A Survey of the Law of Easements in West Virginia

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A SURVEY OF THE LAW OF EASEMENTS IN WEST VIRGINIA

John W. Fisher, II*

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I. INTRODUCTION

"An easement is commonly defined as a nonposessory interest in land of another."¹ “Easements frequently are created to endure forever. These ‘perpetual’ or ‘permanent’ servitudes are so called because they are without durational limitations and, hence, may theoretically last in perpetuity.”² This right to use the land of another, which continues to bind the owners of the respective estates long after the ownership of those who owned the land at the time the easement was created, provides fertile grounds for disputes and disagreements. Add to this the fact that easements can be created not only by an “express” agreement between the parties, but also by the application of principles of law to the particular facts, it should come as no surprise that disagreements and disputes are not uncommon. However, unlike a marriage in which the parties can divorce and part company with each other when the disputes and disagreements reach an intolerable level, in easement situations, the relationship will usually continue.

As might be expected, there are a significant number of easement cases in West Virginia. By their very nature, easement cases are fact specific and are often per curiam decisions in which the West Virginia Supreme Court of Appeals applies the general principles of “easement law” to resolve the specific dispute. However, when the various decisions are taken together, a body of easement law is fairly well articulated by our court.

As is so often true in issues of property law, an understanding of the law’s origin in the common law of England is helpful in studying the law’s evolution in this country. This article, therefore, begins with a brief review of the jurisprudential concepts of easement law in feudal England followed by definitions of the applicable terminology.

¹ JON W. BRUCE & JAMES E. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 1.1, at 1-2 (citations omitted). In Kelly v. Rainelle Coal Co., 64 S.E.2d 606, 613 (W. Va. 1951), overruled by Kimball v. Walden, 301 S.E.2d 210 (W. Va. 1983), the court distinguishes easements, profit a prendre, and “bare license.”

² BRUCE & ELY, supra note 1, § 10.1, at 10-2 to10-3 (citations omitted).
The majority of the Article involves a discussion of the various methods by which easements may be created and their respective elements. These discussions begin with express easements. As easements are an interest in land, the Statute of Frauds and the Recording Acts are applicable to express easements, with much of the litigation of express easements involving the construction of the language used in their creation.

The other methods by which easements are created include by the application of principles or elements of law to a particular set of facts. These “implied” easements include prescriptive easements, the easement equivalent of adverse possession; ways of necessities, which rest upon a presumption that parties would not intend to “landlock” conveyed or retained property; easements implied from quasi-easements, which arise from the fact that a person does not have an easement across, or through, his or her own property; and easements by estoppel, which involve applying the equitable principle of estoppel to easement situations. The elements of each will be discussed as gleaned from the case law in West Virginia. Appropriately, the Article ends with a brief discussion of how easements may terminate. 3

3 This Article does not address the issue of when a roadway becomes a “public” road or the subject area of roads or streets that are platted on a subdivision plat which is recorded. However, a recent opinion by the West Virginia Supreme Court of Appeals, Ford v. Dickerson, 662 S.E.2d 503, 504-05 (W. Va. 2008), summarizes the ways in which roads become “public” and the recording of subdivision plats as follows:

4. “Generally there are but three methods by which the public may acquire a valid right to use land owned by another as and for a public road or highway:
   (1) By condemnation proceeding, with compensation to the property owner for the damage resulting from such forceful taking; (2) by continuous and adverse user by the public during the statutory period, accompanied by some official recognition thereof as a public road by the county court, as by work done on it by a supervisor acting by appointment of that tribunal; (3) by the owner’s dedication of the land to the public use, or by his consent to such use given in writing, and acceptance of the dedication by the proper authorities.” Syllabus Point 4, Ryan v. Monongalia County Court, 86 W. Va. 40, 102 S.E. 731 (1920).

5. “In order to acquire title to the streets and alleys shown upon a plat by which it is proposed to dedicate them to the public, the municipality or other proper public authority must accept the same.” Syllabus Point 1, City of Point Pleasant v. Caldwell, 87 W. Va. 277, 104 S.E. 610 (1920).

6. “This acceptance may be by some order or resolution of the proper municipal authorities, or it may be implied from their acts in connection with the streets so proposed to be dedicated, such as making improvements thereon, taking charge thereof, and assuming control thereof.” Syllabus Point 2, City of Point Pleasant v. Caldwell, 87 W. Va. 277, 104 S.E. 610 (1920).

7. “Where the owner of a tract of land lays the same off into lots, streets, and alleys, and makes a plat thereof, and offers to dedicate the streets and alleys shown upon such plat to the public, the public authorities may accept such dedication in whole or in part. If an acceptance by implication is relied upon, the acts which it is contended work such implied acceptance must show a clear intent to treat and consider the streets and alleys thus offered as public
Law students are often reminded that behind the principles of law of each case set forth in their casebook, there are the stories of the litigants. Given the ongoing relationship between owners and successive owners of the dominant and the servient estates and human nature, the study of easement law promises to continue to be relevant and interesting in the years ahead.  

II. THE TERMINOLOGY OF EASEMENT LAW

The American Law Institute’s “initial” treatment of servitudes was published in 1944 as the fifth and final volume of the original Restatement of Property. In 1987, work on Restatement (Third) of Property began and thirteen years later, on May 12, 1998, the American Law Institute adopted the “new” restatement dealing with servitudes. As the forward notes, “The large ideas in this Restatement are very different from those that governed its predecessor. Easements, profits, irrevocable licenses, real covenants, and equitable servitudes are here treated as integral parts of a single body of law, rather than as discrete doctrines governed by independent rules.” This Article will be concerned with that area of the law of servitudes that is traditionally classified as “easements.”

The recent West Virginia case of Newman v. Michel provides a concise summary of several aspects of easement law. In that case, the court states, “an easement may be defined as the right one person has to use the lands of another for a specific purpose and is a distinct estate from the ownership of the soil it strengthens and alleys.” Syllabus Point 4, City of Point Pleasant v. Caldwell, 87 W. Va. 277, 104 S.E. 610 (1920).

8. “No dedication to public use arises upon the subdividing of land into lots, streets and alleys as shown upon a recorded plat, until and unless the proper public authority either expressly or by clear implication accepts the dedication so tendered.” Syllabus Point 1, Rose v. Fisher, 130 W. Va. 53, 42 S.E.2d 249 (1947).

4 The case of Sherrard v. Henry, 106 S.E. 705 (W. Va. 1921), illustrates this point. The following excerpt is from the court’s Syllabus:

While the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement subject to be controlled by the state in the exercise of its police power, it is such a valuable right as a court of equity will protect, and the same character of adverse possession that will confer title to real estate will suffice to confer such right.

. . . .

One who buries the body of his dead relative upon a burial lot which another has the exclusive right to use for such purpose, will be required by mandatory injunction to disinter and remove the same.

Id. at 705, Syl. Pts. 3, 5.

5 Lance Liebman, Foreward to, RESTATEMENT (THIRD) OF PROP. ix (2000).

6 Id.

7 Id.

8 688 S.E.2d 610 (W. Va. 2009).
The court quotes the Restatement's (Third) of Property definition that “[a]n easement creates a nonpossessing right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.” As discussed in this Article, “easement” includes: (1) those created by express terms of grant or reservation, (2) easements by implication, (3) ways of necessity, (4) easements by prescription, and (5) estoppel.

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9  Id. at 615 (quoting Kelly v. Rainelle Coal Co., 64 S.E.2d 606, 613 (W. Va. 1951)).
10  Restatement (Third) of Property § 1.2(1).
11  Id. at § 2.7. “The formal requirements for creation of a servitude are the same as those required for creation of an estate in land of like duration.” Id. at 115.
12  See generally id. at §§ 2.11–2.14.
13  Id. at § 2.15. “A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicates that the parties intended to deprive the property of these rights.” Id. at 202.
14  See generally id. at § 2.16. Servitudes Created by Prescription: Prescriptive Use.

A prescriptive use of land that meets the requirements set forth in § 2.17 creates a servitude. A prescriptive use is either:

1. a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
2. a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

Id. at § 2.17 Servitudes Created by Prescription Requirements. “A servitude is created by a prescriptive use of land, as that term is defined in § 2.16, page 260, if the prescriptive use is:

1. Open or notorious, and
2. Continued without effective interruption for the prescriptive period.

Periods of prescriptive use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefited by the inchoate servitude.

Id.

15  Id. at § 2.10.

If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:

1. the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief; or
2. the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.
In the discussion of easement law certain terms appear with frequency and will therefore be defined at the outset. As the court explained in the Newman case:

The land benefiting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate.

It is essential to the existence of an easement, which is appurtenant to land, that there are two distinct estates or tenements, the dominant to which the right belongs, and the servient upon which the obligation rests. The term easement and the term servitude are often used indiscriminately; the one is usually applied to the right enjoyed, the other to the burden imposed. A right of way over the land of another is an easement in the dominant estate and servitude upon the servient estate.¹⁶

The Newman case also provides a good understanding of the terms “appurtenant” and “in gross” as used in easement law.

“An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate. Essentially, an easement appurtenant serves the owner of the dominant estate in a way that cannot be separated from his rights in the land.” Hodgins v. Sales, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003) (internal citation omitted). See also, Syllabus Point I, Jones v. Island Creek Coal Co., 79 W. Va. 532, 91 S.E. 391 (1917) (“If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intention of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate.”).

An easement appurtenant may therefore be thought of as the right to use a certain parcel of land that is called a servient estate, a right that is attached—i.e., appurtenant to—the dominant estate. The main features of an easement appurtenant are that there must be both a dominant and servient estate; the holder of

the easement must own the dominant estate; the benefits of the easement must be realized by the owner of the dominant estate; and these benefits must attach to possession of the dominant estate and inhere to and pass with the transfer of the title to the dominant estate.

... An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal and usually ends with death of grantee.

Unlike an easement appurtenant, an easement in gross does not run with the land and creates no dominant or servient estates. See Restatement (Third) of Property: Servitudes § 1.4(2) (2000). Other courts have stated that an easement in gross is purely personal and usually ends with the death of the grantee. Singleton v. State, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). An easement in gross is not assignable and applies to specific people and not to guests or assignees. Beckstead v. Price, 146 Idaho 57, 65, 190 P.3d 876, 884 (2008). An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal and usually ends with death of grantee.

Easements are also classified as “affirmative” or “negative.” As the court explained in Cottrell v. Nurnberger:

Easements are sometimes classified as affirmative and negative. An affirmative easement exists when the owner of the servient estate must permit something to be done upon it or some use to be made of it. A negative easement exists when the owner of the servient estate is prohibited from doing something on his estate which but for the easement would be lawful and which affects the dominant estate.

III. EASEMENTS BY EXPRESS GRANT OR RESERVATION

In many situations the easement is created by an expressed grant or reservation. In such instances, the owner of a tract of land either conveys a portion of it to another and grants an easement over the land retained to benefit the land conveyed or reserves an easement across the land conveyed for the benefit of

17 Id. at 616–17.
18 Cottrell, 47 S.E.2d at 457; see also Bennett v. Charles Corp., 226 S.E.2d 559, 563 (W. Va. 1976).
the land retained. In these situations, the easement created is a part of the deed conveying a parcel of land. Expressed grants also include transactions in which the sole purpose of the instrument is the creation of the easement — for example, a right of way for a public utility or a private right of way for ingress and egress to an adjacent tract of land.

As noted above, the Newman court quoted the Restatement’s (Third) of Property definition that “[a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.” Bruce and Ely explain the significance of being a “nonpossessing interest in land of another” as follows:

“Several aspects of the definition are noteworthy. First, an easement is an interest in land, not merely a contract right. This distinction is important for various purposes, including resolving questions about the applicability of The Statute of Frauds and the availability of compensation for condemnation. Second, the nonpossessory feature of an easement differentiates it from an estate in land. Thus, the holder of an affirmative easement may only use the land burdened by the easement; the holder may not occupy and possess the realty as does an estate owner. Third, an easement burdens land possessed by someone other than the easement holder. This characteristic is a corollary of the nonpossessory element of an easement. It emphasize

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We recognized the distinction between an “exception” and a “reservation” in Malamphy v. Potomac Edison Co., 140 W.Va. 269, 273, 83 S.E.2d 755, 758 (1954):

“An exception is language in which ‘* * * the grantor withdraws from the operation of the conveyance that which is in existence, and included under the terms of the grant.’ Tate v. United Fuel Gas Co., 137 W.Va. 272, [280.] 71 S.E.2d [65, 70 (1952)]; I Devlin on Real Estate, Third Edition, § 221; 16 Am.Jur., Deeds,§ 298. ‘A reservation is ‘ ‘something arising out of the thing granted, not then in esse, or some new thing created or reserved, issuing or coming out of the thing granted, and not a part of the thing itself, nor of anything issuing out of another thing’ ‘’. Tate v. United Fuel Gas Co., supra; I Devlin on Real Estate, Third Edition supra.”

We went on to state in Malamphy: “Notwithstanding that the language in a deed of conveyance may be phrased as a ‘reservation’, such language may be regarded and treated as an exception if it is necessary in order to carry out the plain purposes of the parties to the instrument.” 140 W.Va. at 273, 83 S.E.2d at 758. (Citations omitted).

20 Newman, 688 S.E.2d at 610.

21 Id. at 615.

22 BRUCE & ELY, supra note 1, at § 1.1, at 1-2.
es the distinction between possession and use and highlights the fact that a possessor and an easement holder can simultaneously utilize the same parcel of land.”

As the quote notes, the Statute of Frauds is applicable as an easement is an interest in land. While one normally associates the doctrine of “part performance” with contracts involving the sale of land, the principle is also applicable to the creation of easements. In Sanford v. First City Co., a covenant in a lease to erect a building was modified by an oral agreement. The court’s holding is summarized by Syllabus Point 2, which states:

Equity will enforce by specific performance a parol contract for an easement where it appears that the party seeking to establish the easement thereunder has performed the contract in whole or in part to the extent that to refuse to enforce performance of it would be tantamount to a fraud upon him.

Also, written instruments transferring an interest in land must be recorded to be afforded the protection provided by the recording acts.

The significant majority of the appellate cases in West Virginia involving granted or reserved easements fall into one of three general categories (1) what constitutes permissible use of the easement, (2) the location or width of the easement and (3) whether the easement is “appurtenant to” or “in gross”.

A. What Constitutes Permissible Use of an Expressed Easement

In commenting on express easements, the court in Farley v. Farley said:

Furthermore, we have held that the rule governing the construction of other writings is the same as the rule relating to the construction of grants of easements; that rule provides that the rights of parties must be ascertained from the words of the grant.
so long as the words are unambiguous. See, e.g., Semler v. Hartley, 184 W. Va. 24, 399 S.E.2d 54 (1990); Jenkins v. Johnson, 181 W. Va. 281, 382 S.E.2d 334 (1989); Hoffman v. Smith, 172 W. Va. 698, 310 S.E.2d 216 (1983); Collins v. Degler, 74 W. Va. 455, 82 S.E. 265 (1914). Moreover, in Syllabus Point 1 of Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962), we explained that “[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” In Sally-Mike Properties v. Yokum, 175 W. Va. 296, 300, 332 S.E.2d 597, 601 (1985), this Court stated that the “language of the instrument itself, and not surrounding circumstances, is the first and foremost evidence of the parties intent.”

Later in the Farley opinion, the court, citing West Virginia case law, said:

“Where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant.”; Syllabus Point 2, Lowe v. Guyan Eagle Coals, Inc., 166 W. Va. 265, 273 S.E.2d 91 (1980) (“No use may be made of a right-of-way different from that established at the time of its creation so as to burden the servient estate to a greater extent than was contemplated at the time of the grant.”).

In Shock v. Holt Lumber Co., the issue was whether the plaintiff was entitled to an injunction to prevent transport of timber cut on other lands across the plaintiff’s property under the easement granted in a deed in which the plaintiff was the grantor. The general rule, as expressed by the court in Shock, is that

There can be no question that the rights of one claiming an easement by express grant are limited within the scope of the privilege. The extent of the servitude is determined by the terms of the grant. . . . “Where an easement exists by express grant its use must be confined to the terms and purposes of the grant.” “When a right of way has been acquired by grant, it

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29 Farley v. Farley, 600 S.E.2d 177, 180 (W. Va. 2004). In Semler v. Hartley, 399 S.E.2d 54 (W. Va. 1990), the court held it was in error to permit extrinsic evidence from the grantors of the easement which would restrict or limit the unambiguous language in their deed granting a right of way 30 feet in width.

30 Farley, 600 S.E.2d at 181.

31 148 S.E. 73, 74 (W. Va. 1929).
must be used according to the terms of the grant.” . . . “When a right of way has been acquired by prescription the right will be commensurate with and measured by the use.” . . . There is also little doubt that the owner of land over which a right of way has been granted may, ordinarily, restrain an excessive and unwarranted use of the easement. “An unlawful or excessive use of an easement may be enjoined.”

In *Ratcliff v. Cyrus*, after the court concluded that an easement granted in the deed was not void for vagueness, it further held the easement was limited to the “rear property” and could not be extended to other property owned by the plaintiff. The court cited with approval Syllabus Point 1 of *Dorsey v. Dorsey*, which stated, “An easement cannot be extended as a matter of right, by the owner of the dominant estate, to other lands owned by him.”

In *Shepherd v. Yoho*, the owner of the dominant estate sought to enjoin the owner of the servient estate from also using the right of way. The right of way was expressly provided for in a 1918 deed. In addition to the language relating to the right of way, a 1990 conveyance contained the following language:

“It is agreed and understood the right-of-way hereby granted is a private right-of-way for use by the Grantees and their invitees and is limited to use for ingress, egress and regress to said 30-acre tract of the Grantees. The Grantors, their heirs or assigns shall have the express right to use this right of way at any and all times.”

The Yohos were the owners of the servient estate. The lawsuit was precipitated by the Shepherds placing two gates across the right of way over the

32 *Id.* at 74 (citations omitted).
33 544 S.E.2d 93 (W. Va. 2001).
34 A “twenty-foot right-of-way running from the house trailer site in a westerly direction to two marble markers which are set on the boundary line of the Johnson and Ratcliff land to the lands of William Glenn Ratcliff and Thelma Ratcliff to the Adkins-Ratcliff Lane thence running in a northerly direction to Tolisa (sic) Highway.” *Id.* at 96–97.
35 *Id.* at 97.
36 153 S.E. 146 (W. Va. 1930).
38 559 S.E.2d 905 (W. Va. 2001).
39 “‘There is retained over and through this boundary of land a right-of-way on or near the road now traveled down the run; which right-of-way is for the perpetual use of the first party and his assigns.’” *Id.* at 906.
40 *Id.*
protest of the Yohos. The appeal, which resulted in the reported opinion, followed a ruling by the circuit court, which granted exclusive use of the right of way to the Shepherds and enjoined the Yohos from using it.\footnote{Id.} On appeal, the court noted that the Yohos, as the direct successors to the grantors in the 1990 deed, had """"the express right to use the right of way at any and all times.""""\footnote{Id. at 907.} As to the general principal of law the court continued:

As a general rule, """"where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant."""

