books of the property county, and charged with the taxes chargeable thereon since the year one thousand eight hundred and thirty-one, where the tract does not contain more than one thousand acres, are hereby released and exonerated from forfeiture, and from the delinquent taxes and damages charged thereon.

5. All lands in this State heretofore vested in the State of Virginia by forfeiture, or by purchase at the sheriffs' sales for delinquent taxes, and not released or exonerated by the laws thereof, or by the operation of the preceding section, may be redeemed by the former owners, by payment to this State of the amount of taxes and damages due thereon at the time of such redemption, within five years from the day this Constitution goes into operation; and all such lands not so released, exonerated or redeemed, shall be treated as forfeited, and proceeded against and sold as provided in the third section of this article.

6. The former owner of any tract of land in this State sold under the provisions of this article, shall be entitled to receive the excess of the sum for which such tract may be sold over the taxes and damages charged and chargeable thereon, and the costs, if his claim be filed in the Circuit Court which decreed the sale, within two years thereafter.
As to this article, Professor Bastress\textsuperscript{65} describes the provision of the 1863 Constitution as based on ordinances adopted by the Reorganized Government of Virginia after Virginia seceded, but before West Virginia became a state. The ordinances dealt with fundamental matters that needed immediate attention and could not await statehood. Due to the turbulent nature of events of that era, the ordinance, and later the constitutional provisions, was considered necessary "to guard against, first, the repudiation of the lawful acts of the old Commonwealth, with respect to land titles; and second, any discrimination against nonresident owners of land."\textsuperscript{66}

Land titles were also dealt with in the six sections of article XIII of the 1872 Constitution of West Virginia.\textsuperscript{67}

\begin{itemize}
  \item W. VA. CONST. art. IX §§ 1–6 (1863).
  \item Bastress, supra note 8, at 280–81.
  \item Id.
  \item Id.
\end{itemize}

Article XIII. Land Titles.

§ 1. Status of titles.— All private rights and interests in lands in this State derived from or under the laws of the State of Virginia, and from or under the Constitution and laws of this State prior to the time this Constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the Constitution and laws in force in this State prior to the time this Constitution goes into effect.

§ 2. Entries.— No entry by warrant on land in this State shall hereafter be made.

§ 3. Transfer of title.— All title to lands in this State heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated in the State of Virginia, or this State, or purchased by either of said State at sales made for the non-payment of taxes and become irredeemable, hereafter forfeited, or treated as forfeited, or escheated to this State, purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State.

WASTE AND UNAPPROPRIATED LANDS

§ 4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, of this State, or purchased by either and become irredeemable not redeemed, released, transferred or otherwise disposed of, the title whereof shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

FORMER OWNER'S PRIVILEGE
As to these provisions, Professor Bastress noted that article XIII "was described by one commentator as 'highly technical,' 'a constitutional enigma' and an article that has 'no place in the Constitution.' As long ago as 1909, an expert described its contents as the 'antiquated clauses of the Constitution.'"

It is fair to speculate that the problem of land title in West Virginia was of sufficient concern to the drafters of the Constitution of 1872 that they believed it needed to be dealt with in constitutional provisions.

For present purposes, the relevant language is that portion of section 3 which reads:

[S]hall be, and is herein transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees), for so much thereof as such person has, or shall have had actual continuous possession of, under color of claim of title for ten years, and who, or those under whom he claims, shall have paid the State taxes thereon for any five years during such possession; or if there be no such person, then to any person (other than those

§ 5. The former owner of any such land, shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter.

LAND BOOKS---TAXES

§ 6. It shall be the duty of every owner of land, or of an undivided interest therein, to have such land, or such undivided interest therein, entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with taxes legally levied thereon and pay the same. When, for any five successive years, the owner of any tract of land, or undivided interest therein, shall not have been charged on such land books with state, county and district taxes thereon, shall be forfeited, and title vested in the State. But if, for any one or more of such five years, the owner of such land, or of any undivided interest therein, shall have been charged with state, county and district taxes on any part of such land, such part thereof, or undivided interest therein, shall not be forfeited, or of any interest therein, at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest, charged on such land books, with all state and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein, for the year one thousand eight hundred sixty-three, and every year thereafter, with interest at the rate of ten per centum per annum, and pay all taxes and interest thereon for such years, and thereby redeem the land or interest therein: Provided, such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited. (1933, 2nd Ex. Sess., c. 72, §1 Ratified.)

W. VA. CONST. art. XIII §§ 1–6 (1872).
for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees), for so much of said land as such person shall have title or claim to, regularly derived, immediately or immediately from, or under a grant from the Commonwealth of Virginia, or this State, not forfeited, which but for the title forfeited, would be valid, and who, or those under whom he claims has, or shall have paid State taxes charged or chargeable thereon for five successive years, after the year 1865, or from the date of the grant, if it shall have issued since that year; or if there be no such person, as aforesaid, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees), for so much of said land as such person shall have had claim to and actual continuous possession of, under color of title for any five successive years after the year 1865, and have paid all State taxes charged or chargeable thereon for said period.

This section of our constitution was generally patterned after statutes which were in effect in Virginia at statehood, which provided how the Commonwealth could recover and enforce payments into the Treasury, including taxes, and the method of selling lands acquired by the Commonwealth.\textsuperscript{68}

Therefore, in 1868, before 1872, the legislature had adopted chapter 35, section 20 which stated, "[e]very statute of limitation, unless otherwise expressly provided, shall apply to the state, but as to claims heretofore accrued, the time shall be computed as commencing when their chapter takes effect,"\textsuperscript{69} and the constitutional provision of article XIII, section 3 quoted above dealing with the transfer of title of certain lands held by the state.

The fact that the statutory provision was apparently inconsistent, and therefore in conflict with, the constitutional provision was not addressed, at least initially, by the court. In Hall \textit{v.} Webb,\textsuperscript{70} a case involving adverse possession between two individuals, one of the issues was when the statute of limitations started to run against a grantee who claimed under a tax deed from the clerk of the county court.\textsuperscript{71} The applicable law of the case, for present purposes, is set forth in the first and second syllabus points as:

1. The statute of limitations does not commence to run in favor of an occupant of land, while the title thereto is vested in the State. But the statute does commence to run in favor of such

\begin{itemize}
  \item \textsuperscript{68} \textit{See} \textsc{Va. Code} §§ 41.1-2 to 41.1-20 (1849).
  \item \textsuperscript{69} \textsc{Barnes' Code of W. Va. c.} 35, s. 20 (1868).
  \item \textsuperscript{70} 21 \textsc{W. Va.} 316 (1883).
  \item \textsuperscript{71} \textit{Id.} at 322.
\end{itemize}
occupant against the grantee of the State from the date of the grant of the land so occupied.