\textit{Hoffman v. Smith}, 172 W.Va. 698, 700-01, 310 S.E.2d 216, 218 (1983). It is also a well-established principle of law that the servient estate owner has all the rights and benefits of ownership consistent with the easement including the right to continue to use the land unless there is an express reservation to the contrary. 25 Am.Jur.2d \textit{Easements and Licenses} \$ 98 (1996); 6B \textit{Michie's Jurisprudence Easements} \$ 6 (1998). In this case, the 1918 deed quoted above merely created a right of way for perpetual use. The language in the deed does not establish or even imply that the right of way is for the exclusive use of the dominant estate owner. Likewise, subsequent deeds in the chain of title reference the right-of-way, but none contain an exclusive reservation of the right of way.\footnote{Id.}

It should be noted that the issue in the \textit{Shepherd v. Yoho} case was the use of the right of way, not erection of the gates per se. The right to erect gates across a right of way was at issue in \textit{Hoffman v. Smith}.\footnote{310 S.E.2d 216, 217 (W. Va. 1983).} In \textit{Hoffman v. Smith}, the circuit court had granted the Smiths, the owners of the servient estate, the right to replace the gates across the right of way with cattle guards.\footnote{Id. at 217.} The 1907 deed, which created the right of way across what became the Smiths' property, contained the following statement as part of the express grant of the right of way: """"Where gates and bars are placed, they are to be maintained and kept closed by the parties hereto, their heirs and assigns.""""\footnote{Id. at 217-18.} On appeal the court, on the basis of the expressed terms in the grant, reversed the circuit's decision that the gates could be replaced by cattle guards, stating,
We believe the law is too well settled with regard to upholding limitations contained in a written easement to permit us to ignore the language of the easement grant setting the maintaining of gates and the closing of the same. Furthermore, even if it were demonstrated that cattle guards are as effective as gates in securing livestock, there is the larger question that gates provide a measure of privacy that inhibits casual trespassers from making free use of the right-of-way.\footnote{Id. at 220. Prior to this statement reversing the circuit court, the court had explained: With regard to the gate issue, we begin with the general rule that where one acquires an easement over the property of another by an express grant, the use of that easement must be confined to the terms and purposes of the grant. 

It has also been recognized that where a grant of a right-of-way allows the grantor to maintain gates across it, there is a duty imposed on the grantee to close the gates after passing through them. \textit{Id. at 218} (citations omitted).}

The dictum in the \textit{Hoffman} case is instructive. While the case was decided on the expressed terms of the grant of the right of way, the court also discussed the right to erect gates in the absence of an expressed permission. The court said:

The general rule is that unless there is specific language in the grant of an easement to the contrary, the grantor of a right-of-way over farm land retains the right to erect gates, provided they do not unreasonably interfere with the use of the easement. We stated in \textit{Collins v. Degler}, 74. W.Va. 455, 461, 82 S.E. 265, 2667 (1914):

Freedom in the use of the right-of-way over farming land is not unreasonably interfered [sic] with or restrained by the use of gates, when the grant of the right has no provision forbidding them. Why? Because the very character of the land makes gates essential to the proper and reasonable use of the way. They are, in other phrase, the custom of the business.

Moreover, even where a right-of-way over farm property has been obtained by prescriptive use the servient owner has the right to erect gates in a reasonable manner. *Mitchell v. Bowman*, 74 W.Va. 498, 82 S.E. 330 (1914).

Thus, under the foregoing law with regard to agricultural property, even where there are no gates when the easement was granted and no express language in the grant permitting the servient owner to erect gates, the servient owner is still permitted to do so. Here, the right to maintain gates and the obligation to close them is expressly contained in the grant of the right-of-way. 48

The case of *G. Corp., Inc. v. Mackie, Inc.* 49 involved the development of commercial property along Corridor G, in Kanawha County. Although the case principally involves the interpretation and application of a Declaration of Protective Covenants and Restriction, an ancillary issue involved the grant of “a non-conclusive 40 foot easement or right-of-way” leading from Corridor G, to property owned by Fletcher. 50 The court, while recognizing that the Declaration of Protective Covenants and Restriction could change the application of the general rule, quoted Syllabus Point 6 of *Sanders v. Roselawn Memorial Gardens*, 159 S.E.2d 784 (W. Va. 1968), as follows:

> “An owner of a servient estate may legally grant successive easements for purposes of travel in and over a certain road or way in favor of various property owners having need for such travel easements, to be used jointly by them; and a person having such an easement right may not be permitted to object to any use of or change in the character of such road or way by the owner of the servient estate or by any other owner of such an easement right or way so long as the rights of the one complaining are not thereby impaired or interfered with in an undue or unreasonable manner or degree.” 51

An interesting issue involving express easements was presented in *Keller v. Hartman*. 52 Sam Byrd owned a tract of land in Franklin, Pendleton County, which included a house, garage, and four commercial buildings. Upon his death in 1949, the property descended to his three children, Leslie, Maurice, and

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48 Id. at 219 (citations omitted).
49 466 S.E.2d 820 (W. Va. 1995).
50 See id. at 822.
51 Id. at 824.
52 333 S.E.2d 89 (W. Va. 1985).
Wayne. Maurice purchased Leslie’s interest giving him a two-thirds undivided interest. In 1956, Maurice and Wayne partially partitioned the tract with Wayne taking sole ownership of one of the commercial properties, Maurice taking sole ownership of two of the commercial properties, and the balance of the tract remaining in Maurice (⅔ undivided interest) and Wayne (⅓ undivided interest) as tenants in common. In 1978, the successor to Maurice’s interest, his widow, sold one of the commercial buildings to Mr. Hartman, the tenant, who had rented the building since 1953. In addition to conveying the building to Mr. Hartman, the grantor also granted an easement across the unpartitioned portion of the original tract of land describing it as “across her undivided ⅔ interest.”

Three years after the grant of the easement, the owner of the two-thirds (⅔) undivided interest conveyed her interest in the unpartitioned portion to the owner of the one-third (⅓) undivided interest, her brother-in-law. The conveyance to her brother-in-law provided: “This conveyance is made subject to any and all rights-of-ways [sic] and easements affecting the real estate herein conveyed.”

In responding to the argument “that the 1978 deed conveying the easement to the appellees was void and thus incapable of being later ratified,” the court, in affirming the jury’s finding that the brother-in-law had consented to or ratified the easement, said:

This Court has held that a conveyance of land by one cotenant without consent of the other cotenant(s) is not void as between the grantor and grantee. Boggess v. Meredith, 16 W.Va. 1, 27–29 (1879); Worthington v. Staunton, W.Va. 208, 241–2 (1880).

The general rule regarding grants of easement by cotenants is found at 86 C.J.S., Tenancy in Common § 111: “Ordinarily a tenant in common cannot, as against his cotenants and without their precedent authority or subsequent ratification, impose an easement on the common property in favor of third persons; but the easement may be binding on the undivided interest of the granting cotenant.” [Citations omitted].

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53 Id. at 91–92. The language in the 1978 deed provided:

The party of the first part [Elsie Byrd] also grants and conveys to the party of the second part [Hartmans] a right-of-way thirty (30) feet in width across her undivided two-thirds (⅔) interest in the real estate owned by her and located East of and between South Branch Street, the location of said right-of-way shall be the same entrance which the parties of the second part now use for the purpose of ingress and egress to the real estate herein conveyed.

Id. at 92–93.

54 Id. at 93.

55 Id. at 95.
We have recognized that a cotenant who did not join in the original conveyance may affirm or ratify the act of another cotenant "in carving out a portion of the common estate." *Mauzy v. Nelson*, 147 W. Va. 764, 770, 131 S.E.2d 389, 393, 97 A.L.R.2d 732, 738 (1963). In syl. pts. 5 and 7 of *Worthington v. Staunton*, supra, this Court held:

A deed from a co-tenant of a part of the land held in common, describing it by metes and bounds, cannot in any way operate to the prejudice of the other tenants in common. They have the right to have the land partitioned unaffected by such deed.

Such a deed will become operative and pass the land to the grantee by metes and bounds, if the other tenants in common, before partition, confirm and ratify it, and after partition, if that portion is allotted to the purchaser thereof; and in either case such deed will be binding on both the grantor and grantee.

Our holdings with respect to conveyances by one cotenant, and subsequent ratification by the remaining cotenant(s), apply with equal force to the grant of an easement. *See Saulsberry v. Saulsberry*, 121 F.2d 318 (6th Cir. 1941). We conclude from the foregoing authorities that where a tract of land is owned by tenants in common and one tenant grants an easement to a third party, which by the express terms of the grant, purportedly conveys only the grantor's undivided interest, such grant is effective to create an easement on the other tenants' interest, if the other tenant(s) consent to or subsequently ratify the conveyance.

Upon review of the record we find that the evidence was sufficient to present a jury question as to whether Wayne Byrd consented to or ratified the conveyance of the easement. The jury could reasonably infer consent or ratification from testimony regarding Wayne Byrd's silence, his response to the conveyance of the easement by Elsie Byrd or his acceptance of the 1981 deed.56

56 *Id.* at 96.
1. Mineral and Timber Severances

A source of litigation over what usage was permissible under an express right-of-way grant has been the severance deeds of minerals or timber and the associated mining or timbering rights. An illustrative case is *Lowe v. Guyan Eagle Coals, Inc.* The 1902 severance deed gave the owner of the mineral interest his heirs and assigns "full rights of way to, from and over, said premises by the construction and use of roads . . . or otherwise, for the purpose of . . . shipping or transporting all of said minerals . . . whether contained on said premises or elsewhere." The issue presented to the Circuit Court of Logan County in 1979 was whether Guyan Eagle could transport coal from a strip mine on an adjacent tract, i.e., not a part of the land involved in the 1902 severance. The owner of the surface interest appealed a summary judgment by the circuit court in favor of the "mineral interest," holding that the "surface property is a servient estate to the dominant Guyan Eagle mineral estate and that the 1902 deed created an easement appurtenant to the coal estate which is not subject to termination." In reversing the grant of summary judgment, the Supreme Court of Appeals explained:

> These facts are akin to those in *West-Virginia-Pittsburgh Coal Co. v. Strong*, 129 W.Va. 832, 42 S.E.2d 46 (1947), wherein the first syllabus point is:

> In order for a usage or custom to affect the meaning of a contract in writing because within the contemplation of the parties thereto, it must be shown that the usage or custom was one generally followed at the time and place of the contract's execution. *Id.*

> At Footnote 3 in *Buffalo Mining Co. v. Martin*, supra, 267 S.E.2d, at 724, we interpreted the *West Virginia Pittsburgh Coal Co. v. Strong*, supra, decision to be based on the compatibility of a mineral owner's uses of and burdens on a surface owner's estate, with the intention of the parties to the deed, a genuine question of material fact that must be resolved at trial. Summary judgment is inappropriate. *Reed v. Smith Lumber Co.*, W.Va. 268 S.E.2d 70 (1980), Syllabus.

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57 273 S.E.2d 91 (W. Va. 1980).
58 *Id.* at 92–93.
59 *Id.* at 92.
It is stated quite precisely, in 25 Am.Jur.2d Easements and Licenses § 77, that no use may be made of a right-of-way, different from that established at the time of its creation so as to burden the servient estate to a greater extent than was contemplated at the time of the grant. See generally, Annotation, Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms, 3 A.L.R.3d 1256 (1965 and supp.).

We remand this cause to the circuit court for an evidentiary hearing to determine whether the technology of hauling is so different from anything contemplated in 1902 that it overburdens the surface owner’s estate and is beyond the deed’s reservation: whether the burden now is alien to that generally contemplated by parties to such deeds at the time and place of its execution. If a jury determines that the present uses of the right-of-way were within the contemplation of the parties as to potential burdens on the surface estate, Guyan Eagle is entitled to use the property as it is. If a jury finds that the burdens were beyond those contemplated and paid for, it may assess damages for the unauthorized use.\(^{60}\)

An earlier decision which raised the same issue as the Lowe case was Jones v. Island Creek Coal Co.\(^{61}\) The operative words in the grant were essentially the same as in Lowe.\(^{62}\)

\(^{60}\) Id. at 93.

\(^{61}\) 91 S.E. 391 (W. Va. 1917).

\(^{62}\) Together with the full and complete rights and privileges of every kind of mining, manufacturing, and transporting such coal, gases, salt water, oil, and minerals on, through, and over the said premises, and in particular the right of exploring for, and extracting the said minerals, and also with full rights of way to, from, and over said premises by the construction and use of roads, tramways, railroads, or otherwise, for the purpose of exploring, extracting, storing, handling, manufacturing, refining, shipping, or transporting all said materials, whether contained on the said premises or elsewhere, and for any other purpose whatsoever, and with the full right to take and use all water, stone, and timber except walnut, poplar, and oak over 12 inches in diameter found on said premises required for any purposes: Provided, however, that the said parties of the first part shall have the right to take for themselves such coal as they may need for the domestic use of their own family so long as they shall remain on the said premises; or in case said coal cannot be taken without inconvenience to the mining operations of the party of the second part, then the same shall be delivered by and received from said party of the second part free of charge.

Id. at 392.
The coal company wanted to haul timber from an adjacent tract across the plaintiff's surface interest under the easement granted in the 1892 severance deed claiming that the timber would be used for its mining operatives, "so far as the same is required therefore, and that the remainder will be sold in the open market; that it will require from one-third to one-half of all said timber for the conduct of the mining operation." After concluding that the easement was appurtenant to the mineral estate in the 70 ¼ acre tract in the 1892 deed, the court stated:

"Easements by express grant or reservation must be limited to the matters contained in the deed. Nothing passes by implication as incident to the grant except what is reasonably necessary to its fair enjoyment. The extent of the rights acquired must therefore depend upon the construction placed upon the terms of the grant, and in construing such instruments the court will look to the circumstances attending the transaction, the situation of the parties, and the state of the thing granted to ascertain the intention of the parties. In cases of doubt the grant must be taken most strongly against the grantor." 64

It will be noted from this quotation that nothing passes by implication as incident to the grant except what is reasonably necessary to its fair enjoyment. In this case the situation of this land is such that it is reasonably necessary to the fair enjoyment of the grant of the minerals that the grantee of them shall have the right to remove minerals from other lands over the surface of this land, and if it can be said that such is the case then the grant of rights of way over the 70 ¼ -acre tract of land for the purpose of removing coal from other tracts, as well as from this tract, will be held to be an easement appurtenant to the ownership of the minerals in this tract of land and to be enjoyed by the owner of these minerals.

Applying these conclusions to the case in hand, we find that the defendant has the right to construct such a tramroad over the land of the plaintiff as may be reasonably necessary for its use in procuring timber from other lands to be sawed into lumber for use in its mining operations upon the 70 ¼ -acre tract of

63 See id.
64 Id. at 394 (quoting Cyc. P. 1201).
land, or upon its other lands operated or intended to be operated in conjunction therewith.\textsuperscript{65}

In construing mining rights, the court limited the implied rights in severance deeds in \textit{Buffalo Mining Co. v. Martin}\.\textsuperscript{66} In \textit{Buffalo Mining Co.}, the issue was whether an electric transmission line could be erected on the surface under the language of the mining rights granted in the 1890 mineral severance deed. Syllabus Points 2 and 3 set forth the majority holding as follows:

2. Where there has been a severance of the mineral estate and the deed gives the grantee the right to utilize the surface, such surface use must be for purposes reasonably necessary to the extraction of the minerals.

3. In order for a claim for an implied easement for surface rights in connection with mining activities to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.\textsuperscript{67}

2. Utility Easements

While the case was before The Supreme Court of Appeals on an appeal from the lower court’s grant of a summary judgment, \textit{Larew v. Monongahela Power Co}.\textsuperscript{68} provides a concise statement of the rule of reasonableness the court had discussed at length in \textit{Kell v. Appalachian Power Co}.\textsuperscript{69} In \textit{Larew} the court summarized its holding in \textit{Kell} as follows:

In \textit{Kell} . . . we discussed the property rights when a utility easement has been granted by stating:

\begin{quote}
The fee interest in land over which a power company has been granted an easement remains in the party making the grant. The grantor-owner of the land retains the right to make any reasonable use of the land subject to the eas-
\end{quote}

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} 267 S.E.2d 721 (W. Va. 1980).

\textsuperscript{67} \textit{Id.} at 722, Syl. Pts. 2, 3.

\textsuperscript{68} 487 S.E.2d 348 (W. Va. 1997).

\textsuperscript{69} 289 S.E.2d 450 (W. Va. 1982).
ment so long as that use is not inconsistent with the rights of the grantee. (footnotes omitted).

In exercising the rights granted under an easement, a power company must follow the rule of reasonableness. In other words, the power company “may not inflict unnecessary damage on the land” and “may not unreasonably increase the burden placed upon the servient tenement.” *Kell*, 170 W. Va. at 17, 289 S.E.2d at 454. These common law principles formed the basis for our decision in *Kell* holding that the indenture did “not authorize the power company to apply toxic herbicides to that right-of-way by aerial broadcast spraying.” Syllabus, in part, *Kell*.

In *Kell*, we found that the right given by the utility indenture was “to cut and remove trees, overhanging branches or obstructions that endanger the safety, or interfere with the use, of the power company’s lines on the right-of-way granted by the indenture.” *Kell*, 170 W.Va. at 20, 289 S.E.2d at 457.70

3. Adapting to Technology

In *Davis v. Jefferson County Telephone Co.*,71 the issue was whether the owner of the servient estate could prevent the owner of the dominant estate from giving permission to the telephone company to install poles and wires in the right of way. The language granting the easement read: “‘and a right of way for the benefit of the land hereby conveyed . . . .”72 The court stated: “The general rule is that where a right of way is granted or reserved without limit of use it

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70 *Larew*, 487 S.E.2d at 352–53 (citations omitted). Footnote 4 of the *Larew* opinion stated:

The following is a more complete excerpt of *Kells’s* discussion of the common law principles concerning an utility easement:

A power company, however, does have the right, under a general right-of-way easement, to enter upon the land to maintain and repair its equipment to the extent necessary to the safe and effective operation of that equipment. A power company, however, in exercising that right of entry, may not inflict unnecessary damage on the land. *Otter Tail Power Co. v. Malme*, n. 13, supra. [92 N.W.2d 514 (N.D. 1958)] Similarly, it has been held that a power company, in exercising its right to enter upon the land to maintain or repair its equipment, may not unreasonably increase the burden placed upon the servient tenement. *Martin v. Norris Public Power Dist.*, 175 Neb. 815, 124 N.W.2d 221 (1963). It was decided very early that this right of entry included the right to enter upon the land to cut or trim trees or limbs which might be a danger to the power lines. (footnotes omitted).

71 95 S.E. 1042 (W. Va. 1918).

72 *Id.* at 1043.
may be used for any purpose to which the land accommodated thereby may naturally and reasonably be devoted.”

The court then added:

If then those living in a rural district with only such unlimited private ways as that involved here are to enjoy any of the modern conveniences, such as electric light, natural gas, telephones, and the like, they must of necessity rely upon such ways by which to obtain them. To deny them such right would be to stop to some extent the wheels of progress, and invention, and finally make residence in the country more and more undesirable and less endurable. Where there has been such an unlimited and unrestricted grant of a way we think it may be reasonably implied that the parties intended an unlimited reasonable use thereof, as distinguished from an unreasonable and improper one. It is fully shown in the evidence in this case that the poles and wires are so set and hung as to constitute no invasion of plaintiff’s right or any obstruction to the enjoyment by him of the residue of his land.

A recent case which follows a similar analysis is C/R TV, Inc. v. Shannondale, Inc. Shannondale was the owner of a development, which granted Potomac Edison an easement to install poles and wires for electrical and telephone service within its subdivision. Potomac Edison licensed other utilities to use its poles in Jefferson County, West Virginia, including the Shannondale subdivision. Potomac Edison had license arrangements with both C/R TV and Mid-Atlantic Cable, both of which were involved in providing cable television. Shannondale, who had an exclusive agreement with Mid-Atlantic Cable to provide cable television within its development, sought to enjoin C/R TV from stringing its television cable on Potomac Edison’s poles in its subdivision. One of Shannondale’s arguments was that the easement it had granted to Potomac Edison was not broad enough to permit Potomac Edison to license a television cable company to use its poles.

The Fourth Circuit Court stated: “The question thus presented is whether an easement to construct poles and to string electrical power and telephone wires on the poles includes the right to string television transmission cables.”

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73 Id. at 1044.
74 Id. at 1044.
75 27 F.3d 104 (4th Cir. 1994).
76 The easement Shannondale had granted to Potomac Edison permitted “the installation, erection, maintenance, repair and operation of electric transmission and distribution pole lines, and electric service lines, with telephone wires thereon.” Id. at 106.
77 Id. at 107.
The Fourth Circuit also noted that in *Kell*, the West Virginia Court had “recognized that the power company could normally ‘take advantage of technology improvements in utilizing the easement.’” The Fourth Circuit also noted that the West Virginia Court had defined the boundaries on a proposed use in *Buffalo Mining Co.* and stated the test as follows:

The test announced in *Buffalo Mining* thus requires us to inquire into: (1) whether the use sought to be included within an easement grant is *substantially compatible* with the explicit grant, and (2) whether it *substantially burdens* the servient estate.

Applying the principles of West Virginia case law, the Fourth Circuit reasoned:

In the case before us, the 1955 easements gave Potomac Edison the right to erect poles and to string electric power lines and telephone wires on them. Under the acknowledged right granted by the easement, Potomac Edison licensed GTE to install telephone wires for distribution of telephone service to Shannondale residents. At the time of the grant, these wires consisted of a narrow band, voice-service twisted pair of copper wires. But with technological advances over the years, improved wires were strung under the easements granted to Potomac Edison, including fiber-optic cables. GTE’s fiber-optic cables, which Shannondale concedest are permitted by that doctrine which entitles a grantee to utilize technological advances, carry signals that provide voice, computer data, telecopying, and visual transmissions. At oral argument, counsel for Shannondale agrees that GTE could properly transmit all forms of electronic and fiber-optic signals. Because GTE is a telephone company, Shannondale argues, its cable may be labeled as “telephone wire” as used in the 1955 easements.

Shannondale’s call for a strict interpretation of the easement language against C/R TV, however, cannot be reconciled with its common-sense interpretation and application of the easements over the years. A strict interpretation would limit the use

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78 289 S.E.2d 450 (W. Va. 1982).
79 C/R TV, Inc., 27 F.3d at 107.
81 C/R TV, Inc., 27 F.3d at 108.
of the telephone wire language of the easement to wires devoted solely to audio transmission. 82

After addressing two other arguments advanced by Shannondale and Mid-Atlantic Cable, the court stated:

In summary, applying the test announced in Buffalo Mining, we conclude that (1) the use of a wire for the transmission of television signals is substantially compatible with the use given for the transmission of telephone date and visual signals now enjoyed by GTE, and (2) the addition of a television transmission wire, indistinguishable in appearance from other communication wires authorized under the grant, does not impose an unnecessary or even an increased burden on the servient estate. Accordingly, we hold that the 1955 easements granted by Shannondale to Potomac Edison are sufficiently broad to permit Potomac Edison, and hence C/R TV, to string television transmission wires and cables on its poles. 83

B. Location or Width of the Easement

While the issue of the location and the width of the easement is more frequently an issue in prescriptive easements, the issue also arises where there are express grants and reservations of easements.

A helpful starting point for the discussion of the location of an easement is Highway Properties v. Dollar Savings Bank. 8 4 In Highway Properties, there were five parcels of land totaling approximately thirty-six acres adjacent to U.S. Route 19 near Oak Hill, West Virginia. In 1983, these five parcels were conveyed by North Hills, as grantor, to Fayette Square, as grantee, in a single deed with the five parcels specifically and separately described and numbered one through five. The two largest parcels, adjacent to each other, became involved in the ensuing litigation involving the easement set forth in the 1983 deed in which North Hills conveyed the tracts to Fayette Square. 85

The only provision in the 1983 deed to Fayette Square pertaining to the easement provided: "'It is agreed and understood that there is common parking and right-of-ways or easements in, to and across all parcels for ingress and egress from and to all other parcels.'" 86 Following subsequent transfers of both parcel one and parcel five, litigation ensued when the owner of parcel five con-

82 Id. at 108.
83 Id. at 109.
84 431 S.E.2d n95 (W. Va. 1993).
85 Id. at 97.
86 Id.
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...containing 16.4 acres was denied access through parcel one, containing 17.4 acres. While the circuit court ruled in favor of the owner of parcel one on the basis of merger as a result of the 1983 conveyance, the Supreme Court of Appeals explained, "[I]ndependently of the doctrine of merger, it is our belief that there is a more fundamental problem foreclosing Highway Properties’ easement." In the discussion which follows, the court discusses several West Virginia cases and then quotes with approval from a North Carolina case which succinctly stated the rule as follows:

“When an easement is created by deed, either by express grant or by reservation, the description thereof ‘must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which is refers. . . . There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.’ Thompson v. Umberger, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942).” (citations omitted).

The court then said:

[1]t is our conclusion that the easement sought to be created in this case in the 1983 deed to Fayette Square was insufficient as a matter of law as to its description. The language in the 1983 deed that “[i]t is agreed and understood that there is common parking and rights-of-way or easements in, to and across all parcels for ingress and egress from and to all other parcels” was a totally inadequate description. In its out conveyance of Parcel One and Parcel Five, Fayette Square could have created an easement on Parcel One in favor of Parcel Five, but the language it used was totally inadequate.

None of the easement language identified the location or width of the easements on the land. The descriptions contained noting that would serve to specify in the slightest degree any means of geographically locating the easement on the property.

It should be noted that these rules regarding the sufficiency of the description of an easement contained in a deed apply only to the initial conveyance. The fact the subsequent deeds may refer

87 Id. at 98.
89 Highway Properties, 431 S.E.2d at 99.
generally to exceptions and reservations of record or may make no such references does not diminish the validity of the original easement if it previously was described adequately. The reason for this rule is because a purchaser of real property is on notice as to those matters which are contained in the chain of title to the property.\footnote{Id. at 99-100.}

The sufficiency of the description of an easement was again before the court in Folio v. City of Clarksburg.\footnote{655 S.E.2d 143 (W. Va. 2007).} In Folio, the court discussed the effect of the passage of West Virginia Code § 36-3-5a on the descriptions of easement.\footnote{W. VA. CODE § 36-3-5a (2009) (Easement and right-of-way; description of property; exception for certain public utility facilities and mineral leases.).}

As to the adoption of this code section the court said:

W. Va. Code § 36-3-5a(a) (2004) provides that a right-of-way cannot be declared invalid because of the failure of the granting instrument to include a metes and bound description, a centerline specification, or a drawing or plat reference. However, it is well-established that there still must be a sufficient description which serves as a guide to identify the land upon which the easement is located. In that regard, this Court has held that,

\begin{enumerate}
\item[(a)] Any deed or instrument that initially grants or reserves an easement or right-of-way shall describe the easement or right-of-way by metes and bounds, or by specification of the centerline of the easement or right-of-way, or by station and offset, or by reference to an attached drawing or plat which may not require a survey, or instrument based on the use of global positioning system which may not require a survey: Provided, That oil and gas, gas storage and mineral leases shall not be required to describe the easement, but shall describe the land on which the easement or right-of-way will be situate by source of title or reference to a tax map and parcel, recorded deed, recorded lease, plat or survey sufficient to reasonably identify and locate the property on which the easement or right-of-way is situate: Provided, however, That the easement or right-of-way is not invalid because of the failure of the easement or right-of-way to meet the requirements of this subsection.
\item[(b)] This section does not apply to the construction of a service extension from a main distribution system of a public utility when such service extension is located entirely on, below, or above the property to which the utility service is to be provided.
\item[(c)] The clerk of the county commission of any county in which an easement or right-of-way is recorded pursuant to this section shall only accept for recording any document that complies with this section and that otherwise complies with the requirements of article one, chapter thirty-nine of this code, without need for a survey or certification under section twelve, article thirteen-a, chapter thirty of this code.
\end{enumerate}

\textit{Id.}
"A deed granting to a railroad company land for its right of way must contain on its face a description of the land in itself certain, so as to be identified, or if not in itself so certain, it must give such description as, with the aid of evidence outside the deed, not contradicting it, will identify and locate the land, otherwise the deed is void for uncertainty." Syllabus Point 1, *Hoard v. Railroad Co.*, 59 W.Va. 91, 53 S.E. 278 (1906). 93

As to the insufficiency of the language creating the easements in the case before it, the court in *Folio* affirmed the lower court holding as follows:

The two right-of-way agreements at issue in this case were identical except for the fact that one stated that the pedestrian right-of-way would be five feet and the other specified a width of ten feet. The agreements did not establish a beginning point but, rather, indicated that the rights-of-way would "be located in the discretion of said Grantee to Pike Street over a reasonable route as necessary . . ." Clearly, the language in the agreements is insufficient to serve as a guide to identify the location of the rights-of-way. Accordingly, we do not believe that the circuit court erred by finding the agreements were ambiguous and inadequate to convey the rights-of-way. 94

Even expressed easements that are not void for vagueness may still have description problems. One of the earlier examples is *Palmer v. Newman*. 95 In *Palmer*, the 1910 deed transferring the tract also provided "an outlet leading from this 41.4 acres, extending west to the public road leading to Proctor, it being the same road now leading from the public road to this tract of land." 96 Originally the gate where this right of way joined the public road had an outlet twenty feet wide and a passage-way of sixteen feet through the fence line between the two tracts. 97 The ownership of the servient tract passed into the hands of the defendant in 1916, and in 1920, friction between the owner of the dominant estate and the servient estate resulted in litigation. At issue was the width of the plaintiff's right of way.

93 *Folio*, 655 S.E.2d at 147.
94 *Id.* at 147–48.
95 112 S.E. 194 (W. Va. 1922).
96 *Id.* at 195.
97 *Id.* at 196.
Citing secondary authority, the court stated:

It is a well-settled law of easements that, where there is no stated width in the instrument creating or reserving a right-of-way, a suitable and convenient way is meant which will be determined by its sufficiency to afford ingress or egress to those entitled to use it; and such sufficiency will depend upon the purposes of the grant or reservation, and the circumstances of each case. 19 C.J. p. 968, § 204.

“In determining the extent of a right of way, it is proper to consider the whole scope and purpose of the deed creating it, the manifest intent of the parties in its execution and the situation of the property.” Jones on Easements, § 385.

The servient estate cannot be burdened by the occupancy of a greater width than is reasonably necessary for the purposes for which the right of way was intended.98

Applying the maxim “‘Tell me what you have done under such a deed, and I will tell you what that deed means,’”99 the court concluded that the plaintiff was not entitled to a twenty foot wide outlet and a right of way sixteen feet in width.100

The difficulty of resolving disputes between neighbors involving easements is illustrated by the case Stover v. Milam.101 The issue involved the width of an express easement for ingress and egress across the servient estate where there was no precise width set forth in the deed. After the circuit court decided the width and location of the right of way, the parties were back in court when the owner of the servient estate claimed the owner of the dominant estate had widened the right of way in violation of the court’s order. Also involved was the assertion that the owner of the servient estate was impeding the use of the

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98 Id. at 196–97.
99 Id. at 197 (quoting Chapman v. Bluck, 4 Bing (N.C.) 187). See also Rhodes Cemetery Ass’n v. Miller, 7 S.E.2d 659, Syl. Pts. 2, 3 (W. Va. 1940):

2. In a deed granting a “convenient right of way” over the lands of the grantor, specifying the distance between two fixed terminals, but not definitely describing the course thereof, the practical use of a particular way and acquiescence therein by the parties fixes that as the location of the easement.

3. “Where the width of a right of way is not specified in the grant, not determinable therefrom, the scope and purpose of the deed creating it, the situation and use of the property, and the intent of the parties will be considered, so as to provide a reasonable, safe and convenient way for the purposes for which it was intended.” Palmer v. Newman, 91 W. Va. 13, 112 S.E. 194.

100 Palmer, 112 S.E. at 197–98.
right of way by erecting posts, railroad ties, and other impediments restricting traffic over the right of way. On appeal, the court found that while the circuit court had correctly applied the principal set forth in Palmer v. Newman\(^{102}\) in determining the width and location of the easement, the lower court had erred in limiting the owner of the servient estate from erecting boundary markers on his property adjacent to the right of way.\(^{103}\) The court noted the constitutional right of Mr. Stover to “use his property as he sees fit, as long as he does not impinge upon Mr. Milam’s right to use the easement . . . .”\(^{104}\)

An example of a vague description considered sufficient is found in Ratcliff v. Cyrus.\(^{105}\) In Ratcliff, a 1981 deed granted the easement in the following language:

\(^{102}\) Palmer, 112 S.E. 194.

\(^{103}\) Stover, 557 S.E.2d at 397-98. On appeal the court said, “While we appreciate the circuit courts extreme frustration with the parties in this case and their persistent dispute which the court had, on numerous occasions, attempted to fairly and equitably resolve once and for all, there simply is no authority to support the continued restriction of Mr. Stover’s use of his own property.” \(^{104}\) Id. (citations omitted).

\(^{104}\) Id. at 398. The court said:

According to the Constitution of this State, “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” W. Va. Const. art. III § 10. This protection is afforded to “any significant property interest,” Don. S. Co., Inc. v. Roach, 168 W.Va. 605, 610, 285 S.E.2d 491, 494 (1981) (citations omitted), and includes not only the actual physical possession of property but the right to use the same.

“Property within the meaning of our Constitution against the taking or damaging of private property without just compensation paid or secured to be paid comprehends not only the thing possessed, but the right also to use and enjoy it, and every part of it, and in the case of real estate to the full limits of the boundary thereof.”

Syl. Pt. 1, Fruth v. Board of Affairs, 75 W.Va. 456, 84 S.E. 105 (1915), overruled on other grounds by Farley v. Graney, 146 W.Va. 22, 119 S.E.2d 833 (1960). Because this constitutional protection prohibits the encumbrance of one’s property absent sufficient justification,

[w]herefore any thing done by a state or its delegated agent, as a municipality, which substantially interferes with the beneficial use of land, depriving the owner of lawful dominion over it or any part of it, and not within the general police power of the state, is the taking or damaging of private property without compensation inhibited by the Constitution.

Syl. pt. 2, Fruth, 75 W.Va. 456, 84 S.E. 105. \(^{105}\) See also Syl. pt. 2, Lovett v. West Virginia Cent. Gas Co., 65 W.Va. 739, 65 S.E. 196 (1909) (“The impairment of the utility of one’s property by the direct invasion of his private domain is a taking of his property, within the constitutional meaning, though the owner has not less of material things than he had before.”).

\(^{105}\) 544 S.E.2d 93 (W. Va. 2001).
[A] twenty-foot right-of-way running from the house trailer site in a westerly direction to two marble markers which are set on the boundary line of the Johnson and Ratcliff land to the lands of William Glenn Ratcliff and Thelma Ratcliff to the Adkins-Ratcliff Lane thence running in a northerly direction to the Tolisa (sic) Highway.

In holding the description sufficient, the court said:

The easement language articulates a beginning point as the site which contained a mobile home. The deed further provides for the direction of the easement. Therefore, we are satisfied that the description identifies the easement granted in the deed. As we previously noted, “[t]he main object of a description of land . . . in a deed of conveyance . . . is not in and of itself to identify the land sold but to furnish the means of identification, and when this is done it is sufficient.” Consolidation Coal Co. v. Mineral Coal Co., 147 W.Va. 130, 143, 126 S.E.2d 194, 202 (1962).

While holding the description sufficient, the case was remanded because during oral argument it was disclosed that the markers referred to in the deed no longer existed.

C. Is the Easement Appurtenant or In Gross?

One of the earlier West Virginia cases setting forth the rules to determine whether an easement is appurtenant or in gross is Jones v. Island Creek Coal Co. As discussed above, the issue in Jones was whether the easement created in a severance deed of the minerals permitted timber from other tracts of land to be hauled across the surface of the servient estate. Relying on secondary authorities and cases from other jurisdictions, the court set forth the following general principles of construction.

“Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing

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106 Id. at 96–97.
107 Id. at 97.
108 Id.
109 91 S.E. 391 (W. Va. 1917).
to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant to the land, and not an easement in gross."

....

"Where the dominant and servient estates are clearly defined in an easement contract and the easement is beneficial to the dominant estate the easement is appurtenant, and not in gross, and it is not necessary that the dominant and servient estates be contiguous or that the right of way granted shall terminate on the dominant estate."

....

From these decisions it clearly appears that the grant of an easement will not be construed to be in gross if it can be fairly construed to be appurtenant to the estate of the grantee.110

Fourteen years after the Jones case, the construction of language in a severance deed was again back before the court. In Post v. Bailey,111 the issue was whether coal could be mined from adjacent tracts through the land of the plaintiff's (Post) under the provision of the 1900 severance deed. The deed read:

"It is further expressly understood and agreed by the parties of the first part that the party of the second part his heirs and assigns shall have the right to enter upon and under said land and shall have the privilege of ingress and egress under, over and through said land together with the right to mine and remove all of said coal, to remove upon and under said land the coal from and under other lands together with all necessary and convenient rights of ways through and under such land with necessary drainage, ventilation and ventilating shafts to remove all of said coal upon or under said land and to remove the coal under neighboring land without any liability for damage to water, surface or anything thereon or therein by reason thereof."112

The essence of the plaintiff's argument was that coal mined on other properties — i.e., not coal mined from the lands covered by the severance deed

110 *Id.* at 393–94.
111 159 S.E. 524 (W. Va. 1931).
112 *Id.* at 524.
— could not be moved across the servient tract.\textsuperscript{113} In rejecting this argument, the court stated:

The right to remove other coal over and through the premises was an element of value entering into the consideration paid by the grantee to the grantors for the estate granted, and the rights and privileges covenanted for in the deed. The evident intent of the parties, as disclosed by the language employed by the grantors in the covenant under discussion, was that the coal granted was to be operated in connection with coal underlying other lands. It must be considered that the coal granted was of greater value with the concomitant right of operating the same along with coal from other lands, than it would have been without such right. The right of haulage was appurtenant to the coal granted, and was to be employed in the operation of said coal in conjunction with coal from other lands. Principles recognized and applied by this court in the case of \textit{Jones v. Island Creek Coal Company}, 79 W. Va. 532, 91 S.E. 391, are decisive and controlling of the proposition now, under consideration. Syllabus 1 of that case holds: “If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intention of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate.” Cases cited in that opinion are pertinent. They sustain the propositions: (a) An easement may be created by covenant or agreement as well as by grant; (b) whether an easement is appurtenant or in gross is to be determined by the intent of the parties as gathered from the language employed considered in the light of surrounding circumstances; (c) an easement will not be presumed to be in gross when it can fairly be construed to be appurtenant.\textsuperscript{114}

A case which illustrates another way this issue may arise is \textit{Mays v. Hogue}.\textsuperscript{115} In \textit{Mays}, an instrument titled “Right-of-Way Agreement” was entered into on May 11, 1973, between Clara McQuain and her husband, as grantors, and Franklin D. Ashley and his wife, as grantees. The relevant portion of the agreement provided “the parties of the first part [The McQuains] do GRANT and CONVEY, unto the parties of the second part [The Ashleys] a right-of-way

\textsuperscript{113} See \textit{id.} at 525.
\textsuperscript{114} \textit{id.} at 525–26.
\textsuperscript{115} 260 S.E.2d 291 (W. Va. 1979).
over and across their tracts of land . . . .” The land subject to the right of way was described in the agreement by location, (“situate near the top of Amona Hill, Geary District, Roane County”), by the date of the deed in which the McQuains acquired title and by reference to the deed book and page in which the deed was recorded. The right of way was adequately described as to its location on the ground and its width was set forth as twelve feet wide. Subsequently, the McQuains, the owners of the servient estate, conveyed the land to the Mays, and the Ashleys conveyed the property to the Hogues. The deed from the Ashleys to the Hogues contained the following statement: “The said Grantors do further grant to the said Grantee all their right, title and interest in and to a certain right of way for the use of the above described premises granted to the said Franklin D. Ashley by Claire McQuain and her husband by a certain Agreement . . . .” The Mays contended the easement was “a personal privilege in the Ashleys which could not be transferred or assigned [and that] . . . [t]he privilege created was destroyed when the Ashleys attempted to transfer the privilege to the Hogues.” The circuit court held the easement was appurtenant and the Mays appealed arguing, in part, that the failure to use the words “their heirs and assigns” in the granting clause of the agreement showed it was intended to be personal to the granters, i.e., in gross. On appeal the court, citing cases from sister jurisdictions, rejected this argument stating: It has been widely held that the omission of such words as “heirs and assigns” ordinarily does not tend to show that a grant is personal rather than appurtenant.