2. Where land had been granted by the State, and an adversary possession had commenced to run against the true owner, and subsequently such land became forfeited to the State under the delinquent land laws, such possession would not be adversary to the State or her grantee after the forfeiture, except from the time the land was regranted or sold by the State.\(^{72}\)

The decision in *Hall v. Webb* was written by Justice Snyder, who one year later provided the extensive and informative discussion of the history of land title in Virginia and West Virginia in *McClure v. Maitland*.\(^{73}\)

In *Witten v. St. Clair*,\(^{74}\) which again dealt with competing claims to land, Justice Snyder, writing for the court, reversed the lower court because of erroneous instructions to the jury. As part of that discussion, the court said:

Prior to the Code of 1849, it was always essential in the State of Virginia to show, that the land had been granted to someone, because the statute of limitations did not run against the State, and therefore no time however protracted could divest her title to the land and transfer it to an adverse claimant. *Levasser v. Washburn; Nimmo v. Commonwealth.*

The law in this State on this subject is defined by sec. 3, Art. XIII, of our Constitution. The substance of said section is, that the title to all waste and unappropriated lands and all lands vested in the State by forfeiture or otherwise shall be transferred to and vested in three classes of owners or claimants in the following order: *First.* Such persons as shall have had actual continuous possession of such land under a color or claim of title for ten years *and shall have paid the State taxes thereon* for any five years during such possession; *Second.* If there be none such, then such persons as shall have title or claim thereto regularly derived from the Commonwealth of Virginia or this State, not forfeited, which but for the title forfeited would be valid and who *have paid all State taxes charged or chargeable thereon* for five successive years since 1865; and *Third.* If there be no

\(^{72}\) *Id.* at 318.

\(^{73}\) 24 W. Va. 561 (1884).

\(^{74}\) 27 W. Va. 762 (1886).
such persons, then to any such persons as shall have had claim to and actual continuous possession of the land under color of title for any five successive years since 1865, and shall have paid all State taxes charged or chargeable thereon for said period. See also se. 1, ch. 105 Amd. Code.

It will be observed, that the instruction now under consideration wholly omits the essential element of the payment of the taxes on the land. This is made by the Constitution a condition precedent to the right of any claimant of any of the three classes of persons mentioned to acquire the title of the State to lands. Whether the plaintiff had paid the taxes on the land was a question for the jury, and the instructions should have submitted that question to them.\(^75\)

In the years that followed Witten v. St. Clair, the Supreme Court of Appeals decided several cases involving competing claims, adverse possession, and the real estate taxation provisions of our State's Constitution and statutes. In Parkersburg Industrial Co. v. Schultz,\(^76\) the court discussed inconsistency between the taxing provision in the Constitution of 1872 and the Constitution of 1868.\(^77\)

The court's decision in State v. Harman\(^78\) is apparently the first case in which the statute of limitation provision found in chapter 35, section 20, is discussed in context of article 13, section 3, of the constitution. The case involved the claim of ownership by the trustees of the Flat Top Land trust who took possession under an invalid tax deed, and the State of West Virginia who claimed the right to sell the property as forfeited to the state for non-entry on the tax books. While the case presents a number of issues involving the real estate tax law during the early years of statehood, for present purposes, the relevant comment by the court is that:

I have endeavored to show that the Flat Top trustees acquired title by transfer of the forfeited title under section 3, art. 13 of the Constitution. That does not involve the question of adverse possession. We hold, however, that the trustees, by reason of such possession as above stated, have title to the forfeited land under the statute of limitations. Code 1899, §20, c. 35, enacts

\(^{75}\) Id. at 769–70 (citations omitted).

\(^{76}\) 27 S.E. 255 (W. Va. 1897).

\(^{77}\) Id. at 257–58.

\(^{78}\) 50 S.E. 828 (W. Va. 1905).
that "every statute of limitations, unless otherwise expressly provided, shall apply to the state." This does away with the maxim, "No time runs against the King or state." This being wild land—not land used in administration of government—the statute runs against the state. Foley v. County Court. The statute took title out of the state and vested it in the trustees, and for this reason the state could not ask a sale, as it did not own the land.\textsuperscript{79}

Given the facts of the case, i.e. the Flat Top trustee possessed the land as successor in interest of an invalid tax deed and had paid taxes thereon for thirty years,\textsuperscript{80} the provision of article XIII, section 3, of the constitution of 1872 transferred title to them and, therefore, there is not an issue as to the statute of limitation provision set forth in chapter 35, section 20, of the Code. The very point is noted and discussed by the court in Lewis v. Yates.\textsuperscript{81}

As with most of the early cases involving conflicting grants and competing titles, the facts in Lewis v. Yates are lengthy, complicated, and not easy to summarize. The defendant, Lewis, claimed fifty-seven acres by adverse possession. The lower court held for the defendant. On appeal, the court held that while the defendant may have acquired title to the fifty-seven acres by adverse possession, the land had never been entered on the land books for taxation in his name or the names of those under whom he derived his color of title, and no taxes were ever paid.\textsuperscript{82} The land therefore became forfeited to the state for a period of five years of nonentry for taxation and nonpayment of taxes (Const. art. 13, § 6; Parkersburg, etc., Co. v. Schultz), and has never been redeemed. By virtue of section 3 of article 13 of the Constitution [Code 1906, p.lxxxiv], this forfeited title has been transferred to the plaintiff, and those under whom she holds. The nonpayment of taxes was in no sense her fault. As she did not claim under that title, it was in no sense her duty to pay them. She had been in possession by her tenant under her own title covering the same land, and paid the taxes on it under her title. Therefore she was in a position to take by transfer the forfeited hostile title. Payment of taxes on the land by her and predecessors in title under her own title did not prevent the forfeiture of the hostile title under which she was neither bound to pay the taxes, nor possibly had any right to pay them. In view of this

\textsuperscript{79} Id. at 837–38.
\textsuperscript{80} Id. at 838.
\textsuperscript{81} 59 S.E. 1073 (W. Va. 1908).
\textsuperscript{82} Id. at 1080.
situation, the verdict cannot stand, although for the reasons stated it would otherwise be beyond the power of the court to disturb it, unless the statute of limitations saves it. Before the passage of section 20 of chapter 35 of the Code of 1899 [Code 1906, § 1137], saying, “Every statute of limitation, unless otherwise provided, shall apply to the state,” there was no adverse possession against the state. In Smith v. Chapman, Judge Lee said: “But if the party in possession had acquired no such rights at the time of the forfeiture (title by transfer, or title by adverse possession against the forfeited title), from that time his adversary possession and the statute of limitations must cease to run as against the commonwealth, and the commissioner’s deed would pass her title thus acquired unaffected by the continued possession of the party holding with whatever claim of title;” and the court held that: “An actual possession of land claiming the same adversely does not prevent the operation of the deed made by the commissioner of delinquent lands, conveying to a purchaser the commonwealth’s right to the land.” See, also, Staats v. Board; Levasser v. Washburn. Sate v. Harman, holds that the statute of limitation runs against the state as to land, the title whereto is in the state by forfeiture; and such operation of the statute was suggested in Foley v. County Court. As the latter case did not concern such lands, there was in it no application of the doctrine; but, in State v. Harman it was applied, although we decided that the party to whom we gave the benefit of it had title to the land by transfer under section 3 of article 13 of the Constitution. There the benefit of it was allowed to one who was not in default, as to payment of taxes on the land, and whose title was good independently of his adverse possession. Here we have the reverse of that condition. The person whose title has been forfeited remains in actual possession. If the statute is allowed to operate in his favor against the state, the constitutional machinery, designed for the enforcement of the state’s right to taxes on all land, and the settlement of land titles, by forfeiture and transfer under sections 6 and 3 of article 13 of the Constitution [Code 1906, pp. lxxiv, lxxxv], respectively, will cease to perform its functions in cases of this kind. A legislative act cannot have such effect. Whatever its terms may be, it must be subordinated to the organic, paramount law of the state, and made to operate in harmony with it. The Legislature has power to release and dispose of forfeited land titles (State v. Jackson); but it certainly cannot, directly or indirectly, nullify the forfeiture, and transfer clauses of the Constitution. It cannot prevent forfeitures and transfers, which the Constitution says shall occur, so as to make the land yield to the state her taxes,
and as to vest superior title in persons who have put themselves within certain conditions prescribed by said section 3. The statute applied in State v. Jackson, and treated as a legislative grant of forfeited titles, did not conflict with any constitutional provision. It neither prevented forfeiture under section 6, nor transfer under section 3. It seems to me the state does not take for proprietary or speculative purposes, but only for governmental purposes, chiefly for the settlement of land titles.83

The above quote states the obvious, i.e. that the statute of limitation provision found in chapter 35, section 20, of the Code does not apply to titles held by the state as a result of forfeiture for taxes. As to those lands the provision of article XIII of the constitution controlled.

The nature of plaintiff’s title necessary to sustain an action of ejectment was the issue in Riffle v. Skinner.84 The plaintiff and the defendant owned adjacent tracts of land, and the question was whether title acquired by the plaintiff’s possession for twenty-seven years, i.e. adverse possession, was sufficient.85 In holding that it was sufficient title, the court recognized that it was not necessary for the plaintiff to trace his title to a grant from the state.86

Although not specifically raised by name, it is apparent that Justice Poffenbarger’s decision in Lewis v. Yates was foremost in mind when Justice Brannon wrote a concurring opinion in Riffle v. Skinner.87 In beginning his concurring opinion, he noted, “This case having involved much discussion in conference, . . . [there are several matters on which] I desire to express an opinion . . . .”88 One of the matters upon which Justice Brannan wanted to express his

83 Id. at 1080–81.
84 67 S.E. 1075 (W. Va. 1910).
85 Id. at 1076.
86 See id. at 1077. The defendant, Skinner, argued that one may not recover in ejectment upon proof of adverse possession, unless he shows that at some time the state granted the land or that there has been that which would cause a transfer of the state’s title under article 13 of the Constitutions (Code p. lxxxiv) --- ten years adverse possession and payment of the taxes for five years.
87 Id. The Court rejected this argument noting:

This presumption of title that accompanies an adverse holding necessarily implies a grant originally from the sovereignty, since the title presumed must have that origin. And since a grant from the state is presumed, the claim that the statute of limitation does not run against the state unless payment of taxes is shown is immaterial.

88 Id.
89 Id. at 1079–82.
90 Riffle, 67 S.E. at 1079.
opinion was whether Code 1906, c. 35 s. 20 was in conflict with article XIII, section 3 of the constitution.\footnote{When it is demanded that a person suing in ejectment who has had possession actual for the statutory period under color of title, claiming the land as his own, shall trace title back to the state, I reply that he has the title of the state by force of that kind of grant made by the statute of limitations, a statutory grant, a grant conferred by that statute. The state is just the same for this purpose as a private owner; for as to its land owned as a proprietor, not used for governmental purposes, it is an individual subject to the statute, for the reason that a statute says: "Every statute of limitations, unless otherwise provided, shall apply to the state." Code 1906, c. 35, § 20. Until the Code of 1868, going into effect April 1, 1869, that was not the law, because until then, the rule was, "Nullum tempus occurrit regi," no time runs against the king, and this applied to a state. Hall v. Webb. But that statute changed the old rule as to land not used for governmental administration. As to property so used, it is not under the statute. Ralston v. Weston; Foley v. County Court. But we have decided as to property not so used that the state is subject to limitation because of that Code section. State v. Mines; State v. Sponaugle; State v. Harman. I notice, too, that the same is held in City of Wheeling v. Campbell. Therefore, by limitation, Riffle acquired state title and could recover upon it. I notice that in Witten v. St. Clair, 27 W.Va. 762, there is a departure, not only from the principle everywhere held that as between individuals the statute of limitations will confer title on which a plaintiff may sustain ejectment, but also a disregard of section 20 above cited.\textit{Id.} at 1081–82.}

As to the court's statement in an earlier decision, Justice Brannon states:

It is notable that [Witten v. St. Clair] speaks of the rule that time does not run against the state as still in force, when section 20, c. 35, of the Code had been in force 16 years. In Hall v. Webb, 21 W.Va. 318, the same ignorance of the new statute was shown by the same able judge who wrote the opinion in Witten v. St. Clair. He said that the statute of limitations had no reference to the state. He had in mind only chapter 104. I attribute this to inadvertence, want of knowledge of section 20, c. 35. The state has title to land, and right of entry as incident to title. If it be in possession of another, the state may sue. It is not right that land in long possession of a person under color of title should not avail him against the state. The new statute is right. If it be said that the Constitution (article 13, § 3 [Code 1906, p. lxxxiv]) prescribes the way in which the land may be acquired, requiring payment of taxes, I reply that that is one way of acquisition; that is, by \textit{inurement}, based on possession and payment of taxes. But there is another mode under the law, by limitation. When one is in possession, the statute running in his favor, the suggestion is made that he must also show payment.
of taxes in addition to possession. They are different modes of getting title. To get it by limitation the party must have color of title and claim adversely; whereas he may get title under the Constitution by possession and payment of taxes, though he never made adverse claim against the state. I say that if he has possession you cannot defeat its effect under the statute by demanding payment of taxes. Will you presume that he has not paid? Rather, if there is to be any presumption, will it not be that he did pay? You must show sale for taxes or forfeiture for nonentry. If the state proceeds to sell as forfeited, she must show forfeiture. Shall either the state or an individual say to one in possession for the statute period that he must show payment of taxes to show title in ejectment? That has never been required to get the benefit of the statute. True, it may be shown that the title acquired once by the statute has been itself forfeited, or forfeited before the statute has run out (Parkersburg Indus. Co. v. Schutlz); but he must show it, just as he may and must show any other outstanding better title in another, if he has it not himself. Point 6 of Witten v. St. Clair is wrong in requiring payment of taxes in addition to possession to get the benefit of such possession. Will any one doubt the power of the Legislature to say that one holding possession under color of title for 10 years shall get good title against the state, unless you say that article 13, § 3, and Code, c. 105, prescribe the only ways of acquiring state title? They are designed to prescribe two ways of getting state title, but surely cannot be held to deny the Legislature power to give peace and rest of titles to those holding for the years fixed by that great statute of public policy and repose of homes, the statute of limitations. Thus I agree to the decision also because of that statute.90