Relying upon the principles set forth in Jones v. Island Creek Coal Co., the court held:

After examining the records in this case, we conclude that the easement granted in the “Right of Way Agreement” was clearly an appropriate and useful adjunct to the estate of the Ashleys. Under our ruling in Jones, supra, in the absence of a showing that the conveyance was a merely personal right, then the right created should be considered an easement appurtenant. There is in this case no showing that the parties intended that the right be a merely personal one. Such a conclusion under the authority cited is not justified by the failure of the parties to use words of limitation. We, therefore, cannot conclude that the Circuit

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116 Id. at 292.
117 See id. at 292–93.
118 Id. at 293.
119 Id.
120 Id. at 294.
121 91 S.E. 391 (W. Va. 1917).
Court of Roane County erred in ruling that the “Right of Way Agreement” created an easement appurtenant.  

1. Transferability

As alluded to in the Mays case, “courts in the United States traditionally have viewed easements in gross as unassignable and noninhertable.” “Easements appurtenant adhere to a dominant estate. Unless prevented by the terms of its creation, an easement appurtenant is transferred with the dominant property even if this is not mentioned in the instrument of transfer.” This general statement is consistent with West Virginia Code § 36-3-10. The argument that the language used in the agreement created an easement in gross was again before the court in Stricklin v. Meadows. The owner of the servient estate argued the relevant language in the deed was ambiguous and that extrinsic evidence would show that the easement created was in gross, not appurtenant. After rejecting the argument that the deed was ambiguous and after briefly quoting the Jones v. Island Creek Coal Co. and Post v. Bailey cases, the court noted:

In Mays v. Hogue, 163 W. Va. 746, 260 S.E.2d 291 (1979), the owners of the servient estate advanced an argument similar to the Appellees’ argument in the present case. The easement in

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122 Mays, 260 S.E.2d at 294.

123 BRUCE & ELY, supra note 1, at § 2.2, at 2-5. As to a discussion of easements in gross that are considered transferable, see id. at §§ 9.4-9.7, at 9 to 9-14.1.

124 Id. at 9-1, 9-2.

125 W. VA. CODE § 36-3-10 (2010). “Deeds to include buildings, privileges and appurtenances. Every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced.” Id.

126 544 S.E.2d 87 (W. Va. 2001).

127 The pertinent part of the deed provided:

For the consideration stated above, the parties of the first part further grant and convey to the parties of the second part, as joint tenants, with rights of survivorship and not as tenants in common, a second easement and right of way 15 feet in width for access to said property to be used by the parties of the second part in common with the parties of the first part in said subdivision over and across remaining land of the parties of the first part which second easement and right-of-way shall be adjacent to and along the northerly line of said Lot No. 19 of Sunnybrook Estates and running from the State road to the easterly line of the parcel of land herein conveyed.

The words “and other property owners” had been stricken from the deed, as indicated above.

Id. at 89.

128 “We consequently conclude that the lower court erred by finding that the deed was ambiguous and by permitting the introduction of extrinsic evidence.” Id. at 91.
question had been established by predecessors in title, and the subservient estate owners contended that the easement should be considered personal based upon the absence of reference to the rights of successors, heirs, or assigns. They maintained that the easement was applicable only to the original property owners and not transferrable to subsequent owners. Id. at 748, 260 S.E.2d at 293. The lower court held, and this Court agreed, that the conveyance was not merely personal in nature. Mays, 163 W. Va. at 748-49, 260 S.E.2d at 293. Implementing the principles of Jones and Post, this Court concluded that “in the absence of a showing that the conveyance was a merely personal right, then the right created should be considered an easement appurtenant.” Id. at 750, 260 S.E.2d at 294. This Court discerned no “showing that the parties intended that the right be a merely personal one” and concluded that the easement was appurtenant rather than in gross. Id.

The deed in the present case did not employ any language indicative of an intent to create a personal easement. The deed established an easement for the benefit of the property now owned by the Stricklins and did not indicate that the easement would be discontinued upon cessation of ownership by the Keelings. As the Appellants contend, the stricken language merely clarified that the easement was limited to owners of the dominant property and did not create a public way for “other property owners in said subdivision.”

The court, in a footnote within the above quote, made the following observations:

With respect to deeds conveying a fee simple interest in an estate, West Virginia Code § 36-1-11 (1923) (Repl. Vol. 1997) provides that words of limitation are not necessary to convey the interest in fee simple and that a conveyance “shall be construed to pass the fee simple . . . unless a contrary intention shall appear. . . .” In the somewhat analogous situation of the present case, the deed neither contained words of limitation nor otherwise demonstrated an intent to create an easement solely for the benefit of the Keelings. An easement appurtenant was therefore created.

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129 Id. at 92 n.6.
130 Id.
A case in which the court found that an easement in gross was created is *Ratino v. Hart*. In 1906, the defendant Harts' (appellees) predecessor granted the plaintiff Ratino's (appellant) predecessor in title a right of way stating:

The said parties of the first part [the appellees' predecessors in title] grant to the said party of the second part [the appellant's predecessors in title] a right of ingress and egress from the Fairmont turnpike through their land by the same route that is now used to his land. With the understanding that there is to be no sawmilling or lumbering or hauling for oil wells machinery or fixtures for gas wells or anything else outside of regular farm purposes, and the party of the second part is to help keep up road and bridge from the Fairmont turnpike to said land of second party; to be used only as a family right of way with the understanding that hay, straw and coal is to be hauled when the ground is dry enough to not cut ditches in the field or when it is frozen hard enough to not cut in. This will no longer hold good if the second party injures any stock of the first parties.

This grant of the right of way was specifically included in each conveyance in the appellants' claim of title. The Harts became the owner of the property in 1979, and Ratino purchased his property in 1987. The lawsuit was filed in 1989, after the Harts refused Ratino usage of the alleged right of way. The trial court held that the 1906 deed's language was unambiguous and conferred only a personal right of way, i.e., in gross. After citing the *Mays* (the Syllabus from *Jones*) and *Post* cases, the Supreme Court of Appeals affirmed the trial court stating:

In this case the language of the deed granting the right-of-way is clear and requires no interpretation. The deed unequivocally states that it is "to be used only as a family right of way[.]” Mr. Ratino is clearly not a member of the family of the grantee of the 1906 deed. Nor does he so assert.

*Black's Law Dictionary* 510 (6th ed. 1990) defines an “easement in gross” as follows:

An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in

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132 *Id.* at 754.
133 *Id.* at 754–55.
or right to use land of another; it is purely personal and usually ends with death of grantee.

(citation omitted). See also Holland v. Flanagan, 139 W. Va. 884, 81 S.E.2d 908 (1954). Because, on its face, the right-of-way granted in the 1906 deed was clearly an easement in gross, and did not attach to the land, the trial court did not err in holding that, as a matter of law, no right-of-way existed for the benefit of the appellant. 134

While the court held in the Ratino case that the deed language created an easement in gross, it also held that an unlawful detainer action is not the appropriate cause of action to contest the denial or refusal of the use of a right of way. 135

IV. PRESCRIPTIVE EASEMENTS

A. Early West Virginia Decisions

The concepts of prescriptive easements have their origin in early English common law and the feudal systems and rested upon the fiction of the “lost grant.” The influence of the English doctrine of “lost grants” on American jurisprudence is summarized by Professors Bruce and Ely as follows:

English law first presumed that a use that had continued “during time whereof the memory of man runneth not to the contrary” had a lawful origin. The date of the beginning of this continued use was arbitrarily set as 1189. Over time, however, it became increasingly difficult to prove continuous use from that date. To avoid the inconvenience posed by this evidentiary requirement, English courts developed the fiction of the lost grant. If a particular use had long existed, it was presumed that a grant authorizing such use had been made, but that the grant itself had been lost. It was eventually settled that continued use for 20 years was conclusive on the issue of a lost grant. In cases where this period had run, the jury was directed to find a lost grant, and even proof that a grant had, in fact, never been made could not rebut the presumption.

134 Id. at 756.
135 After discussing West Virginia statutory provisions and case law, the law from sister jurisdictions and an 1887 United States Supreme Court case, the court stated, “It is abundantly clear from the foregoing that an action for unlawful detainer may not be brought by one claiming a mere nonexclusive right-of-way.” Id. at 758.
American courts generally adopted the lost grant doctrine as part of the common law. There was a split of opinion as to the nature of the presumption, but most judges followed the English rule that the presumption was conclusive. . . . Moreover, the doctrine is inconsistent with the recording system, which requires that grants of interests in land be recorded.

Courts in this country gradually recognized the weakness of the lost grant theory. Hence, they generally have abandoned it in favor of applying by analogy the statute of limitations governing adverse possession. This analogy extends both to the period of prescription and to the manner of use. Today, most courts base prescription on the adversity of use and a claimant must prove virtually the same elements as must be demonstrated for adverse possession. Nonetheless, the lost grant theory survives in some jurisdictions and has left a residue of terminology that often confuses modern analysis of prescriptive easements. It is not always clear whether judges actually rely on the lost grant fiction or merely invoke an ancient formula by rote.136

In 1907, the West Virginia Supreme Court of Appeals discussed the “common law rule” in the case of Walton v. Knight137 as follows:

Some confusion may arise from the language used in our decisions as to the time required to establish title to a way by prescription. In Boyd v. Woolwine, supra, it is held to be twenty years; but in Wooldridge v. Coughlin, supra, ten years. The natural inquiry is, why this difference, and what is the time essential? It is evident, from the authorities cited, that the court was referring in the former case to the common-law rule, and in the latter to our present statute of limitations. “By judicial construction an adverse user of an easement for the period mentioned in the statutes (of limitations), as they were passed from time to time, became evidence of a prescriptive right.” Jones Easem., 1 section 161; Railroad Co. v. McFarlan, 43 N.J.L. 605, 617. “Such adverse user must have existed for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession.” Jones Easem. section 164. In Lucas v. Turnpike Co., 36 W. Va. 427, 437, 15 S.E. 182, 185, the Court quotes with apparent approval Goddard on Easements: “Without minutely stating here the local statutes

136 BRUCE & ELY, supra note 1, at § 5.1, at 5-6 to 5-9; see also 2 RALEIGH COLSTON MINOR, THE LAW OF REAL PROPERTY 1260–63 (2d ed., Ribble ed. 1928).
137 58 S.E. 1025 (W. Va. 1907).
of limitations as to adverse user, it may be safely asserted that no less period will suffice, and no greater will be required, in fixing the requisite length of enjoyment to gain a right to an easement in land by prescription than to acquire the land itself by adverse occupation. This element of duration is therefore comparatively simple.”

The “residue of terminology that often confuses modern analysis” is illustrated by the following excerpt from the Walton discussion:

“[T]hat the use of the easement was adverse and under a claim of right, in the absence of circumstances indicating the contrary, and moreover such enjoyment of the right affords a conclusive presumption of the right.” And, quoting from Railroad Co. v. McFarlan, Jones says in the same section: “When the fiction of a lost grant was devised, there arose considerable diversity and fluctuation in judicial opinions as to whether an uninterrupted user for the period of limitation conferred a legal right, or raised merely a presumption of title which would stand good until the presumption was overcome by evidence which negativèd in the judgment of juries the existence of a grant. This state of the law produced great insecurity of titles by prescription, and subjected such rights to the whim and caprice of juries. This evil was remedied by the later English authorities which gave to the presumption of title arising from an uninterrupted enjoyment of twenty years the most unshaken stability, and made it conclusive evidence of a right . . . . In this country the prevailing doctrine is, that an exclusive and uninterrupted enjoyment for twenty years creates a presumption juris et de jure, and is conclusive evidence of title whenever, by possibility, a right may be acquired by grant.”

In the decades that followed the Walton decision, the West Virginia Supreme Court of Appeals decided a number of cases in which a claim of a prescriptive easement was asserted. However, the decisions were usually relatively short, typically fact specific, and usually only addressed one or two of the elements necessary to establish a prescriptive easement. For example, in Crosier v. Brown, the court held that because the use was permissive a prescriptive easement was not established. The court also noted that the usage had not been

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138 Id. at 1026.
139 BRUCE & ELY, supra note 1, at § 5.1, at 5-6 to 5-9.
140 Walton, 58 S.E. at 1027.
141 66 S.E. 326 (W. Va. 1909).
of a definite, certain, and precise line. In *Roberts v. Ward*, the court found there was a right of way by prescription noting, in effect, that acquiescence does not constitute permission. In *Stagger v. Hines*, the court found there was a prescriptive right and then added: "It is well settled that a way acquired by prescription has its limitations. If acquired for one purpose, it cannot be broadened or diverted to another; and its character and extent are ascertainable and determinable by the use made of it during the period of prescription."

In *Perdue v. Ballenger*, the court concluded that there was no prescriptive easement because there was not a sufficient showing of a period of ten years of continuous use. In *Foremen v. Greenburg*, the court explained that joint use of the right of way by the owners of the servient and dominant estates does not preclude the establishment of a prescriptive easement. The court also reaffirmed that mere acquiescence and silence by the owners of the servient estate does not constitute permission so as to negate a claim that the use was adverse.

In a similar manner, the court in *McNeil v. Kennedy* stated: "Such rights of way in the dominant owner is not affected by the fact that others or even the public may also have similar rights in such way, if his right be exclusive in the sense that no one else may lawfully oppose him in that right." In so holding, the court did note: "It is true as we have said of our own cases, that the right of plaintiff must exist independently of the rights of others or of the public.

In *Hall v. Backus*, the court again recognized that it is possible to gain a private prescriptive easement even though it is enlarged into a public way stating, "If a private way is enlarged into a public way, the private easement is not merged, and discontinuance of the way, as a public one, does not destroy the easement."

In *Linger v. Watson*, the court rejected the plaintiff's argument that he had a prescriptive easement to maintain telephone lines across the defendant's property. The court held that the lines were erected pursuant to a revocable license and were, therefore, permissive not adverse.

142 102 S.E. 96 (W. Va. 1920).
143 104 S.E. 768 (W. Va. 1920).
144 *Id.* at 770.
145 105 S.E. 767 (W. Va. 1921).
146 106 S.E. 876 (W. Va. 1921).
147 *Id.* at 877.
149 *Id.* at 204 (citations omitted).
150 *Id.*
151 114 S.E. 449 (W. Va. 1922).
152 *Id.* at 453.
153 150 S.E. 525 (W. Va. 1929).
In *Post v. Wallace*, the court found that the plaintiff had proven the elements necessary to establish a prescriptive easement but remanded the case to the trial court to "specifically locate upon the ground the right of way which the plaintiff, Claid Post may use." The court noted the law requires that "an easement of private way over land must have a particular definite line."

In *Allen v. Neff*, the facts established that Allen had obtained a prescriptive easement for general passage across Neff's land by usage that involved "regular walking, riding, and logging way" and that by 1905 there had been such usage for over twenty years. In 1905, Allen asked and was given permission to widen the path so that it could accommodate wagons. From 1905 until 1925, Allen used the widened path continuously as a wagon road. However, in 1925, it was obstructed so that Allen could no longer use it. The question presented was: "[D]id Allen lose the easement he had acquired in 1905, by obtaining permission . . . to widen and use the path as a wagon road?" In answering this question, the court stated:

Under our decisions the right which Allen had acquired to the use of the pathway in 1905 was a vested freehold estate in land. It is settled law in this state that one cannot lose vested title to land by oral admission that it is the property of another; disclaimer of a freehold can only be by deed or in a court of record. This court has never applied that rule to an easement. But we see no reason why the principle is not just as applicable to easements as it is to any other freehold interest in land. A case in point is *Tracy v. Atherton*, 36 Vt. 508, which holds:

"A right of way having become established by adverse use, will not be divested by an application for, and obtaining of a license to use it from the other party." 160

As illustrated by the above cases, there were a number of prescriptive easement cases decided in the first half of the twentieth century. The decisions resolved the dispute between the litigants without an extended discussion of the various elements required to establish prescriptive easements.

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154 192 S.E. 112 (W. Va. 1937).
155 *Id.* at 112.
156 *Id.* at 115.
157 135 S.E. 2 (W. Va. 1926).
158 *Id.* at 3.
159 *Id.*
160 *Id.* (citation omitted).
B. Town of Paden City v. Felton

The case of *Town of Paden City v. Felton*\(^{161}\) represents a departure from the pattern of the previous prescriptive easement decisions. In the *Town of Paden City* case, the Circuit Court of Wetzel County sustained the demurrer of the defendant to the Town of Paden City’s complaint, and on the joint motion, the parties certified the circuit court’s ruling to the West Virginia Supreme Court of Appeals.\(^{162}\) At issue was the right of the city to enjoin the defendant from obstructing a drainage ditch for surface water runoff which crossed the defendant’s property. Although the ditch had been continuously and uninterruptedly open to the drainage of surface water for well in excess of ten years when the defendant acquired the title to the property in 1946, after she acquired the title, she obstructed the ditch where it crossed her property and refused to permit employees of the plaintiff to remove the debris.\(^{163}\)

After disposing of the first two grounds cited by the circuit court for sustaining the demurrer,\(^{164}\) the Court of Appeals turned its attention to the question of whether the city had acquired an easement by prescription or whether there had been a dedication of the ditch for public use.\(^{165}\)

After a general discussion of the legal attributes of an easement and the various ways in which an easement can be created,\(^{166}\) the court, citing secondary sources and decisions from sister jurisdictions, stated:

\(^{161}\) 66 S.E.2d 280 (W. Va. 1951).

\(^{162}\) *Id.* at 282.

The grounds of demurrer embodied in the certificate of the circuit court are:

1. Though the plaintiff claims the right of drainage through the lot of the defendant, the bill of complaint contains no allegation that there is any deed or other written instrument which creates the easement which the plaintiff claims to own.

2. The right of drainage, claimed by the plaintiff, is within the Statute of Frauds and the bill of complaint does not allege that such right is based upon any memorandum in writing signed by the party sought to be charged, or his agent, which confers upon the plaintiff the right which it claims.

3. The bill of complaint contains no allegations of fact which establish any right or easement by prescription to drain water on or through the land of the defendant.

\(^{163}\) *Id.* at 285.

\(^{164}\) The court stated: “‘[T]he holding in the *Pifer* case [(Pifer v. Brown, 43 W. Va. 412, 27 S.E. 399, 49 LRA 497)] has no application to the facts in the case at bar. In consequence, the grounds of demurrer that the easement claimed by the plaintiff is within the Statute of Frauds and can be created or acquired only by deed or other written instrument are not well founded and can not be sustained.’ *Id.* at 286 (citation added).