Justice Poffenbarger, who wrote the opinion in Lewis v. Yates, also wrote a concurring opinion to reply to Justice Brannon’s concurrence. Justice Poffenbarger wrote:

My real purpose in writing this note, however, is not to strengthen the position taken in the opinion adopted by the majority of the court, but to direct attention to the specific ground upon which the decision is based. We do not say the statute of limitations runs against the state in respect to forfeited, escheated, and waste and unappropriated lands. Judge BRANNON alone asserts that it does. At present, I am of the contrary opinion. Im-

90 Id. at 1082.
pliedly the provisions of section 3 of article 13 of the Constitution invite occupation and settlement of these lands, by transferring the titles, acquired by forfeiture, escheat, or purchase at sales made for nonpayment of taxes, and the title to waste and unappropriated lands, not redeemed, released, or otherwise disposed of, to persons who actually occupy them and pay taxes thereon. This seems to make all such entries permissive and not hostile, and this view is emphasized by the absence of any provision, in either the organic or statutory law, for actual possession of, or dominion over, such lands on behalf of the state. All these laws deal exclusively with the titles to such lands, and leave the subject of possession thereof wholly untouched, except in so far as they impliedly extend permission to individuals to settle upon, and acquire the titles thereto, before they are otherwise disposed of.  

In concluding his concurrence, Justice Poffenbarger noted, "The position I take does not nullify section 20 of chapter 35 of the Code. There are many other instances in which right of action accrue to the state and are barred by time."  

Justice Williams filed a dissent in the Riffle case contending that since the plaintiff "did not prove that he had paid taxes thereon for five years", the plaintiff could not win. Justice Williams believed that the verdict of the lower court for the plaintiff must be reversed because "it was necessary for plaintiff to prove payment of taxes, in addition to proving possession, in order to obtain the state's title under section 3, art. 13, of the Constitution." Justice Williams' basic objection to the majority opinion relates to presumption and burden of proof.

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91 Riffle, 67 S.E. at 1083.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.

An examination of our decisions will show that, in those cases wherein a plaintiff has been permitted to recover upon a possessory title, without proof of payment of taxes, it appeared, either that the state had parted with its title to the land in controversy, or that the parties claimed title from a common source, in which latter event the defendant was estopped to deny plaintiff's title, for by denying plaintiff's title he would be denying his own.

It is admitted that defendant could have defeated plaintiff's action by proving that the land had been omitted from the land books and had not been taxed for five successive years. But why the necessity of proving this, when it does not appear that the state had ever parted with its title? Such defense is only necessary to show a forfeiture of plaintiff's title to the state, and how can there be a
VI. WHAT DOES IT ALL MEAN?

The decisions in the Foley v. Doddridge County Court, the Ralston decisions, and Riffle v. Skinner, seemed to have resolved the issues of adverse possession of city streets and the method by which individuals could acquire title to forfeited, waste, unappropriated, or escheated lands.

Forfeiture of a title never acquired? To hold that it is necessary for defendant to establish, as a defense, that plaintiff's title has been forfeited to the state, before plaintiff has proved that the state had parted with the title, is a contradiction in terms.

The well-established rule of law, subject to the exceptions above pointed out, prevailing in this state and in Virginia, which requires plaintiff to prove a good and sufficient title and a right to the possession, before he can recover in ejectment, I understand to mean this: That he must prove a title in himself prima facie good as against the state; not necessarily that it is absolutely good at the time of his action, for there may have been a forfeiture; and, if he proves that his title is prima facie good as against the state, he can recover, unless the defendant proves a better title, either in himself, or outstanding in another person, or that plaintiff's title has returned to the state by forfeiture. This is necessarily true, because the state is the fountain of title.

Riffle, 67 S.E. at 1084–85.

Ralston I, 33 S.E. 326 (W. Va. 1899); Ralston II, 36 S.E. 446 (W. Va. 1900); Riffle 67 S.E. 1075.

Justice Dent's opinion in Clifton v. Town of Weston may have helped to convince potential litigants that the court was not going to reconsider the Ralston decisions overruling the City of Wheeling v. Campbell case. See Clifton, 46 S.E. 360 (W. Va. 1903). In Clifton, Judge Dent said:

This court, however, has emphatically and advisedly disapproved of the doctrine sought to be established in the case of Wheeling v. Campbell, and since unwittingly followed in some subsequent cases, and has finally determined that such doctrine is not now, and never was, the law of this state. Ralston v. Weston [Ralston I], 46 W.Va. 544, 33 S.E. 326, 76 Am. St. Rep. 834. The plaintiff insists that, if the law is adhered to, many persons in Weston will suffer the loss of valuable property they have acquired by fencing in the public highways of the town. If such be true, they ought to suffer. Persons who are so indifferent to the Golden Rule and their public obligations as to make the destruction of public easements the source of private gain deserve no commiseration at the hands of violated law. The more there are of such persons, the greater the need of those sovereign principles that prevent private aggression of public rights. The mistaken departure from these principles in the case of Wheeling v. Campbell has caused endless fictitious claims to portions of the public highways to spring up all over the state, to be bolstered up by false swearing and manufactured evidence, to the great detriment of public interests and private morality. The law as vindicated will put a stop to all such claims, restore respect for public rights, and promote the welfare and peace of all communities alike. No man can or should be permitted to acquire in any manner whatsoever the sovereign rights of the people contrary to their sovereign will. Opposition to this doctrine tends to anarchy pure and simple.

Id. at 361.

https://researchrepository.wvu.edu/wvlr/vol113/iss3/4
The "law" that emerged from these cases and their progeny, as gleaned from their holdings and dicta, was that the statute of limitation did not apply to land owned by the state and used for governmental purposes, but could apply to the state's property held for "private" uses. Individuals could not gain title by adverse possession to dedicated streets or highways, whether state highways or city streets. Article XIII of the constitution and the statutory provision enacted to implement it provided the procedure that applied to individuals acquiring state "owned" land, and this constitutional provision was in furtherance of the goal of getting the forfeited, waste, and unappropriated lands into the hands of taxpayers. To the extent that the court explained why Code chapter 35, section 20, did not apply to the above situations, but applied to others, it was because the term "state" as used in the statute applied when the term "state" was analogous to its acting as an individual (i.e. proprietary) but not where the term was synonymous with "sovereign." To apply the statute to the state when it was "acting" in the sense of the "sovereign" was not what the legislature could have intended.