\(^{165}\) *Id.*

\(^{166}\) *Id.*
A municipal corporation may acquire an easement by prescrip-
tion to the same extent as any other person; but if a municipality
claims an easement by prescription it must be established by
corporate acts which regulate or exercise control over it.\textsuperscript{167}

The court then stated the elements necessary to create an easement as
follows:

As to an easement by prescription, the requisites for its acquisi-
tion are continued and uninterrupted, open and visible, use of a
definite right in the land of another which is identical to that
claimed as an easement and has a relation to the use of, and a
direct and apparent connection with, the dominant tenement un-
der an adverse claim of right, for the prescriptive period of time.
The further condition that the user must be exclusive is some-
times added. 17 Am. Jur., Easements, Section 59. “Exclusive
use,” however, does not mean that no one has used the way ex-
cept the claimant of the easement; it means that his right to do
so does not depend upon a similar right in others. In order to
establish an independent prescriptive right, the individual user
must perform some act to the knowledge of the servient owner
which clearly indicates his individual claim of right. 17 Am.
Jur., Easements, Section 64. The rule generally followed is that
use of a right of way in common with the public is regarded as
negating a presumption of grant to any individual user. 17
Am. Jur., Easements, Section 64. An easement over land will
not arise by prescription simply from permission of the owner
of the servient estate, no matter how long the permissive use
may continue; and when a use by permission has begun, in the
absence of some decisive act by the claimant of the easement,
which indicates an adverse and hostile claim, the use will con-
tinue to be regarded as permissive, and this is especially so
when the use of the land is in common with its use by others.
[Citation omitted]. In \textit{Linger v. Watson}, 108 W. Va. 180, 150
S.E. 525, in point 2 of the syllabus, the requisites for the acqui-
sition of an easement by prescription are stated in this language:
“To establish an easement by prescription there must be: First,
continued and uninterrupted use or enjoymen; second, identity
of the thing enjoyed; and third, a claim of right adverse to the
owner of the soil, known to and acquiesced in by him. If the
use is by the owner’s permission, or if he opposes and denies
the right, title to the easement does not come by such use.”  [Ci-

\textsuperscript{167} Town of Paden City v. Felton, 66 S.E.2d 280, 286 (W. Va. 1951).
In Hall v. Backus, 92 W. Va. 155, 114 S.E. 449, this Court uses this language in point 3 of the syllabus: “Use of an open way in common with the owner of the land on which it is and the public in general, is presumptively permissive and not exercised under a claim of right, in the absence of proof of some act on the part of the person so using it, or circumstance under which he used it, showing a claim of exclusive or peculiar right in him, distinct from that of the general public.”

The court recognized a line of cases in which the public uses a private way because they have not been denied the right to use it, and that said use is viewed as permissive and that such use is not considered an implied dedication. The court also recognized a line of cases in which the user of the way asserts an independent and individual right to use the way which does not depend upon a similar right in other persons.

This Court has frequently decided that the open, continuous and uninterrupted use of a private way by one landowner over the land of another person for a period of ten years or more, with the knowledge of such other person, is presumptive evidence of the claim of right to an easement and of the adverse character of the use, and that the presumption will be deemed to be conclusive, unless it is shown that the use was permissive or that the owner of the land so used protested and objected to such use. Post v. Wallace, 119 W. Va. 132, 192 S.E. 112; Hall v. Backus, 92 W. Va. 155, 114 S.E. 449; Staggers v. Hines, 87 W. Va. 65, 104 S.E. 768; Hawkins v. Conner, 75 W. Va. 220, 83 S.E. 982; Walton v. Knight, 62 W. Va. 223, 58 S.E. 1025; Boyd v. Woolwine, 40 W. Va. 282, 21 S.E. 1020; Rogerson v. Shepherd, 33 W. Va. 307, 10 S.E. 632. Those cases involved the right of the owner of land, who used a way over the land of another owner, to an easement as a result of open, continuous and uninterrupted use of such way for a period of ten years or longer under a claim of right to such use. The language of those cases clearly implies, however, that the person so using the way and claiming an easement in it asserted an independent and individual right in himself to use the way and that the right to do so did not depend upon a similar right to such use in other persons.

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168 Id. at 286–87.
169 See id. at 287–88.
170 Id. at 288.
Following the discussion of distinctions between the permissive common use and the asserted individual and independent right, the court affirmed the circuit court in sustaining the demurrer concluding the allegations of the plaintiff’s use of the drainage ditch in this case fell into the former category.\textsuperscript{171}

As to the assertion that there had been a dedication to the public use, the court said that the bill of complaint failed to establish any dedication, express or implied, of the ditch, as a public drain...\textsuperscript{172}

C. The Burden of Proof

In the early case of \textit{Crosier v. Brown},\textsuperscript{173} the court explained the burden of proof in prescriptive easement cases as follows: “In this important matter, of subjecting, without pay, one man’s land for the use of another, we must remember that the claimant carries the burden of proof, and he must show a use as of right, a hostile adversary use, clearly show it.”\textsuperscript{174} In \textit{Beckley National Exchange Bank v. Lilly},\textsuperscript{175} the court articulated the rule in Syllabus Point 2: “In order to establish a right-of-way by prescription, all of the elements of prescriptive use, including the fact that the use relied upon is adverse, must appear by clear and convincing proof.”\textsuperscript{176}

In \textit{Berkeley Development Corp. v. Hutzler},\textsuperscript{177} one of the important easement decisions in West Virginia, the court set forth, in Syllabus Point 1, the burden as follows:

“The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof.”\textsuperscript{178}

\textsuperscript{171} \textit{Id.} The allegations in the complaint indicate[] clearly that such use of the ditch by the plaintiff was permissive and not adverse to the defendant or her predecessor in title as to her lot or to the owners of the other lots affected. The use of the ditch by the plaintiff, being permissive only, regardless of the duration of the period of its exercise, did not confer upon the plaintiff any right of drainage or easement in the ditch on and over the lot of the defendant.

\textsuperscript{172} \textit{Id.} at 289.

\textsuperscript{173} 66 S.E. 326 (W. Va. 1909).

\textsuperscript{174} \textit{Id.} at 328.

\textsuperscript{175} 182 S.E. 767 (W. Va. 1935).

\textsuperscript{176} \textit{Id.} at 767.

\textsuperscript{177} 229 S.E.2d 732 (W. Va. 1976).

\textsuperscript{178} \textit{Id.} at 733.
In the recent decision of Newman v. Michel,\textsuperscript{179} the court cited the Berkley Development Corp. and Beckley National Exchange Bank decisions as to the burden of proof with approval.

**D. Do “Without the Owners’ Permission” and “Adverse” Mean the Same Thing?**

In the recent decision of Newman v. Michel,\textsuperscript{180} the plaintiffs sought to establish an easement by prescription across the adjacent property of the defendants. A simplified version of the facts is that the Newmans’ farm had been in the family since the late 1800s. It had access from an old county road across the southern part of what is now the Michel tract where it connected to the southern edge of the Newmans’ farm. Access to the farm via this route was occasionally impossible because of the flooding of Mud River. In 1940, T.M. Newman obtained a written easement from one of the Michels’ predecessors in title for a different access from the county road to the Michels’ farm. While T.M. Newman lived on the farm, he did not have an ownership interest in the farm and, therefore, the circuit court held and the Supreme Court affirmed that the easement to T.M. Newman was \textit{in gross} not \textit{appurtenant} to the Newman farm. As an easement in gross, it ended upon T.M. Newman’s death in 1946. The Newmans continued to use the “T.M. Newman right-of-way” after his death with an alteration in the route in 1963 when a house was built across a portion of the easement. Following the death of the last Newman living on the farm in 1973, the Newmans visited the farm seven to fourteen times per year until 2003, when the easement was barred by the Michels erecting a gate and locking it.

As noted above, the court determined that the 1940 T.M. Newman written agreement was in gross, which terminated with T.M.’s death, so the Newmans’ only basis of an easement was the alternative claim of an easement by prescription.

As to the use of the easement following T.M. Newman’s death, the court noted, “The Newmans’ use of this easement and the spur which they later developed were not objected to by the Fletchers.”\textsuperscript{181} As to the use of the “spur” after the house was constructed over a portion of the original route of the T.M. Newman easement the court said, “The Newmans’ use of the spur around the Michels’ residence between 1963 and 1975 was sufficient to establish that the use was continuous for a period of at least 10 years.”\textsuperscript{182} As to the use of the “easement” after the death of T.M. Newman in 1946, the court said: “The Fletchers’ lack of explicit permission in the face of the Newmans’ use of their

\textsuperscript{179} 688 S.E.2d 610 (W. Va. 2009).
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} at 620.
\textsuperscript{182} \textit{Id.}
property is not sufficient to satisfy the adverse requirement.Faultner and Town of Paden City require one to make a decisive act manifesting an adverse or hostile claim. The testimony showed no such hostile act occurred during the time the Fletchers owned the property. “Rather, the Newmans’ use of a portion of the T.M. Newman easement and the spur continued routinely throughout the time the Fletchers owned the property, and at no time did the Newmans and Fletchers have any disagreement over this use.”

As to the relationship between the Newmans and the Michels after the Michels acquired the property in 1973, the court said, “While the Newmans’ relationship with the Michels was not as friendly as it had been with the Fletchers . . . [t]he testimony does not reveal any adverse or hostile acts on the part of the Newmans since the Michels bought the property in 1973 which would convert their use from being permissive into being prescriptive.”

Given the fact that the Supreme Court affirmed the circuit court’s grant of summary judgment to the Michels “and finding that the T.M. Newman easement was in gross and terminated upon T.M. Newman’s death in 1946[,]” it follows that the Newmans’ use of the right of way after 1946 could no longer be considered permissive and would, therefore, be hostile as the term is used as an element of prescriptive easements. For example, as the court in the Syllabus to Roberts v. Ward said: “Open, continuous and notorious use by an owner of land, of a private way over an adjoining tract owned by another person, known, acquiesced in, unobjected to and unprotested by the latter, is presumptively adverse to him and enjoyed under a bona fide claim of right.”

Similarly, in Staggers v. Hines, the court set forth the above-quoted Syllabus Point in the decision, and stated: “An obvious corollary of this [rule] is that mere silence or lack of objection on the part of the owner does not amount to a grant of permission to use the way, precluding adverse character in the user.”

The case of Conley v. Conley provides a helpful understanding the meaning of “adverse” as an element of prescriptive easements. During the oral arguments to the court in Conley, counsel for both parties agreed that “the only real issue in dispute between the parties relates to whether the easement was

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183 Id.
184 9 S.E.2d 140 (W. Va. 1940).
185 66 S.E.2d 280 (W. Va. 1950).
187 Id. at 621.
188 Id. at 618.
189 102 S.E. 96 (W. Va. 1920).
190 Id. at Syllabus.
191 104 S.E. 768 (W. Va. 1920).
192 Id. at 770.
claimed adversely, i.e., whether Della Conley used the pipeline in a manner hostile to Grady Conley.”

The facts in Conley were not in dispute. In 1957, Grady Conley gave the Logan County Board of Education permission to use the gas pipeline when the Board of Education constructed a schoolhouse nearby. The Board of Education ceased using the pipeline in 1965 and gave Della Conley permission to hook on to the line in exchange for her giving the Board permission to remove the schoolhouse across her property. The Board gave her the permission to hook onto the pipeline without Grady Conley’s approval. Grady learned of Della’s use of the pipeline shortly after she began using the pipeline in 1965. The use continued until 1978 when there was a dispute between Della and Grady over title to the land on which the school was formerly located upon. In Conley, the court quoted with approval the adverse possession decision of Somon v. Murphy Fabrication & Erection Co. as follows:

“The person claiming adverse possession must show that his possession of the property was against the right of the true owner and is inconsistent with the title of the true owner. The word ‘hostile’ is synonymous with the word ‘adverse’ and need not and does not import that the disseisor must show ill will or malvolence to the true owner.”

As to the application of the law to the facts of the case, the court in Conley said, “Finally, it is clear from the record that Della Conley claimed use of the pipeline adverse to the rights of Grady Conley and although he acquiesced, he did not give her express permission for such use.” The court affirmed the circuit court’s judgment that Della had established a prescriptive easement.

The law of adverse possession has also proven helpful in understanding other elements of prescription easements. In Veach v. Day, the issue was whether there was a prescriptive easement with the particular question being whether the claimants use had been “continued” or “continuous.” The court again looked to the law of adverse possession for guidance as to what the term meant noting, “There is a similarity between the elements which must be shown to establish a prescriptive easement and those necessary for adverse possession.” After quoting Syllabus Point 3 from the Somon case, the court said, “In

194 Id. at 142.
195 See id.
198 Id.
199 Id.
201 Id. at 863.
several adverse possession cases we have recognized that an occasional or spo-
radic adverse use does not constitute ‘continuous’ use.”

As noted above, the court in Conley had looked to the Somon case for
guidance as to whether the use was “adverse,” and the court in Veach also
looked to the same case for guidance because of the similarity between the ele-
ments of adverse possession and prescriptive easements. Therefore, the court’s
reasoning in Somon as to why it adopted the “objective test” as to what consti-
tutes “adverse” should also be applicable to “easement law.” The court in So-
mon said:

We are not aware of any case in which this Court has been
asked to consider whether, if it is shown that one holds property
under the mistaken belief it is within his deed, this fact destroys
his right to claim that he held it hostilely or adversely. The an-
notation in 80 A.L.R.2d 1171 collates the various cases and
theories and the case of Norgard v. Bushe, 220 Ore. 297, 349
P.2d 490, 80 A.L.R.2d 1161 (1960), provides a full analysis of
these theories.

It is, perhaps, sufficient to comment briefly on the two major
and opposite views that have evolved in this area. One ad-
vances a subjective test; the other an objective one. Those
courts that follow the subjective test reason that the element of
hostile and adverse connotes a mental intent and therefore if one
entertains a belief that he holds the disputed area by virtue of
his title document, he does not possess it with the requisite ad-
verse or hostile intent. The other view looks on the physical
acts and concludes that if physical dominion has been exercised
over the disputed area, this is sufficient to satisfy the adverse or
hostile element. As Holmes, C.J., stated in Bond v. O’Gara,
177 Mass. 139, 58 N.E. 275 (1900), “His claim is not limited by
his belief.” We favor this latter theory.

The reasons for such selection may be at best arbitrary, but it
does appear that proof is more certain if limited to objective
evidence. The physical evidence of possession should alert the
true owner that an adverse claim is made, at which point he has
ten years to end the problem. It is also compatible with the
claim of title that must be shown in order to satisfy this element
of the doctrine of adverse possession in this type of case. This
is true since the actual boundaries of the disputed area have
been shown not to lie within the title instrument, thus giving

\[202\] Id.
rise to the “mistake” in the first instance. The only way the disseisor can hold is by showing actual dominion over the disputed area, which is the basis for a claim of title.203

Therefore, it is submitted that the law set forth as Syllabus Point 2 in the Faulkner v. Thorn case,204 while sound in principle, was not applicable to the facts presented in the Newman case. In the Faulkner case, the original right of way “ran ‘straight-through’ from the Ridge to the Mountain Road, crossing a steep hill near the latter.”205 The predecessor in title of the defendants’ farm was given permission by the predecessor in title for the plaintiff’s farm “to shun the hill” entirely by detouring around the hill and onto his land. The fence setting forth the lane was moved to accommodate this detour.206 The issue was whether the easement was rerouted around the hill or was straight across the steep hill. The court said, “Since the use of the detour was entirely permissive at its inception, and the record discloses no adverse user, we are of opinion that defendant and his predecessors in title acquired no prescriptive right to use the detour.”207 In Faulkner, the issue was the location on the ground of a portion of the easement, not whether an easement existed. In the Newman case, the permission granted by the easement in gross ended with the death of T. M. Newman in 1946. After his death, it would not be consistent with the law to consider those who continued to use the right of way to reach the Newman farm as doing so with the approval of the grantor of T.M. Newman’s in gross agreement. Therefore, the Newman family’s use of the easement area from 1946 until the trial in this case in June of 2007, in the eyes of the law, should have been considered adverse.

As Professors Bruce & Ely state:

When use of a servient estate is initially permissive, the use will confer a prescriptive right only if the user subsequently makes a direct assertion of a claim hostile to the owner. On the other hand, uses that continue after permission has been revoked or

204 The use of a way over the land of another, permissive in its inception, will not create an easement by prescription no matter how long the use may be continued, unless the licensee, to the knowledge of the licensor, renounces the permission and claims the use as his own right, and thereafter uses the way under his adverse claim openly, continuously and uninterruptedly, for the prescriptive period.
206 See id.
207 Id. at 142.
that differ significantly from that permitted constitute adverse usage.208

In section 5.10, the authors state:

Most courts employ an objective standard to determine hostility in easement cases, reasoning that hostile intent is best demonstrated by conduct. The private mental attitude of the claimant is irrelevant. Thus, use of another’s land in the mistaken belief that such activity only affects the claimant’s own land is nonetheless adverse. Similarly, use of land under an invalid grant of an express easement does not negate its adverse character because such usage does not depend on the landowner’s suffering. Moreover, use of land under a mistaken belief that the scope of an express easement permitted such activity is deemed adverse.209

The authors raise concern as to the Restatement (Third) of Property’s approach taken in section 2.16, stating:

The Restatement (Third) of Property — Servitudes has broken new ground by taking the problematic position that a prescriptive easement may be grounded either upon adverse use or upon “a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.” Drafted to apply primarily to common driveways, this provision was designed to give an alternative and allegedly more compelling explanation for prescriptive easements in these situations, which often arise from consensual use under the invalid grant of an easement. In fact, courts have long recognized that use of another’s land under an ineffective easement grant is adverse. Consequently, the Restatement approach may serve to further confuse the adversity requirement.210

There should be no disagreement that “revoked” as used by Professors Bruce and Ely and “terminated” as used in the Newman case have the same legal significances. Therefore, anyone using the easement area other than T.M. Newman and those permitted to do so by his gross easement agreement would be traversing the easement without the consent of the landowner.

208 BRUCE & ELY, supra note 1, at 5-38 to 5-40.
209 Id. at § 5.10, at 5-40 to 5-42.
210 ld. at § 5.11, at 5-42.
E. Continued and Uninterrupted Use

As the West Virginia Supreme Court said in an early case:

Some confusion may arise from the language used in our decisions as to the time required to establish title to a way by prescription. In Boyd v. Woolwine, supra, it is held to be twenty years; but in Wooldridge v. Coughlin, supra, ten years. The natural inquiry is, why this difference, and what is the time essential? It is evident, from the authorities cited, that the court was referring in the former case to the common-law rule, and in the latter to our present statute of limitations. “By judicial construction an adverse user of an easement for the period mentioned in the statutes (of limitations), as they were passed from time to time, became evidence of a prescriptive right.” 211

The Walton court explained, “[The] fiction of a lost grant seems to have been originally invented to avoid the rule of pleading requiring profert.” 212 Initially,

there arose considerable diversity and fluctuation in judicial opinions as to whether an uninterrupted user for the period of limitation conferred a legal right, or raised merely a presumption of title which would stand good until the presumption was overcome by evidence which negatived in the judgment of juries the existence of a grant. 213

After discussing the court’s earlier decisions in Virginia and West Virginia, the court concluded:

Whenever therefore there has been such use for a long period, the bona fides of the claim of right is established, and the owner of the servient estate must rebut the presumption of right, by showing leave or license from him, or protest and objection under such circumstances as to repel the presumption. 214

211 Walton v. Knight, 58 S.E. 1025, 1026 (W. Va. 1907).
212 Id. at 1026. Black’s Law Dictionary defines profert as a “Common-law pleading. A declaration on the record stating that a party produces in court the deed or other instrument relied on in the pleading.” BLACK’S LAW DICTIONARY 1329 (9th ed. 1999).
213 Walton, 58 S.E. at 1027.
214 Id.
As part of the Walton court’s tracing of the evolution from common law roots of prescriptive easement to the early days of West Virginia’s statehood, the court quoted with approval an 1892 case as follows:

In *Lucas v. Turnpike Co.*, 36 W. Va. 427, 437, 15 S.E. 182, 185, the court quotes with apparent approval Goddard on Easements: “Without minutely stating here the local statutes of limitations as to adverse user, it may be safely asserted that no less period will suffice, and no greater will be required, in fixing the requisite length of enjoyment to gain a right to an easement in land by prescription than to acquire the land itself by adverse occupation. This element of duration is therefore comparatively simple.”215

The Walton court also relied upon *Wooldridge v. Coughlin.*216 In *Wooldridge*, the court said:

Prescription presumes, as defined at common law, that a grant was once made far back in time. In the past the length of time of user of the easement must have been so long that evidence of its commencement has become lost in its lapse. It must have been from a time “whereof the memory of man runneth not to the contrary.” But that is all changed now; for, if there has been such actual use of the easement for the time fixed by statute for the recovery of corporeal property, that statute is applied by analogy and the right becomes fixed and vested. However, between the old and new rules of prescription there is an important distinction. The flight of the long time requisite to vest the right under the old law afforded a conclusive presumption that there had been an express grant of the easement, its evidence lost by the tooth of time, and no proof that it never existed could be heard; whereas, under the new rule user for the statutory period raises only a *prima facie* presumption of a grant, which may be repelled. This distinction is important in this case. To establish a right of way under the modern law, it must appear that it has been exercised for the statutory period with the acquiescence of the owner over whose land the way is claimed. True, such user without more, is taken to be with his acquiescence and knowledge, and *prima facie* gives the right; but if it

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215 Id. at 1026.
216 33 S.E. 233 (W. Va. 1899).
appears that the user is against his protest, and that he denied the right, the right cannot become vested from time of user.\textsuperscript{217}

By 1937, in \textit{Post v. Wallace},\textsuperscript{218} the court stated: “We do not think it necessary to cite authority for the proposition that: ‘A private right of way by prescription may be acquired over another’s land by visible, continuous and uninterrupted use thereof for ten years, under a \textit{bona fide} claim of right, with the acquiescence of the owner.’”\textsuperscript{219} Syllabus Point 1 of \textit{Town of Paden City v. Felton}\textsuperscript{220} is to the same effect and is set forth as Syllabus Point 6 in \textit{Newman v. Michel}.\textsuperscript{221} The ten-year period referred to in the case is derived from West Virginia Code § 55-2-1.\textsuperscript{222}

As to the requirement of ‘continuous,’ the court in \textit{Veach v. Day}\textsuperscript{223} wrote: “While we are aware of no West Virginia case which discusses what constitutes ‘continued’ or ‘continuous’ use such as to give rise to a prescriptive easement, a number of jurisdictions have held that the ‘continuous’ requirement involves something more than mere infrequent or sporadic use of a road.”\textsuperscript{224} After discussing cases from Texas and New York, the court noted, “There is a similarity between the elements which must be shown to establish a prescriptive easement and those necessary for adverse possession.”\textsuperscript{225} After briefly discussing two West Virginia cases holding that “occasional” or “sporadic” use is not sufficient for adverse possession, the court held, “Given these authorities, we are of the view that to support the establishment of a prescriptive easement the use of a way must be more than occasional or sporadic.”\textsuperscript{226} In the \textit{Veach} case, the testimony was essentially that since 1957, the Days used the contested way once or twice in the spring to hunt mushrooms and during the deer season two or three times.\textsuperscript{227} In reversing the circuit court, the Supreme Court of Appeals said:

\begin{itemize}
  \item \textsuperscript{217} Id. at 235 (citations omitted).
  \item \textsuperscript{218} 192 S.E. 112 (W. Va. 1937).
  \item \textsuperscript{219} Id. at 115.
  \item \textsuperscript{220} 66 S.E.2d 280 (W. Va. 1951).
  \item \textsuperscript{221} 688 S.E.2d 610, Syl. Pt. 6 (W. Va. 2009).
  \item \textsuperscript{222} W. VA. CODE § 55-2-1 (1923). Entry upon or recovery of lands, “No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through when he claims.” \textit{See generally} \textit{Naab v. Nolan}, 327 S.E.2d 151 (W. Va. 1985).
  \item \textsuperscript{223} 304 S.E.2d 860 (W. Va. 1983).
  \item \textsuperscript{224} Id. at 862 (citations omitted).
  \item \textsuperscript{225} Id. at 863.
  \item \textsuperscript{226} Id.
  \item \textsuperscript{227} \textit{See id.} at 862.
\end{itemize}
We conclude that the evidence of use in the case before us does not demonstrate sufficiently continuous use to support the establishment of an easement by prescription. We note that the Days’ own testimony was that the road was from time to time closed and that family only used it a few times a year to hunt upon the land.228

F. Use

As related to prescriptive easements, the “use” of property fulfills several different functions. First, the nature of the use of the way during the prescription period establishes the purposes for which it can be used. In Staggers v. Hines,229 this aspect of the rule is explained as follows: “It is well settled that a way acquired by prescription has its limitations. If acquired for one purpose, it cannot be broadened or diverted to another; and its character and extent are ascertainable and determinable by the use made of it during the period of prescription.”230 In Staggers, the objection to use was the hauling of timber and lumber over the road in wet weather, but since the record did not accurately define the character and extent of the use during the prescriptive period, the case was remanded.231

In Burns v. Goff,232 it was claimed that during the prescriptive period, the easement was used for ingress and egress to access a single dwelling and that, in 1975, a trailer was placed on the property and the occupants of the trailer began to use the driveway for ingress and egress.233 In response to the argument that using the way to access the trailer exceeded the use during the prescriptive period, the court said:

We find this argument to be without merit. The appellants fail to distinguish between the character or purpose of the use and the frequency of a use of the same character. During the prescriptive period, the driveway was used for ingress and egress to a residential dwelling for all those purposes for which a person would use a driveway to their home, e.g. personal access, access of service and delivery vehicles, and for the visitation of friends and relatives. The use of the driveway by the trailer’s occupants was of the same character and for the same purpose, i.e., ingress and egress to a residential dwelling. Although the

228 Id. at 863.
229 104 S.E. 768 (W. Va. 1920).
230 Id. at 770.
231 See id. at 770–71.
232 262 S.E.2d 772 (W. Va. 1980).
233 Id. at 775.
driveway may now receive more frequent travel of the same character, this is not controlling. It would be a different matter, as an example, if the driveway were now intended to be used for commercial purposes, as this would clearly indicate a change in the character of the use.\footnote{id.}

In Clain-Stefanelli v. Thompson,\footnote{486 S.E.2d 330 (W. Va. 1997).} the court reiterated its holding in Burns that an increase in frequency of a use of the same character is not the same as a change in the character of the use. After citing Burns, the court in Clain-Stefanelli said:\footnote{id. at 336–37.}

We find this reasoning to be applicable in the present case, and hold that where a change in the use of a right-of-way is not a change of its character or purpose but merely one of degree, such as a mere increase in frequency of use, the extent of and the right to use the right-of-way is not affected by such change. There is evidence that the appellant’s property was used at various times as a residence, farm, and for recreational activities such as hunting and fishing, and the circuit court found that a right-of-way exists for these purposes. There is no evidence that the appellant’s property was ever used for commercial purposes.

We find, therefore, that the right-of-way at issue may be used for ingress and egress to additional residential dwellings on the appellant’s property that may result from any development or subdivision, for such would be in keeping with the historical character and purpose of the right-of-way. This would merely result in an increased frequency of residential traffic over the right-of-way and not a change in its character or purpose. We emphasize, however, that the right-of-way may not be used to serve any commercial development of the appellant’s property. Also, we are not declaring that the appellant has the right to develop or subdivide her property for any purpose, because the question of such a right includes many additional issues which exceeds the scope of this Court’s concern. We merely find that the right-of-way at issue may be used to serve additional residential traffic.\footnote{id.; see also Pobro, LLC v. LaFollette, 618 S.E.2d 434 (W. Va. 2005).}
While the *Clain-Stefanelli* case involved an increase in usage of the same activities that gave rise to the prescription easement, a usage of a different kind is illustrated by the next three cases. In *Hanshew v. Zickafoose*, the court held that although Zickafoose had obtained a prescriptive easement across a lane which bordered his land for maintenance of a fence, he could not use the lane for an ingress and egress to a new residence built on his property. In *Crane v. Hayes*, on facts similar to *Hanshew v. Zickafoose*, the court held: “While the appellants [Cranes] are entitled to continued usage of the road for the purposes as encompassed within that original ten-year prescriptive period, [i.e., agricultural related purposes,] they are not entitled to increase the burden on the land to encompass travel for residential purposes.”

In *Grist Lumber, Inc. v. Brown*, the issue was whether the prescriptive easement could be used for timber removal. The easement across the servient estate had been in continuous use since 1911. In rejecting the appellant’s argument as to what constituted the “prescriptive period” for the purpose of determining the permitted use, the court in footnote four said:

Grist Lumber asserts that the prescriptive period during which the easement was created was actually from 1911 to the present, contending that the “prescriptive period” is not legally limited to any particular ten-year span, but rather includes all years of usage with a minimum of ten years. The law of this state is in accord with the conception advanced by Grist Lumber; where an action seeking designation of a prescriptive easement is brought, a precise ten-year period within an extensive history of use does not have to be asserted, as long as the usage has been conducted continuously for at least ten years. The entire history

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239 See generally id. at 429. George Zickafoose had used the lane from 1951 until 1979 to repair the fence that ran along the northside of the lane. George had conveyed a lot on the north side of the lane to his son and daughter-in-law on which they built their residence. The court’s holding was, “the easement is limited to the use of a vehicle in connection with fence repairs, and cannot be expanded to include vehicular use for ingress or egress to the new residence. Zickafoose could convey nothing more.” *Id.*


241 In *Crane*, “The prescriptive easement is limited to the uses to which the road was put during that prescriptive period specifically, agricultural, gathering of firewood, checking fences, and the use of small machinery to clear the roadbed.” *Id.* at 120.

242 *Id.* Mr. Crane intended to build two residences on his land and access them by the easement involved in the litigation. *See id.* at 118.


244 *Id.* at 68.
of the usage, as presented in evidence, must be evaluated to determine the character and scope of the prescriptive easement.\(^{245}\)

While recognizing it is the use of the way during “all years of usage with a minimum of ten years,” on the facts of the instant case, the court stated:

In the present case, the record reflects very infrequent incidents of use of the road for timbering from 1911 to the placement of the gate across the easement in 1998. There is no evidence that the usage of the road for timber removal continued in an uninterrupted fashion for any ten-year period. The only well-documented instances of usage for timber removal occurred in 1982 and 1985 where express permission by the Appellant’s predecessor in title was granted for timbering use for a limited period of time.\(^{246}\)

An unusual application of this general principle that the use during the prescriptive period determines the nature of the permitted is the case of *Wheeling Stamping Co. v. Warwood Land Co.*\(^{247}\) In 1872, the Cowpland executed an unrecorded “release” in favor of the Pittsburgh, Wheeling, and Kentucky Railroad. Conrail succeeded to the grantee’s interest, and Warwood Land Company succeeded to the Cowpland’s interest. Since the original “release” could not be found, the court held: “Thus, without a recorded document protecting the interests of the railroad, we may only conclude that the railroad acquired a right of way easement by prescription.”\(^{248}\)

In the 1980s, when Conrail abandoned the rail service and sold the 19.8 miles section of railroad property, the question arose whether the grantee of Conrail obtained title to the “prescriptive easement” area or did Warwood Land Company own it as the successor to the servient estate? In holding that Warwood Land Company owned it, the court said:

> Where property acquired by prescriptive easement for railroad purposes is abandoned by the railroad, the property returns to its prior status as an integral part of the freehold to which it previously belonged and there is a rebuttable presumption that it is owned in fee simple by the owners of the abutting land, one-half of the railway easement to each landowner on his respective side of the easement.\(^{249}\)

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\(^{245}\) *Id.* at 71 n.4.

\(^{246}\) *Id.*


\(^{248}\) *Id.* at 256.

\(^{249}\) *Id.* at 254.
1. Location and Width of Easement

Another aspect of the element of “use” is to determine the location and width of the easement and its maintenance. In contrast to expressed grants or reservation of easements which must contain an adequate description, prescriptive easements are created by usage. Therefore, questions concerning width and the exact location on the ground that prescription easements are not unusual.

In Crosier v. Brown, the complaint asserted ownership of a prescriptive easement across land owned by Brown, and described the easement in the complaint as “about 500 yards in length, passing from near the western line of said tract through the western portion of said John M. Brown tract of land to the public road.” The court, in considering the sufficiency of the description, said:

Is the above description of the way sufficient? It is the only description in the record . . . .

At what point on the western line of Brown’s tract does this way begin? What line or course does it pursue through Brown’s tract of 51 ¼ acres? At what point on the public road does it terminate? What public road? The bill does not answer these questions. The bill must point out the way by definite termini and route. The sacred right of property demands that such serious encumbrance upon a man’s estate, if established by record, shall be clearly defined by the record memorial. The evidence does not make it definite. According to it I doubt if one could find this way. It is not fenced. It has no track. You can only find it by the marks of the wheels of a wagon only occasionally used. Many years hence, when living witnesses of its present place are dead, it becomes a question as to location. Recourse is had to this record. It will reflect no light by plat of delineation or other decisive or significant description. If there is anything affecting a man’s land that should be definitely ascertainable, it is a way. Jones on Easements, § 294, says that a way by prescription “must be definite in location. The adverse enjoyment must be in the same place within definite lines for the whole period of limitation.” The proof does not more clearly define it. The decree does not attempt to do so.


Id. at 326.

Id. at 326–27. In addition to stating the description was insufficient, the court said Crosier had failed to establish several elements of a prescriptive easement.
The issue of description was back before the court in *Post v. Wallace*.\(^{253}\) In contrast with *Crosier*, where the court had held that all of the elements of a prescriptive easement had not been proven, in *Post*, the court held that a prescriptive easement was established and remanded the case “to the court below to take such proceedings as may be necessary to locate on the ground the right-of-way decreed.”\(^{254}\) As to the location of the right-of-way, the court said:

We are therefore confronted with the question of whether or not the plaintiff’s bill, the testimony in the case, and the decree of court unholding the Posts’ right to this road are sufficient to establish the particular location of the right of way within the meaning of the authorities which require such location. The plaintiff’s bill does not specifically locate the right of way on the ground, but states that it “is well marked by the old road bed and gates and has been continuously used as a right of way from the public highway to this plaintiff’s land openly, notoriously, adversely and under claim and color of right,” leaving us to conjecture where the road is located, except for the allegation that the road is well marked. On the theory that “that is certain which can be made certain,” this allegation may have some force, but it is uncertain and unsatisfactory, at best. The testimony is slightly more specific in that it refers to the gateway on the division line between the Wallace land and the Post land, and to the gateway on the division line between the Wallace land and the Post land, and to the corner of a meadow fence and a reference to an old or abandoned road with which the present right of way runs parallel, the meanderings of the road passing the residence of the defendants to the property line of H. B. Newlon and over his property to the public road. The decree of the court in attempting to locate the right of way which is decreed to Post, describes it as follows: “* * * extending from a gate in the division line fence between the property of the plaintiff and the defendants, to a pair of bars south of the Howard Davisson’s House located on the defendants’ land, and thence parallel with the old or abandoned road or right of way running through the meadow to the corner of the meadow west of the Howard Davisson’s House, and thence to the original road or right of way and with the original road or right of way over, along and with the meanderings of said road or right of way, along and by a tenant house and along and by the residence of the defendants on the land owned by the defendant

\(^{253}\) 192 S.E. 112 (W. Va. 1937).

\(^{254}\) *Id.* at 116.
Stella Wallace to the property line of H.B. Newlon, and extending over the land of H.B. Newlon to the public highway. "* * *"

The location of this road has not been made with such certainty as to justify the approval of the decree below on that point.255

The case of Faulkner v. Thorn256 involved establishing the location of the easement on the ground following a remand for that purpose. While the case illustrates some of the difficulties in locating the easement on the ground, it is not particularly instructive beyond the facts of the case. Similarly, the case of Clain-Stefanelli v. Thompson257 illustrates the difficulties of establishing the location and width of the right-of-way. The court explained:

In the present case the evidence is not entirely clear as to the exact width of the right-of-way in question at the time it was established, since the right-of-way was established possibly 100 years before the institution of the present action. As previously indicated, Frank A. Whitacre, a surveyor, testified that the right-of-way is 13.6 feet in width and another surveyor, Kenneth F. Snyder, testified that it is eleven feet in width. Three witnesses approximated the width of the right-of-way at 12 to 15 feet. Another witness testified that the right-of-way is approximately 12 feet wide. Given this testimony, this Court cannot conclude that the circuit court erred in holding that the right-of-way is 11 feet wide with a one and one-half foot overhang on each side. Clearly, the 11 foot width is supported by the testimony of surveyor Snyder and the finding of the overhang on each side is reasonably within the parameters established by surveyor Whitacre and the estimations of the other witnesses.258

Since prescriptive easements arise from the use of another’s land, issues such as the duty to maintain or the erection of gates are not resolved by agreement between the parties. In Moran v. Edman,259 among the issues addressed by the court on appeal was the trial court’s order requiring the owner of the servient estate to contribute to the upkeep of the easement. Earlier in the decision, the court had affirmed the circuit court’s ruling that Moran had established a prescriptive easement across Edman’s property.260 In overruling the portion of the

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255 Id. at 115.
256 9 S.E.2d 140 (W. Va. 1940).
258 Id. at 334–35.
259 460 S.E.2d 477 (W. Va. 1995).
260 Id. at 483.
circuit court’s ruling requiring the owner of the servient estate to contribute to the upkeep of the road, the court stated:

In syllabus point 2 of Carson v. Jackson Land and Mining Company, 90 W. Va. 781, 111 S.E. 846 (1922), the Court rather plainly indicated that in an easement situation the duty to maintain an easement is ordinarily upon those entitled to use the easement and not upon the landowner. The Court said:

The duty to maintain an easement in such condition that it may be enjoyed is upon those entitled to its use, in the absence of some contractual or prescriptive obligation upon the owner of the servient estate to so maintain it.\(^\text{261}\)

The issue of whether the owner of the servient estate can erect a gate across the right-of-way gained through prescriptive use is often an important practical question. The court, in Clain-Stefanelli v. Thompson,\(^\text{262}\) provided a helpful discussion of this issue as follows:

The second issue raised by the appellant is that the circuit court erred in holding that the appellees may legally erect and maintain a gate across the right-of-way in question, and denying the appellant the right to install a cattle crossing in lieu of a gate.

The appellant contends that the right-of-way at issue remained open and unobstructed for a period of over 100 years and, therefore, the appellant has a right to continue to use the right-of-way in its unobstructed condition. For the reasons set forth below, we agree with the appellant.

As previously indicated, the fundamental law on prescriptive rights-of-way in this state indicates that the character and purpose of a right-of-way acquired by prescription are determined by the use made of it during the prescriptive period. In determining whether the owner of the servient estate can erect a gate across a prescriptive right-of-way, this Court has historically looked at the facts of each case to ascertain the reasonableness of such action. In Rogerson v. Shepherd, 33 W. Va. 307, 317-318, 10 S.E. 632, 636 (1889), this court stated:

[If] the way acquired by use, although well marked and defined, is restricted, during the time required for the estab-

\(^{261}\) Id.