VII. DID THE COURT HAVE IT WRONG ALL ALONG?

From the earliest days of our state, the court's discussion of the application of chapter 35, section 20 (now section 55-2-19), proceeded on the assumption that statute of limitation did not apply to the state in its sovereign capacity. At issue in City of Wheeling v. Campbell101 was whether an individual could obtain title to a portion of a city street in Wheeling, and the holding in that case, as stated in syllabus points 2 and 3, was:

2. The maxim nullum tempus occurrit regi, applies to sovereignty alone.

3. The statute of limitations, in the absence of an express provision to the contrary, runs against a municipal corporation, the same as against a natural person.102

101 12 W. Va. 36 (1877).
102 Id. The court in the opinion states its holding as follows:

This principle we approve, and regard the exemption from the effects of limitation statutes, as essential to the well-being of the government of the State; but this exemption belongs and appertains to sovereignty alone. The reason for it is very apparent. If the statute of limitations would run against the State, her public lands, if she had any, would be liable to be taken from her by squatters, who would hold them for the time prescribed by the statute, and defy the State; and in those portions of the State sparsely populated there would be few or none to complain, as it would be the cheapest way to obtain lands from the State. The highways of the State would be liable to be impaired or destroyed by encroachments, and the country not being thickly settled, and the neighbors
The court in Ralston I, in overruling the City of Wheeling v. Campbell, reaffirms the "sovereign's" rights in syllabus point 3, stating:

3. The maxim, "Nullum tempus occurrit regi," applies to all the sovereign rights and property of the people and property of the people of the state dedicated to public uses, and of which they cannot be deprived otherwise than according to their express will and appointment.105

In more recent years, the application of West Virginia Code section 55-2-19 was before the court in In re State of West Virginia Public Building Asbestos Litigation.106 The issue before the court in that case was whether the circuit court erred in vacating the jury verdict and awarding a new trial.107 The Supreme Court of Appeals affirmed the trial court's decision to grant a new trial all acquainted with each other, and the State officers being remote from those highways, there would perhaps be little complaint. But in a city or town, where so many people are to suffer inconvenience by such encroachments, and the officers of the city or town are on the spot, such encroachments are not apt to be tolerated for a long period; and they would be less likely to be tolerated, if it were known that an uninterrupted possession of a street, alley or square, would in a certain number of years give title to the occupier. The wholesome doctrine, that no time shall bar the State, has been abolished by a section in the Code of West Virginia, which if allowed to remain until ten years after it went into operation, may be fruitful of much mischief in this State. It is section 20 of chapter 35, and is as follows: "Every statute of limitation, unless otherwise expressly provided, shall apply to the State, but as to claims heretofore accrued, the time shall be computed as commencing when this chapter takes effect." This statute has no application to this cause, because after the time commenced to run, ten years had not elapsed before the suit was brought. The right to bring suit to recover land in this State is barred in ten years. It is clearly proved in this cause, that the defendants and those under whom they claim, had prior to the institution of this suit forty years uninterrupted, open, notorious and continuous possession to the portion of Madison street in controversy, under claim of title thereto; and such adverse possession gives the defendant the right to hold the same.

Id. at 68–69.

103 33 S.E. 326 (W. Va. 1899).

104 12 W. Va. 36 (W. Va. 1877). Syllabus point 6 from Ralston I reads as follows:

6. The opinions of the judges of this court in the cases of City of Wheeling v. Campbell, 12 W.Va. 36, Forsyth v. City of Wheeling, 19 W. Va. 318, and Teass v. City of St. Albans, 17 S.E. 400, 38 W. Va. 1, in so far as they hold that the public easement in the public highways of this state is subject to the bar of the statute of limitations, are disapproved.

Ralston I, 33 S.E. at 326.

105 Id.

106 454 S.E.2d 413 (W. Va. 1994).

107 Id. at 417.
and in doing so noted that, if the case were retried, one of the issues the trial court would need to address was the claim of the appellants that the statute of limitation barred the State’s tort claim.\textsuperscript{108} At the initial trial, the circuit court had applied the common law maxim \textit{nullum tempus occurrit regi} in holding the statute of limitation did not bar the State’s claim.\textsuperscript{109}

The court, citing West Virginia Code section 55-2-19, said that Code section abrogated the common law doctrine making tort statutes of limitation applicable to the State.\textsuperscript{110}

The court’s comment that the statutes of limitation applied to the state could be read as consistent with the then “current” interpretation of “the law,” i.e., the “state” in contracting with builders was acting in a proprietary manner and this was the type of situation that West Virginia Code section 55-2-19 contemplated. To the extent there was any question as what the Court intended by its statement in the \textit{State Public Building Asbestos Litigation cases},\textsuperscript{111} that doubt was removed three years later in \textit{State ex rel Smith v. Kermit Lumber & Pressure Treating Co.}\textsuperscript{112} In \textit{Smith}, the underlying action involved a civil action brought by the State’s Department of Environmental Protection (“DEP”) alleging the contamination of the defendant’s plant site located in Mingo County.\textsuperscript{113} The issue before the Supreme Court of Appeals was whether the circuit court erred in dismissing the civil action as barred by the statute of limitation.\textsuperscript{114} The DEP argued that West Virginia Code section 55-2-19 only applied when the State was asserting its private or proprietary rights, and since in the present case

\begin{footnotesize}
\begin{enumerate}
\item Id. at 421.
\item Id.
\item Id. at 422.
\item \textit{W. Va. Code}, 2-1-1 [1923] provides, in relevant part: “The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was . . . altered by the Legislature of this state.” Furthermore, in the syllabus of \textit{Perry v. Twentieth Street Bank}, 157 W.Va. 963, 206 S.E.2d 421 (1974), this Court stated “[b]y virtue of the authority of Article VIII, Section 21 of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the Legislature to enact statutes which abrogate the common law.” The legislature had the authority to enact \textit{W. Va. Code}, 55-2-19 (1923). Therefore, we conclude that \textit{W. Va. Code}, 55-2-19 [1923] abrogates the common law doctrine of \textit{nullum tempus occurrit regi} thereby making statutes of limitations applicable to the State.