\(^{262}\) 486 S.E.2d 330.
lishment of the right, to a use and enjoyment thereof with bars or gates across it, the right acquired will be restricted to the same extent; and if, on the other hand, the way be well defined and fenced, and used as an open and unobstructed way of during the period necessary to confer the right, the party acquiring this right of way has the right to continue to use the same in its unobstructed condition, and the owner of the servient estate has no right to change said way to another and different locality over his land, and obstruct the new way with gates.

The court in Rogerson noted, however, that in holding that the owner of the servient estate could not obstruct the prescriptive right-of-way with gates, it was deviating from the general proposition that “the owner of a servient estate, over which there is a private way, may maintain gates or bars across the way provided it do not materially interfere with the use of it.” Rogerson, 33 W. Va. at 316, 10 S.E. at 636. The court in Rogerson explained that the case presented some peculiar features which took it out of the general rule governing such cases. These peculiar features included the existence of a parol agreement between the parties’ predecessors in title that the right-of-way would be kept open, and the fact that when the right-of-way was first opened, fences were constructed along both sides of it separating it from the servient estate. The Court also noted that the right-of-way had been unobstructed by gates for about 32 years. In Mitchell v. Bowman, 74 W. Va. 498, 82 S.E. 330 (1914), this Court distinguished Rogerson based on the peculiar facts noted above, and stated in Syllabus Point 2 that:

A way of passage from a public road to a farm, over intervening agricultural lands, acquired by prescriptive use while the servient lands were unenclosed and unimproved, may be properly subjected to gates not unreasonably established and maintained, whenever the owners of the servient lands find it desirable to enclose the same for proper and ordinary use.

Considering the facts of this case in light of the general rule, we find that obstructing the right-of-way with a gate at this late date is simply unreasonable. As noted above, our inquiry on this issue is a fact-specific one. Among the factors that this Court considers in determining whether an owner of a servient estate may erect a gate across a prescriptive right-of-way are the history of the right-of-way and the history of the land it crosses. In the absence of an agreement to the contrary or other special cir-
cumstances, if the right-of-way has been in existence for a short period of time, and the servient estate has historically been unimproved or used as agricultural land, the owner of the servient estate may erect a gate across it for agricultural purposes. If, however, the right-of-way has been in existence for a lengthy time, and a gate has never been placed across it, the owner of the servient estate may not change the character of such a long established right-of-way by obstructing it with a gate. Here, there is evidence that the right-of-way, established in the early 1900’s according to the uncontradicted testimony of one witness, was open until the appellee erected a gate across it in 1993. The character of the right-of-way over its approximate 90 to 100 year existence is that of an unobstructed, ungated right-of-way. Given this evidence, and the rule of law that the character and purpose of a right-of-way acquired by prescription are determined by the use made of it during the prescriptive period, we believe that the right-of-way cannot now be gated. Here, the free and unfettered use of the right-of-way over its long history is controlling.\textsuperscript{263}

G. Miscellaneous Issues Regarding Prescriptive Easements

1. Use by a Tenant

In \textit{Keller v. Hartman},\textsuperscript{264} the defendant Hartman began to lease commercial property from the Byrd’s beginning in 1953. In 1956, the Byrd property was partitioned with Maurice, the owner of a 2/3 undivided interest, getting two of the three commercial properties including the property rented to Hartman, and Wayne, the owner of the remaining 1/3 undivided interest, getting the other commercial property. The property owned by the Byrds between the commercial buildings and a street some distance behind the commercial buildings was not partitioned. Hartman traveled across this property to get deliveries to the rear of the building he rented. This property was owned 2/3 by Maurice and 1/3 by Wayne, respectfully, as tenants in common. When Maurice died in 1968, his interest passed to his wife, Elsie, and in 1978 Elsie sold the commercial property the Hartmans had been renting to them.\textsuperscript{265}

The deed of transfer for the commercial building also provided:

The party of the first part [Elsie Byrd] also grants and conveys to the party of the second part [Hartmans] a right-of-way thirty

\textsuperscript{263} \textit{Id.} at 335–36.

\textsuperscript{264} 333 S.E.2d 89 (W. Va. 1985).

\textsuperscript{265} \textit{Id.} at 92.
(30) feet in width across her undivided two-thirds (2/3) interest in the real estate owned by her and located East of and between South Branch Street, the location of said right-of-way shall be the same entrance which the parties of the second part now use for the purpose of ingress and egress to the real estate herein conveyed.  

The instant litigation was to determine whether the Hartmans had an easement across the undivided interest of the Byrds between the rear of his store and the street some distance from the rear of the store. From 1953 until 1956, Hartman had been the tenant of the Byrds; from 1956 following the partition until 1978, he had been the tenant of Maurice and then his widow, and from 1978 he had been the owner of the store and also the 30 foot right of way contained in the 1978 deed across Elsie’s 2/3 undivided interest. One of Hartman’s grounds for the easement was by prescription. As to the prescriptive easement claim, the court said:

It is fundamental that “no person can have an easement on his own property. The essence of an adverse use is that such use be made of the land of another. (Citation omitted)

For the first three years of the claimed prescriptive period, the leased buildings and the driveway were parts of a single tract of land. The landlords and the owners of the way were identical.

Subsequent to the partition in 1956, the appellees’ landlords in the furniture store-first Maurice and later Elsie-continued to have a 2/3 undivided interest in the “L”-shaped tract. Any use of the driveway by the appellees could not inure to the benefit of their lessors because the lessors could not acquire the right to use the driveway adverse to themselves.

In addition to the above discussion, the court stated:

The appellant contends that the appellees could not acquire an easement because they were merely lessees during the alleged period of prescription. The general rule with respect to acquisition by a lessee of an easement by prescription is that “[o]ne in possession of land as a tenant at will or for years cannot acquire for himself an easement of way over the lands of another.”

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266 Id. at 92–93.
267 Id.
268 Id. at 95.
Am.Jur.2d, Easements and Licenses § 40, see also 28 C.J.S. Easements § 8.

The appellees concede the general rule, but they contend that their adverse use inured to the benefit of their landlord. In the leading case of Deregibus v. Silberman Furniture Co., 121 Conn. 633, 186 A.553, 105 A.L.R. 1183 (1936), it was held that adverse use by a lessee of a way appurtenant to the leasehold premises inures to the benefit of the lessor only where the way is included, expressly or impliedly in the lease.

In the present case, there was no written lease, and the record is devoid of evidence that the claimed easement was included in the oral lease of the furniture store or of the storage building. Therefore, any use by the Hartmans would not benefit their landlords.269

As discussed later in this Article, the Hartmans were held to have an easement as a result of the 1978 deed from Elsie and the subsequent ratification of the easement by Wayne Byrd.270 However, the court’s reliance on the Deregibus case, as quoted in the Harman decision, results in what would seem to be an illogical result in Jamison v. Waldeck United Methodist Church.271 In that case, the question was whether the Jamisons had obtained a prescriptive easement across the church’s property to their house located on an acre of land adjacent to the church property. On March 2, 1982, Earl and Nora Lea Jamison conveyed one acre out of a larger tract to their son Michael Jamison. Michael and Mary, his wife, built a house on this one-acre parcel and moved in during November 1982. Michael and Mary lived in the house until they moved in 1989. Thereafter, they rented the house to tenants. During the time the Jamison’s lived in the house, and after their departure, their tenants relied exclusively upon the roadway across the church’s property as their access to the public road.272 On appeal, the court said it was error for the trial court to have granted the Jameson’s a prescriptive easement “because they did not present evidence that they satisfied the required ten-year period.”273 In reversing the circuit court’s verdict in favor of the Jamisons, the court explained:

Here, the suit against the church to establish the plaintiffs’ rights to a prescriptive easement was filed in the Circuit Court

269 Id.
272 Id. at 231.
273 Id. at 232.
of Lewis County on November 13, 1992. However, the facts indicate that the Jamisons only lived on the property from 1982 until 1989, and then they began renting the property. In Keller, 175 W.Va. at 424, 333 S.E.2d at 95, we cited “the leading case of Deregibus v. Silberman Furniture Co., 121 Conn. 633, 186 A. 553, 105 A.L.R. 1183 (1936), . . . [which] held that adverse use by a lessee of a way appurtenant to the leasehold premises inures to the benefit of the lessor only where the way is included, expressly or impliedly in the lease.”

We do not find any indication in the record that the Jamisons provided in their lease of the property the right to use the Church’s roadway. Likewise, we do not find any argument in their brief that the lease was sufficient to allow a tacking of the period the property was rented to the approximately seven years that they lived on the property. Thus, we conclude that the Jamisons did not prove by clear and convincing evidence that they accrued the ten years necessary to establish the prescriptive easement. We, therefore, reverse the judgment of the trial court as to its entering a verdict in favor of the Jamisons.274

Given the privity that exists between landlord and tenant, it is doubtful that the Deregibus case represents the general rule. Bruce and Ely, in their treatise, state:

Further, successive uses under one title, such as by a landlord and a tenant, satisfy the privity requirement and may be tacked. Some jurisdictions, however, adhere to the view that adverse use by a tenant inures to the benefit of the landlord only when the asserted easement is within the express or implied terms of the lease.275

Even if one accepts the Deregibus case as a correct statement of the law, it defies logic to reason that if the “exclusive” access to the Jamison house was across the church’s property that a lease of the house would not “impliedly” include the access the landlord had used for three years and was the only access to the property.

274 Id.
275 Bruce & Ely, supra note 1, at § 5.19, at 5-72. “Prescriptive uses need not be made personally by the owner of the claimed prescriptive servitude, but may be made by tenants, customers, guests, and visitors of the claimant.” Restatement (Third) of Property, § 2.16 Comment c, 227-28; see also Tenant’s Adverse Possession or Use of Third Person’s Land not Within the Description in the Lease as Inuring to Landlord’s Benefit so as to Support Latter’s Title or Right by Adverse Possession or Prescription, 105 A.L.R. 1187 (1936).
2. Application of the Recording Acts to Prescriptive Easement

The West Virginia Supreme Court of Appeals in *Fanti v. Welsh*, 276 in dicta said:

that James A. Welsh was a purchaser for value without actual or constructive notice and that, therefore, even if a prescriptive right to an easement had been acquired by the plaintiffs as against the railroad company as owner of the land, such right was extinguished and that Welsh, as a purchaser for value without notice, took the land free and clear of any such easement right. 277

In *Clain-Stefanelli v. Thompson*, 278 the court, again in dicta, followed the reasoning in *Fanti* setting forth the principle in Syllabus Point 2 as follows:

When a servient estate is sold, a prescriptive right-of-way over that estate is extinguished unless the purchaser of the servient estate has either actual or constructive notice of its existence. Where the prescriptive right-of-way is open and visible so that a reasonably careful inspection of the servient estate would disclose the existence of the right-of-way, the purchaser has constructive notice. 279

In *Wolfe v. Alpizar*, 280 the court applied the principle set forth as dicta in the *Fanti* and *Clain-Stefanelli* cases holding that when Mrs. Alpizar purchased the property that was asserted to be the servient estate; she was protected as a *bona fide* purchaser. In the language of the court:

At that point in time, Ms. Alpizar became a *bona fide* purchaser for value without notice. Ms. Alpizar, in essence, was an innocent purchaser and Mr. Wolfe’s and Mr. Ellison’s claims, even if valid, were extinguished by an innocent purchaser’s *i.e.* Ms. Alpizar’s acquisition of the land. The appellants have asserted no documentation of which Ms. Alpizar could have or should have been aware that would have alerted her to the appellants’ claims to the bridge. All parties agree that the easement recorded in the deed transferring property title is not the location of

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277 *Id.* at 506.
279 *Id.* at 331, Syl. Pt. 2.
the bridge, as the bridge is far north of the actual easement. Furthermore, all parties concede that the alleged easement at the bridge location was not recorded. Thus, there is no documentation that would have alerted Ms. Alpizar to the appellants’ claims to the bridge.281

The application of the recording acts to prescriptive easements and the fundamental soundness of the dicta in Fanti, which the court followed in Clain-Stefanelli and Wolfe v. Alpizar, are discussed at length in Fisher, The Scope of Title Examination in West Virginia Revisited.282 As more extensively discussed in that article, it is submitted that since prescriptive easements are created by the application of principles of law to a particular set of facts and not by a written agreement, they are not subject to the provision of the recording acts.

V. WAY OF NECESSITY

“Easements of necessity, also called easements by necessity or ways of necessity, are typically implied to provide access to a landlocked parcel.”283 The traditional requirements for its creation are (1) common ownership, (2) severance, i.e. a transfer of a part of the land, (3) necessity at severance for an easement to benefit either the parcel transferred or the parcel retained, and (4) continuing necessity for an easement.284 While the way of necessity was recognized as a method of acquiring an easement in Rogerson v. Shepherd285 and Boyd v. Woolwine,286 the first case in West Virginia in which it provided the legal basis for the recognition of an easement was Wooldridge v. Coughlin.287 In Wooldridge, the dominant and servient tracts were once a part of a common tract,288 and at the time of Cabell’s conveyance to Hurley, a way of necessity existed across Cabell’s land to the public road.289

281 id. at 628.
283 BRUCE & ELY, supra note 1, at § 4.2, at 4-3.4.
284 id. at § 4.2, at 4-4, 5.
285 10 S.E. 632 (W. Va. 1889).
286 21 S.E. 1020 (W. Va. 1895).
287 33 S.E. 233 (W. Va. 1899).
288 “Thus Wooldridge and Coughlin derived title from a common source (Cabell), the Wooldridge title emanating from Cabell first in time.” id. at 234.
289 “I think there can be no doubt that, the instant Cabell conveyed to Hurley, Hurley had, under the law, a way of necessity to the old state road, because between Hurley’s land and that road Cabell owned the land, and on the other side, back of the Hurley land, rises a high mountain, and except the land then yet owned by Cabell, the Hurley land was cut off from access to the outer world by lands of other parties.” id.
Upon these facts, the court said:

the way of necessity vested in Wooldridge existing by reason of the conveyance by Cabell to Hurley, and the necessity of a way over Cabell’s remaining land in favor of Hurley. This right of way was appurtenant to Hurley’s estate in the land, if it existed, and is appurtenant to Wooldridge’s estate in his land as aliee of Hurley. I think such way of necessity exists. "A way of necessity exists where the land granted is completely environed by land of the grantor or partially by his land and the land of strangers. The law implies from these facts that a right of way over the grantor’s land was granted to the grantee as appurtenant to the estate." 290

In response to Coughlin’s claim that Wooldridge had lost the way of necessity to Coughlin through adverse possession, i.e., the ten years statute of limitation, the court said:

that mere nonuser of a way appurtenant to wild land would not destroy the right of way. The fact that Coughlin had possession of his land is not a material element, and would not affect the right of way, as Coughlin’s possession was a matter of course, and it could co-exist with right of way, and would not be in antagonism per se with that right of way. In almost every case of conceded right of way, whether by grant or necessity, there is actual possession of the land subject to such right of way. Arnold v. Stevens, 35 Am. Dec. 305; Gray v. Bartlett, 32 Am. Dec. 208, note. The statute limiting actions for recovery of actual possession of land does not, in terms, apply to incorporeal hereditaments, such as mere easements. If the owner of the servient land deny the easement, and his denial is known to the owner of the dominant land, and there were nonuser thereafter of the way for the statutory period of 10 years, it would defeat the right of way; but I do not see that such private right of way, once brought into being, could be defeated by simple non-user. 291

Over the next several decades, the court decided several important issues relevant to ways of necessity.

In Proudfoot v. Saffle, 292 there was common ownership of a tract of 198 acres and an 80-acre tract, with the only access from a public road to the 198-

290 Id. (citations omitted).
291 Id.
292 57 S.E. 256 (W. Va. 1907).
acre tract being across the 80-acre tract. In a judicial proceeding to enforce liens against the owner of these tracts, the 198 acres was sold.\textsuperscript{293} In holding that the owner of the 198 acres had a way of necessity, the court said:

A way of necessity is not established by the mere fact that one's land is surrounded by the lands of others cutting him off from public ways. “When there is a conveyance of a tract of land, and there is not means of access thereto or egress therefrom, except over the remaining land of the grantor, a way of necessity over such land is granted by implication of law, whether the transfer be voluntary or by sale under execution.” (citation omitted).

“The right of way of necessity passes with each successive transfer of the title, whether voluntary or involuntary.” It is further held: “A way, having been created by necessity for its uses cannot be extinguished so long as the necessity continues to exist.”\textsuperscript{294}

In \textit{Crotty v. New River and Pocahontas Consol. Coal Co.},\textsuperscript{295} the issue was “[w]hether an owner of land can go back beyond the deed of the immediate grantee to the common source of title, however remote it may be, and claim a way by necessity, as appurtenant to the land . . .”\textsuperscript{296} In answer, the court held that the common source of title can be in a remote grantor. The discussion of this question in the decision is concisely summarized in the Syllabus as follows:

Such a way is appurtenant to the granted land, and passes to subsequent grantees thereof, and a subsequent grantee of land not used at the time of the severance of the larger tract by the common owner may, when the use of such way becomes necessary to the enjoyment of the land, claim it under the remote deed of severance.\textsuperscript{297}

The \textit{Crotty} court also discussed the “degree” of necessity required to acquire a way of necessity stating:

As to whether physical obstruction to access to land, such as the insurmountable cliff standing between the plaintiff's lot and the

\textsuperscript{293} See generally \textit{id.} at 256.
\textsuperscript{294} \textit{id.}
\textsuperscript{295} 78 S.E. 233 (W. Va. 1913).
\textsuperscript{296} \textit{id.} at 234.
\textsuperscript{297} \textit{id.} at 233.
public road on the table land within the boundary of lot No. 15, will sustain an implication of a grant of a way of necessity, the authorities are in conflict, some saying the grantee cannot have a right of way out over the adjacent land of the grantor, if, by any means, no matter at what cost, he can get out over his own land, while others say necessity within the meaning of the terms as it is used in the law of contracts suffices. 298

In answer to the question of the degree of necessity, the court said:

In cases like this the courts have said there need not be an absolute physical obstruction. The following text from Jones on Easements, § 316, is well sustained by authority: “The word is to have a reasonable and liberal interpretation. The way must be reasonably necessary. If it were limited to an absolute physical necessity, a way could not be implied if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the purchaser would not have a right of way over the intervening piece as appurtenant to the land, provided he could make another way at an expense of one hundred thousand dollars.” See Pettingill v. Porter et al. 8 Allen (Mass.) 1, 85 am. Dec. 671. 299

In Dorsey v. Dorsey, 300 the court noted two limitations as to ways of necessity. These points are concisely stated in the Syllabus. An owner of a dominant estate who has an “easement of passage by virtue of necessity as to one tract could not as matter of right extend such easement to his other lands.” 301 In Dorsey, the dominant estate consisted of a 95-acre tract which had a way of necessity across tracts of 65 acres and 45 acres. These three tracts had a common source of title. The owner of the dominant estate acquired title to an adjoining 31 ½ acre tract that was never owned by the common grantor. The instant case was to enjoin the owner of the dominant estate from hauling timber cut on the 31 ½ acres and a 35-acre tract across the servient estate. 302

The Dorsey court also explained, “[I]f one has a reasonable outlet over his own property, he cannot exact a more convenient way as of necessity over

298 ld. at 234–35.
299 ld. at 235 (some citations omitted).
300 153 S.E. 146 (W. Va. 1930).
301 ld. at 146.
302 ld. at 147.
the premises of another.\textsuperscript{303} In response to the argument that hauling the timber over the 35-acre tract "would entail expense disproportionate to the value of the timber,"\textsuperscript{304} the court said, "[C]onvenience is not the basis of a right to an easement. `A party cannot have a way of necessity through the land of another (ordinarily) when the necessary way to the highway can be obtained through his own land, however convenient and useful another way might be.'\textsuperscript{305}

In Derifield v. Maynard,\textsuperscript{306} the court held that since there was no evidence that the purported dominant estate and servient estate were ever a part of the same tract of land, there could not be a way by necessity.\textsuperscript{307}

In addition, the Derifield court said that there had been no showing of a "real necessity."\textsuperscript{308} As to the degree of necessity, the court said, "[T]he more modern rule seems to be that `[T]he rule of strict necessity applicable to an implied reservation or grant of an easement is not limited to one of absolute necessity, but to reasonable necessity as distinguished from mere convenience.'\textsuperscript{309}

The issue of "reasonable necessity" was before the court again in the two Justus v. Dotson decisions.\textsuperscript{310} The first time the case was before the Supreme Court of Appeals, the court reversed a summary judgment in favor of the owner of the property over which the way of necessity was sought holding there was a genuine issue of fact as to whether the plaintiff had a "reasonable means of access."\textsuperscript{311}

Following the remand and the circuit court's decision that the "old" lumber road "is so bad as to be deemed an unreasonable means of access to the plaintiff's property,"\textsuperscript{312} the case was back before the court again. This time the court reversed the circuit court's decision that there was a way of necessity stating:

> Although the circuit court applied the proper principles of law, we do not believe that the evidence supports the court's conclusion that the existing road was an unreasonable means of access to the appellees' property.