Because the trial judge applied the doctrine of \textit{nullum tempus occurrit regi} against the appellees, the trial judge did not reach the issues of whether the two-year statute of limitations found in \textit{W. Va. Code}, 55-2-12 [1959] barred the appellees’ claim or whether the discovery rule applies. \textit{Id.}
\item Id. at 413.
\item 488 S.E.2d 901 (W. Va. 1997).
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
the State was bringing the action to protect public rights, the trial court had erred.\textsuperscript{115} Thus, the issue of West Virginia Code section 55-2-19 and its application to the State was placed squarely before the court.\textsuperscript{116}

After the court provided a concise summary of the legislature’s power to change the common law,\textsuperscript{117} a discussion of some decisions of our sister jurisdictions,\textsuperscript{118} and a review of the holdings in \textit{Ralston I} and \textit{Foley v. Doddridge County Court},\textsuperscript{119} the court held:

[B]ecause the language in \textit{W.Va.Code}, 55-2-19 [1923] is unambiguous in stating that “[e]very statute of limitation, unless otherwise expressly provided, shall apply to the State[,]” the language in \textit{Ralston v. Town of Weston} and \textit{Foley v. Doddridge County Court} which suggests that statutes of limitation apply only when the State is acting in its private or proprietary capacity, is misleading. Thus, to the extent that \textit{Ralston} and \textit{Foley} imply that \textit{W.Va.Code}, 55-2-19 [1923] only applies when the State is acting in its private or proprietary capacity, they are hereby modified.

Accordingly, because the legislature’s intent in \textit{W.Va.Code}, 55-2-19 [1923] could not be more clear, this Court must apply the plain language to this case and examine whether there are statutes of limitations which will bar any of the DEP’s three counts.\textsuperscript{120}

As to the West Virginia Code section 55-2-19’s application to adverse possession, the court stated “[b]ecause the matter now before us does not involve adverse possession, we decline to further address whether title of public lands by adverse possession may be obtained.”\textsuperscript{121}

\textbf{VIII. What’s Next?}

If one begins from the premise that sound public policy involves safeguarding state-owned lands that are held for governmental purposes from being acquired by individuals through adverse possession, then a question that follows the \textit{Smith} case is what next?

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 908.
\item \textit{Id.} at 907.
\item \textit{Id.} at 908.
\item See Kermit Lumber, 488 S.E.2d at 908.
\item See \textit{id.} at 909.
\item \textit{Id.} at 910 (alterations in original) (footnote omitted) (citations omitted).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
As Justice Brannon said in his concurring opinion in *Ralston II*\(^{122}\) in referring to the decision in *City of Wheeling v. Campbell*,\(^{123}\) "[i]f the former rule had continued, private individuals would have, year after year, invaded the highways of the people, and held them forever from their use. The public would have to condemn and purchase, time after time, what justly belonged to it."\(^{124}\) A similar point was made by Judge Dent in *Ralston I* case when he said,

[[I]t would be a strange thing for an individual to plead the statute in bar of the right of eminent domain, which is said to be the right of the people to take private property for public use. The right to keep it for public use should be as extensive as the right to take it; for one would be useless without the other.\(^{125}\)

The obvious solution is for the legislature to amend West Virginia Code section 55-2-19 to provide that the statute of limitation does not apply to state-owned property, assuming it wished to recognize a distinction between property owned by the state in a "governmental" capacity, and that owned for "proprietary" purposes to provide guidance as to what falls into those respective categories. It is a fair inference to draw from the fact that the courts specifically recognized the issue and stated it was not addressing it that the court was providing the legislature the opportunity to reconsider the statute. The court's decision not to address the issue of adverse possession of state-owned realty in a case involving the statute of limitation to a "tort claim" may also reflect the court's adherence to the principle to limit rulings to the justiciable case or controversy before it.

A review of the history of the statutory provisions supports the conclusion in *Riffle v. Skinner*\(^ {126}\) that the predecessor of West Virginia Code section 55-2-19 did not apply to vast majority of state owned lands at the time of statehood, i.e. forfeited, treated as forfeited, wasted and unappropriated, or escheated.\(^ {127}\) Prior to West Virginia's statehood, the common law rule of *nullum tempus occurrit regi* applied in Virginia.\(^ {128}\) As Professor Minor noted, "This principle is further affirmed in Virginia by an express enactment declaring that 'no statute of limitation, which shall not in *express terms* apply to the

\(^{122}\) 36 S.E. at 449 (W. Va. 1900).

\(^{123}\) 12 W. Va. 36 (1877).

\(^{124}\) *Ralston II*, 36 S.E. at 450.

\(^{125}\) *Ralston I*, 33 S.E. at 326, 328 (W. Va. 1899).

\(^{126}\) 67 S.E. 1075 (W. Va. 1910).

\(^{127}\) *Id.*

\(^{128}\) MINOR, *supra* note 1, at 1218. "At common law, no lapse of time barred the king's title, the maxim of the law being "nullum tempus occurrit regi." And so it is in the United States, in respect to claims of the states, (and the federal government, also), except where it is otherwise provided by statute." *Id.*
Commonwealth, shall be deemed a bar to any proceeding by or on behalf of the same."\textsuperscript{129}

Following statehood, West Virginia's first Code was approved by the legislature the 29th day of December, 1868, but was not published or distributed until December 1870 (Preface to the Code of West Virginia comprising Legislation to the year of 1870). That publication also contained the West Virginia Constitution of 1863. Article XI, section 8, of the constitution of 1863 provided

[s]uch parts of the common law and the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature.\textsuperscript{130}

This constitutional provision is reflected in article 13, sections 5 and 6 of the Constitution of 1863, which provides:

5. The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been or shall be altered by the legislature of this state.

6. The right and benefit of all writs, remedial and judicial, given by any statute or act of parliament made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved so far as the same may consist with the constitution of this state, the acts of the general assembly of Virginia passed before the twentieth day of June, eighteen hundred and sixty-three, and the acts of the legislature of this state.\textsuperscript{131}

Included in the Code of 1868 as chapter 35, section 20, was the initial version of the present Code section 55-2-19, which read, "[e]very statute of limitation, unless otherwise expressly provided, shall apply to the state, but as to claims heretofore accrued, the time shall be computed as commencing when this

\textsuperscript{129} Id. at 1280. The Virginia Code section was first included in the Virginia Code of 1849, and was in the Virginia Code of 1860 as chapter 42, section 23. The Virginia Code is the inverse of West Virginia. Virginia reaffirms that the statute does not apply unless expressly waived; West Virginia waives it unless the waiver is expressly stated not to apply.

\textsuperscript{130} W. VA. CONST. art. I, § 8 (1863).

\textsuperscript{131} BARNES' CODE OF W. VA. c. 13, s. 5 (1868).
chapter takes effect."\textsuperscript{132} However, at the time of its adoption in sections 3, 4, and 5 of article IX of the Constitution of 1863, the State laid claim to all forfeited, nonentered, wasted and unappropriated lands, and released taxes as to some and directed the legislature to provide for the sale of others.\textsuperscript{133}

In order to implement this constitutional mandate the legislature enacted sections 1 to 44 of chapter XXXI of the Code of 1868. In those Code sections, the legislature set forth provisions for sale or redemption of state-held lands including a variety of time frames in which certain matters had to occur. Therefore, at the same time the legislature enacted chapter 35, section 20, it adopted a lengthy chapter to deal with state-owned lands and how to "dispose" of them.

However, even before the Code of 1868 was published (as noted above the Code of 1868 was adopted December 29, 1868, but not published until December of 1970), the legislature on March 4, 1869, passed an Act "to explain and amend the law relative to the sale of real estate, for the nonpayment of taxes, forfeitures for nonpayment and non-assessment of taxes, and transfer of title vested in the state\textsuperscript{[3]}\textsuperscript{134} which amended "[c]hapter thirty-one of the act to establish a code of laws for this state, passed in the year eighteen hundred and sixty-

\textsuperscript{132}  BARNES' CODE OF W. VA. c. 35, s. 20 (1868).
\textsuperscript{133}  W. VA. CONST. art. IX §§ 3-5 (1863).

3. The legislature shall provide for the sale of all lands in this State heretofore forfeited to the State of Virginia for the non-payment of the taxes charged thereon for the year one thousand eight hundred and thirty-one, or any year previous thereto, or for the failure of the former owners to have the same entered on the land books of the proper county and charged with the taxes due thereon for the said of any year previous thereto, under the laws of the State of Virginia, and also of all waste and unappropriated lands, by proceedings in the Circuit Courts of the county where such lands are situated.

4. All lands within this State, returned delinquent for non-payment of taxes to the State of Virginia since the year one thousand eight hundred and thirty-one, where the taxes, exclusive of damages, do not exceed twenty dollars; and all lands forfeited for the failure of the owners to have the same entered on the land books of the proper county, and charged with the taxes chargeable thereon since the year one thousand eight hundred and thirty-one, where the tract does not contain more than one thousand acres, are hereby released and exonerated from forfeiture, and from the delinquent taxes and damages charged thereon.

5. All lands in this State heretofore vested in the State of Virginia by forfeiture, or by purchase at the sheriff's sales for delinquent taxes, and not released or exonerated by the laws thereof, or by the operation of the preceding section, may be redeemed by the former owners, by payment to this State of the amount of taxes and damages due thereon at the time of such redemption, within five years from the day this Constitution goes into operation; and all such lands not so released, exonerated or redeemed, shall be treated as forfeited, and proceeded against and sold as provided in the third section of this article.

\textit{Id.}

\textsuperscript{134}  1869 W. Va. Acts 88.
eight . . .”\textsuperscript{135} Again, the duration of the 1869 statute was short-lived. Two years later, on February 27, 1871, the legislature amended the statute it had passed on March 4, 1869 to extend the time for former owners to redeem the same.\textsuperscript{136}

Following the adoption of the Constitution of 1872 and its new article XIII, and more particularly section 3, the legislature, on April 9, 1873, passed “[a]n Act to amend and re-enact chapter thirty-one of the code of West Virginia . . .” as chapter 117 of the Code. Section 40 of the new chapter “implemented” the new section three of article XIII of the constitution.

40. All title to lands in this state heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the state of Virginia, or this state, or purchased by either of said states at sale made for the non-payment of taxes and become irredeemable, or hereafter forfeited or treated as forfeited or escheated to this, state, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this state, shall be and is hereby transferred to and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent their heirs or devisees,) for so much thereof as such person has or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims shall have paid the state taxes thereon, for any five years during such possession; or if there be no such person, then to any person (other than those for whose default the same may have been forfeited or returned delinquent their heirs or devisees,) for so much of said land as such person shall have title or claim to, regularly derived, mediately or immediately from or under a grant from the commonwealth of Virginia, or this state, not forfeited, which but for title forfeited would be valid, and who, or those under whom he claims has, or shall have paid all state taxes charged or chargeable thereon for five successive years, after the year 1865 or from the date of the grant, if it shall have issued since that year; or if there be no such person as aforesaid, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have full claim to and actual continuous possession of, under color of title for any five successive years after the year 1865, and have

\textsuperscript{135} Id.

paid all state taxes charged or chargeable thereon for said period.\textsuperscript{137}

It is evident by the number of times the legislature addressed the problem of land titles in West Virginia between 1868 and 1873 that the fact that "the land titles in that portion of the commonwealth of Virginia now embraced within this state were in a most wretched and embarrassed condition[,]"\textsuperscript{138} was very much on the minds of the legislators.

The repeal of sections 4, 5, and 6 of article XIII of the constitution by the voters of West Virginia, at the election held November 3, 1992. When the repeal became effective on July 1, 1993, it made it possible for the legislature to enact new statutory provisions which effectively and efficiently dealt with constitutional issues that were created by those constitutional provisions.\textsuperscript{139} The "new" statute enacted by the legislature contained a provision to replace that portion of the repealed section 3 of article XIII of the constitution that transferred state land to individuals who paid taxes thereon.\textsuperscript{140}

Therefore, throughout our state's history, there has been either a Code section or a constitutional provision combined with Code sections that have

\textsuperscript{137} 1872-73 W. Va. Acts 332–33.

\textsuperscript{138} McClure v. Maitland, 24 W. Va. 561, 575 (1884).


\textsuperscript{140} W. VA. CODE § 11A-3-70 (2010).

Release of title to, and taxes on, lands on which all taxes paid for ten years. In view of the desirability of stable land titles and to encourage landowners to cause their lands to be assessed and pay the taxes thereon, it is the purpose and intent of the Legislature to release all of the state's title and claim and the authority and control of the auditor to any real estate on which all taxes have been paid for ten consecutive years and release all taxes prior to such ten-year period. If, heretofore or hereafter, all taxes due on any parcel of land for ten consecutive years have been fully paid, all title to any such land acquired by the state prior to said ten-year period or all real property tax liens which subject the lands to the authority and control of the auditor prior to said ten-year period shall be and is hereby released to the person who would be the owner thereof but for the title of the state or the real property tax liens which subject the lands to the authority and control of the auditor.

Nothing contained in this section shall affect or be held or construed to affect in any way the right or title of a person claiming to any land by transfer as provided in section three, article XIII of the constitution of the state of West Virginia prior to the repeal of said constitutional provision in the year one thousand nine hundred ninety-two.

It is the intention of the Legislature that this section shall be both retroactive and prospective.

specifically addressed the transfer of State owned property into the hands of taxpayers.

Given the fact that there have been Code sections and/or constitutional provisions relating to the transfer of state owned lands into the hands of individuals since chapter 35, section 20, of the Code was first adopted in 1868, the question of statutory interpretation becomes relevant.

On its face, section 55-2-19 provides “unless otherwise expressly provided.” This proviso would appear to recognize the “land titles” section of the Code as controlling. Also, as discussed above with the adoption of section 3 of article XIII of the constitution of 1872, its provisions would prevail over conflicting statutory provisions. After the repeal of sections 3, 4, 5, and 6 of article XIII of the constitution in 1992, the provision of 11A-3-70 and its companion provisions would seem to apply as opposed to section 55-2-19. The court in the recent case of Zimmerer v. Romano,\(^{141}\) explained its rule of statutory construction as follows:

When two statutes address the same subject matter, this Court attempts to construe the statutes in pari materia to give effect to the full intent and meaning of both legislative enactments. “Statutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syl. pt. 3, Smith v. State Workmen’s Comp. Comm’r. “[W]here two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each.” Syl. pt. 4, in part, State ex rel. Graney v. Sims. If, however, the two statutes cannot be reconciled, the language of the more specific promulgation prevails. “The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Syl. pt. 1, UMWA by Trumka v. Kingdon. Accord Tillis v. Wright (“[S]pecific statutory language generally takes precedence over more general statutory provisions.”); Bowers v. Wurzburg (“Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails.”); Daily Gazette Co., Inc. v. Caryl (“The rules of statutory construction require that a specific statute will control over a general statute when an unreconcilable conflict arises between the terms of the statutes.”\(^{142}\)

\(^{141}\) 679 S.E.2d 601 (W. Va. 2009).

\(^{142}\) Id. at 615–16 (citations omitted).
It would, therefore, appear both by the expressed language of Code section 55-2-19 and rules of statutory construction that the statutory provisions relating to state-owned lands control. Such a holding would be consistent with the precedent in Lewis v. Yates\textsuperscript{143} and Ripple v. Skinner.\textsuperscript{144} The court could also reconsider its statement in Smith that there is no ambiguity in the statute (i.e. section 55-2-19) by recognizing, as an earlier court did, that “[t]he word ‘state’ is generally used to denote three different things, and often without discrimination: First, the territory within its jurisdiction; second, the government or governmental agencies appointed to carry out the will of the people; and, third, the people in their sovereign capacity.”\textsuperscript{145} This quote from Justice Dent’s opinion in Ralston\textsuperscript{146} gains some support from the definition of “state” found in Ballentine’s The Self-Pronouncing Law Dictionary, a dictionary first published in 1931, which reads:

\textbf{[S]tate} (stät). As defined by Vattel, states or nations are bodies politic; societies of men, united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. A more complete definition of a sovereign state, as the term is used in international law, is a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities. \textit{30 Am Jur} 180.

In the United States Constitution the word “state” most frequently expresses the combined idea of people, territory and government. In the ordinary sense of the Constitution, it is a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit which that Constitution designated as the United

\textsuperscript{143} 59 S.E. 1073 (W. Va. 1908).
\textsuperscript{144} 67 S.E. 1075 (W. Va. 1910).
\textsuperscript{145} \textit{Ralston I}, 33 S.E. 326, 328 (1899).
\textsuperscript{146} \textit{Id.} at 326.
States, and makes of the people and states that compose it one people and one country. 49 Am. Jur 225 et. seq.¹⁴⁷


Definitions---Of State.----According to the definition given by Cicero and subsequent public jurists and generally adopted by the courts, a state is a body politic or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength. In modern use the word describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not infrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. In all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser or less definite relations, constitute the state.

Similarly, another section of Am. Jur. describes a “state” as:

II. STATEHOOD AND SOVEREIGNTY

§10. Generally.----A state or nation may be broadly defined as a body politic or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength, occupying a definite territory, and politically organized under one government. “Nations or states,” says Vattel, “are bodies politic; societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights.” A more complete and exclusive definition of a “sovereign state,” as that term is used in international law, is “a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities.” Yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty is limited by relations to a more general government or to other countries. The term is used broadly in general jurisprudence and by writers on public law as denoting organized political societies with an established government. It is often used, however, as denoting only the country or geographical region inhabited by a community of individuals, and it is frequently applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. In those instances where the form of government is absolute, the person of the sovereign is identified with the state itself: “L’état, e’est moi,” said Louis XIV. Hence, jurists frequently use the terms “sovereign” and “state” as synonymous. So also the term “sovereign” is sometimes used in a metaphorical sense merely to denote a state, whatever may be the form of its government, whether monarchical, republican, or mixed.

30 AM. JUR. International Law II Statehood and Sovereignty § 10, p. 443.
What constitutes "ambiguity" was addressed by the court in Energy Development Corp v. Moss. In that case the court said:

This Court has also consistently defined ambiguity as follows:

Ambiguity in a statue or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.


Similarly, in Syllabus point 4 of Tawney vs. Columbia Natural Resources, the court stated "[t]he term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning."

State v. Harden, quoted above in the Moss decision, also contained another syllabus point that may be relevant as it related to West Virginia Code section 55-2-19. Syllabus point 5 of Harden reads, "[a] contemporaneous construction or interpretation, given to a constitution by the Legislature, and acquiesced in by the people and the Courts for a long period of time, will not be disturbed or overthrown, unless it be plainly wrong."

While recognizing that West Virginia Code section 55-2-19 is a Code section, as opposed to a constitutional provision, throughout our state's history until the comment in the Kermit Lumber case, the courts had consistently viewed that section of the Code as not applying to the state in its capacity of sovereign as it relates to its ownership of lands. It is, therefore, submitted that the reasoning reflected in syllabus point 5 of Harden should similarly apply to this statutory provision.

IX. CONCLUSION

In summary, based upon the case law and statutory provisions, one can conclude that West Virginia Code section 55-2-19 was not intended to apply to the State's land so as to permit individuals to obtain title by adverse possession. The basis for this conclusion is that at Statehood in 1863, the common law rule

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149 Id. at 154.
150 633 S.E.2d 22 (W. Va. 2006).
151 Id. at 23–24.
152 Harden, 58 S.E. at 715.
of “nullum tempus occurrit regi” was the law in West Virginia; that the enact-
ment of chapter 35, section 20 (the predecessor of West Virginia Code section
55-2-19) in 1868 was intended as the rule of general application (i.e. “unless
otherwise expressly provided”); that at the same time chapter 35, section 20,
was passed, the legislature also adopted an article in the state constitution and
statutory provisions which provided for the method by which individuals could
acquire title to certain categories of state-owned lands; that the categories of
state-owned properties that individuals could acquire title by occupation and
payment of taxes was specifically identified; and the statutory provisions were
in furtherance of state policy of trying to resolve conflict in land titles and inac-
curate or incomplete records of land titles in the state, and to get the designated
categories of state-owned lands into the hands of taxpayers and productive use.
Consistent with the language of section 55-2-19 as well as statutory construc-
tion, the specific provisions pertaining to state-owned lands prevails over the
general provision of section 55-2-19. Such a construction of the statutes as it
related to state-owned property is consistent with the long line of decided cases
in West Virginia.