\textsuperscript{303} \textit{Id.} at 146. While the 35 acre tract was at one time part of the land from the common grantor, there was evidence that coal and walnut logs had been hauled from this 35 acres to the public road.

\textsuperscript{304} \textit{Id.} at 147.

\textsuperscript{305} \textit{Id.} (citations omitted).

\textsuperscript{306} 30 S.E.2d 10 (W. Va. 1944).

\textsuperscript{307} \textit{Id.} at 12–13.

\textsuperscript{308} \textit{Id.} at 13.

\textsuperscript{309} \textit{Id.} (citation omitted).


\textsuperscript{311} \textit{Justus I}, 242 S.E.2d at 578.

\textsuperscript{312} \textit{Justus II}, 285 S.E.2d at 130.
The appellant, Troy Dotson, testified that: (1) it was only three or four times a year that water would prohibit the residents from using the road; (2) some sort of drain pipe would probably eliminate the problem of flooding; and (3) until approximately six years prior to institution of this suit by appellees, he used the same roadway as the other residents of the hollow. At that time he constructed a vehicular bridge across Bull Creek onto his property.

It is clear from the record that the evidence relating to the condition of the existing road was conflicting. We recognize that what is reasonable access in a rural county of this State may be unreasonable to one living in a more urbanized area. It appears that the appellees found the existing road to be adequate for their needs for a number of years and that this action arose only after the appellants decided to build a “better” way of access to their property.

Viewing the record as a whole, we find that there was no substantial evidence that the existing roadway to the appellees’ property was an unreasonable means of access. Accordingly, the judgment of the circuit court is reversed.\textsuperscript{313}

One of the more frequently cited easement cases is \textit{Berkeley Development Corp. v. Hutzler}.
\textsuperscript{314} The case is frequently cited for the burden of proof of an easement as “clear and convincing”\textsuperscript{315} and for the distinction between easements by prescription and a way of necessity.\textsuperscript{316}

\textsuperscript{313} \textit{Id.} at 130–31.

\textsuperscript{314} 229 S.E.2d 732 (W. Va. 1976).

\textsuperscript{315} \textit{Id.} at 733. Syllabus Point 1 states: “The burden of proving an easement rests on the part claiming such right and must be established by clear and convincing proof.”

\textsuperscript{316} \textit{Id.} Syllabus Points 2, 3 and 4 read:

2. An easement by prescription and a way of necessity are distinguished one from the other since they arise by virtue of different and mutually exclusive conditions.

3. “The open, continuous and uninterrupted use of a road over the land of another, under bona fide claim of right, and without objection from the owner, for a period of ten years, creates in the user of such road a right by prescription to the continued use thereof.” Syllabus pt. 2, \textit{Post v. Wallace}, 119 W.Va. 182, 192 S.E. 112 (1937).
Factually, the case involves Hutzler's efforts to secure an easement from his 105 acres across the 550 acres owned by the Berkeley Development Corporation. The stipulated facts were that the two tracts share a common source of title, Moses S. Grantham, and that there were no expressed easements in the claim of title of either parcel.  

There was evidence of an "old road," perhaps an old logging road from the Hutzler tract across the 550 acres to a public road and that there were no alternative routes from the Hutzler tract to a public road except over lands of others. The court noted that, but for the fact that a prescriptive easement and a way of necessity are mutually exclusive, Hutzler had established both.  

As to between the two possible easements that could be appurtenant to the 105-acre tract, the court said:

Having determined that the record of the trial court below sustains the conclusion that the appellant demonstrated an easement, either by prescription or by necessity, and that the appellee established, by the requisite degree of proof in this case, an easement over the land of the appellee. This conclusion is supported by the evidence presented by both the appellant and the appellee. First, there is no doubt about the existence of the roadway in question. While the parties have used different terms to characterize this road, the basic facts of its presence and location were confirmed by the statements of all witnesses, including the appellee's president and its surveyor, as well as the appellant and his corroborating witnesses. In addition, Hutzler, his son and others familiar with the tracts involved, testified, without contradiction, to the continuous use of the road for more than seventy years. Finally, it was virtually stipulated that the private way connected with a public road and the appellee offered nothing to rebut the appellant's unequivocal proof that there was no other reasonable means of access to the granted land, the law implies an easement in favor of the grantee over the retained portion of the original land of the grantor.  

4. Where one owns and conveys a portion of his land which is completely surrounded by the retained land or partially by the land of the grantor and the land of others, without expressly providing a means of ingress and egress, and where there is no other reasonable means of access to the granted land, the law implies an easement in favor of the grantee over the retained portion of the original land of the grantor.

Id. at 734.  

Id. at 735.

It is abundantly clear that the appellant established, by the requisite degree of proof in this case, an easement over the land of the appellee. This conclusion is supported by the evidence presented by both the appellant and the appellee. First, there is no doubt about the existence of the roadway in question. While the parties have used different terms to characterize this road, the basic facts of its presence and location were confirmed by the statements of all witnesses, including the appellee's president and its surveyor, as well as the appellant and his corroborating witnesses. In addition, Hutzler, his son and others familiar with the tracts involved, testified, without contradiction, to the continuous use of the road for more than seventy years. Finally, it was virtually stipulated that the private way connected with a public road and the appellee offered nothing to rebut the appellant's unequivocal proof that there was no other reasonable means of ingress and egress to the 105 acre tract. These circumstances patently establish the essential elements of both an easement by prescription and a way of necessity. However, the general rule is that these two easements are distinguished one from the other since they arise by virtue of different and mutually exclusive conditions. Thus, the existence of a prescriptive easement negates the requisite necessity for a way of necessity. Similarly, if a way of necessity exists, its use is not adverse so as to confer a prescriptive right.

Id. (citations omitted). In DeWitt v. Elmore, 166 S.E. 271 (W. Va. 1932), the Court also found that the Plaintiff, DeWitt, had established a way of necessity with the Court also stating "[w]e think the evidence warrants a finding of a prescriptive right of the plaintiff to this passageway." Id. at 273.
lee acquired its land with actual notice of the easement, it remains only to determine, as between the two possibilities, which easement is most consonant with the evidence. We are of the opinion that the proof, taken as a whole, more directly supports the implied easement than the prescriptive right. Therefore, we hold that the appellant is entitled to use the roadway across the appellee’s land as a way of necessity to and from his 105 acre tract.\(^{319}\)

VI. ESTOPPEL

One of the earliest cases in West Virginia discussing estoppel in the context of the use of another’s property is *Cautley v. Morgan.*\(^{320}\) The case involved a party wall built by Cautley which encroached upon the adjoining lot of Morgan and Huling six inches more than that permitted by a written agreement. The written agreement permitted the party wall to extend ten inches onto Morgan and Huling’s lot. Cautley, with the assistance of the city engineer had determined the property line. Morgan and Huling had not been consulted as to the location of the property line. Morgan and Huling asserted they first learned of the encroachment six years after the party wall was completed when they started to build a temporary building on their property. On appeal, the court held that Cautley had to remove the six inches of the wall located on Morgan and Huling’s property. As to the claim Morgan and Huling were estopped, the court said:

To create an estoppel in pais, there must be some conduct of the party against whom the estoppel is alleged, amounting to a representation or concealment of material facts; and when everything is equally known to both parties, although they are mistaken as to their legal rights, no estoppel arises.\(^{321}\)

In applying the general principle of estoppel to the facts of the case, the court said:

Under the circumstances of the case the defendants had no duty in the matter, unless they had knowledge that the wall was being constructed on an improper location; and it is not alleged that they had such knowledge, and they aver that they never discovered it until they came to use the wall in the fall of 1899. While it was plainly the duty of the plaintiff, having undertaken

\(^{319}\) id. at 736.

\(^{320}\) 41 S.E. 201 (W. Va. 1902).

\(^{321}\) id. at 202.
to build the wall, and assuming the responsibility of fixing the location herself with the assistance of the city engineer, it was manifestly her duty to see that it was properly located. She had the data at hand, by a careful use of the same, to have made no mistake, and, with the facts before her and in her possession or of record, the presumption was, and the defendants had a right to believe, that plaintiff had located the line at the proper place, and the defendants were not called upon to make the investigation in order to save plaintiff from the mistake that proper care and watchfulness on her part would have prevented. It seems to be one of those cases where there was no intentional fault on the part of either, but by the improper action, though unintentional, of one of the parties a mistake was made, whereby one party or the other must suffer a hardship. This being the case, it is held that that party upon whom a duty devolves and by whom the mistake was made should suffer the hardship, rather than he who had no duty to perform, and was no party to the mistake. 322

A year after the Cautley case, the court again considered the estoppel assertion in Pocahontas Light & Water v. Browning. 323 In Pocahontas Light & Water Co., W.H.H. Witten conveyed a right of way to the water company’s predecessor in title. When constructed the water line passed through 874 feet of land not owned by Mr. Witten, but owned by St. Clair. St. Clair conveyed the tract of land over which the water line was built to Browning, and seven years after the pipe was laid and operating, Browning started to remove the part of the water line that crossed his land. The water company sought to enjoin Browning from removing the water lines, claiming estoppel. 324

The court stated the essence of the plaintiff’s claim as “the whole claim is that he [St. Clair] knew of the laying of the pipe line, and made no objection— in short, he was silent.” 325

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322 Id. at 204.
323 44 S.E. 267 (W. Va. 1903).
324 Id. at 267. “It is not questioned that the pipe line is in part on land of Browning, nor is it claimed that St. Clair ever gave right of way through his land. The whole claim of the water company is that it has title by estoppel in pais from conduct of St. Clair.” Id.
325 Id.
In holding that St. Clair’s silence did not provide a basis for estoppel, the court said:

The doctrine “that one who stands by and sees another laying out money on property to which he has claim, and does not give notice of it, cannot afterwards, in equity and good conscience, set up such claim, does not apply to an act of encroachment on lands the title to which is equally well known or equally open to the notice of both parties.”

Later in the opinion, the court explains:

The idea that one man can get title to another man’s land, or title to an easement upon it, by improvement upon it, or making a road upon it, or a sewer, because he is silent, just as if he had given a grant, is absurd. No estoppel to work that grave result can exist except in the clearest case. The statute of frauds says it takes a deed to do this, but here it is sought to pass an ease-

would devest St. Clair of his land, it is a very important element, for the company to sustain its position of estoppel against St. Clair, that he should have known before the pipe line was laid that it was to be laid through his land, for then it might be said that he allowed the company to expend money without obligation. “A representation, admission, or act after the party’s position has been changed will not avail as grounds for estoppel, because it cannot have been acted on,” 4 Am. & Eng. Dec. in Eq. 286, editing McCall v. Powell, 64 Ala. 254, and many other cases. But he says he did not know that the line passed through his land until after it had been laid. It is not proven that he did know until later. The witness who says he passed by where the ditch was, and the pipes were being unloaded, leaves us to think that St. Clair was engrossed with business thought and did not observe. He says he paid no attention to the ditch, but passed on to Pocahontas. He says the line passed through a rocky, wooded corner of St. Clair’s land. St. Clair lived 10 miles away from the line. St. Clair says the only work he ever saw in cutting the ditch was at a different point on the line. St. Clair seems to be fair; certainly not partial to Browning in his evidence — rather otherwise.

There is no evidence at all that the company constructing the water line was in the least influenced by his remarks or silence, because it did not then have the faintest idea that any of the right of way passed through his land. How can the company say it was misled by what he said, or did not say, when no one thought of the line running on land of St. Clair? To make it an estoppel, the company must be able to say that it was led thereby to make outlay of money. (citation omitted).

Id. at 267–68.

326 Id. at 268.
ment in fee not even by word of mouth, but by mere silence. If this proposition prevails, what tenure lies a man of his lands? 327

The court noted the relevance that St. Clair was not aware the water line was being laid across his land as follows:

Another vital requisite of estoppel is that the person to be bound by it must know that his own right in the matter is being prejudiced by the act of another. Since fraud is the gist of estoppel, unless the person is fully acquainted with the true state of affairs and with his rights in the matter, he will not be estopped; and therefore one who makes statements or does acts in bona fide ignorance of the facts and his rights will not be estopped, unless his ignorance was the result of gross negligence. 4 Am. & Eng. Dec. in Eq. 269; Bigelow, Estop. 519; Bower v. McCormick, 23 Grat. 321. St. Clair did not know that the pipe line would be on his land, or that it was, until after it had been laid. 328

The court’s assessment of the plaintiff’s argument is summed up by the following statement:

The truth is, St. Clair neither did nor said anything to mislead or that did mislead, but he was simply silent when he did not even know his rights were being invaded. Of course, this excludes all elements of estoppels. The company simply made a mistake in using St. Clair’s land, and now wish to make their own mistake St. Clair’s mistake, and charge it to the burden of the land of his alienee. It practically says or shows nothing but that it believed that its title was good. Therein, it shut its eyes to deeds, line fence, and open means of knowledge. 329

Judge Haymond, who authored the majority opinion in Town of Paden City v. Felton, 330 also wrote the majority opinions in two other important easement decisions — Cottrell v. Nurnberger 331 and Stuart v. Lake Washington Realty Corp. 332 Collectively, these three opinions are helpful in understanding many aspects of easement law in West Virginia. Cottrell involves the develop-

327 Id.
328 Id. at 268–69.
329 Pocahontas Light & Water, 44 S.E. at 269.
331 47 S.E.2d 454 (W. Va. 1948).
332 92 S.E.2d 891 (W. Va. 1956).
ment by Nurnberger of 6.2 acres of land on the Coal River in Kanawha County. The subdivision was planned and laid out “to provide suitable building lots for substantial summer homes.” Part of the oral representations made to purchasers of lots were that “Lot No. 45, was reserved solely and exclusively for playground, recreational and other community purposes for the use and benefit of the purchasers, and that he would constitute a well and a well house on that lot for their common use and benefit.” The plaintiffs sued when they learned the lot was to be sold to individuals who planned to construct a hotel on it. In Cottrell, the rights the plaintiffs sought to assert included easements (the right to go onto lot 45), to enforce the oral restrictions as to how lot 45 would be used, and the affirmative duty to construct a well on lot 45. The case was before the court on certified questions, with only two of the four questions being discussed by the court: (1) whether the statute of frauds applied to the oral promises, and (2) whether the defendants were estopped.

As part of its discussion in Cottrell, the court distinguished an easement from a license; decided that the rights the plaintiffs sought to enforce were easements, not licenses; and held that the Statute of Frauds was applicable to the parol promises made by the defendants.

333 Cottrell, 47 S.E.2d at 455.
334 Id. at 455.
335 Id. at 456. (“The questions certified to this Court are: (1) May an easement in land be created by parol; (2) may a license to use land by the licensee be revoked at will by the licensor; (3) are the defendants estopped to assert the defense of the Statute of Frauds; and (4) do the plaintiffs have an adequate remedy at law?”).
336 See id. at 461.
337 Id. at 456 (“An easement creates an interest in land; a license does not, but is a mere permission or personal and revocable privilege which does not give the licensee any estate in land.”)
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It is obvious that the right claimed and sought to be enforced by the plaintiffs, if it in fact exists, is created by and arises from an easement and not by virtue of a license, and as the decisive questions in this case involve the method of creating a valid easement and the availability to the defendants of the defense of the Statute of Frauds in connection with a verbal agreement or arrangement, it is unnecessary to discuss or answer the second and fourth questions presented by the certificate.

Id.

From these authorities, and many others that could be cited, it is clear that the restriction which the plaintiffs seek to impose upon the lot owned by the defendant Nurnberger, if valid and effective, is an easement; that it is within the provisions of Section 3, Article 1, Chapter 36, Code, 1931, which require a contract for the sale of land, or a note or memorandum of such contract, to be in writing and signed by the party to be charged, or his agent, and of Section 1, Article 1, Chapter 36, Code, 1931, which declare that no estate of inheritance or freehold, or for a term of more than five years, in lands, shall be created or conveyed except by deed or will; and that such easement can not be created or acquired merely by parol.
As to whether the plaintiffs were estopped, the court said:

To determine whether the defendants are estopped to set up the Statute of Frauds as a defense to a contract which is within the statute it is important to consider the material difference between a representation and a promise. The one relates to some past or existing fact; the other deals with a declaration in the nature of an agreement by which one person obligates himself to do or to refrain from doing some act. “Strictly speaking a promise is not a representation.” Cunyus v. Guenther, 96 Ala. 564, 11 So. 649, quoted in Black’s Law Dictionary, 3rd Ed., 1443. In the law of contracts a representation is “a statement express or implied made by one of two contracting parties to the other, before or at the time of making the contract, in regard to some past or existing fact, circumstance, or state of facts pertinent to the contract, which is influential in bringing about the agreement.” Black’s Law Dictionary, 3rd Ed., 1534. A promise is “a declaration, verbal or written, made by one person to another for a good or valuable consideration, in the nature of a covenant by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to demand and enforce a fulfillment.” Black’s Law Dictionary, 3rd Ed., 1433.

Applying these definitions, the court concluded that Nurnberger’s statements were promises and not representations.341


Id. at 461. See also Bennett v. Charles Corp., 226 S.E.2d 559, 564 (W. Va. 1976).

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Tested by the foregoing definitions or standards, the statements laid to the defendant Nurnberger constitutes a promise instead of a representation. The statement that Lot No. 45 was reserved has to do with an existing fact or situation, but that statement, without more, is meaningless. The reservation, in existence at the time, is of no purpose or effect unless it is to be continued. The statement of the purpose for which it was reserved, which is essential to impart any meaning to the complete statements, has to do with the use to which the lot will be devoted and involves acts to be done or not to be done in the future. In substance the statements amount to a promise that Lot No. 45, which was reserved for playground, recreational and other community purposes for the use and the benefit of the purchasers, will be used in the future for those purposes, and that the defendant Nurnberger will construct a well and a well house on the lot for their common use and benefit. The statements, as a whole, are of the type which, though sometimes characterized as representations, were regarded merely as oral promises within the Statute of Frauds, and therefore ineffective to create a valid easement or restriction.

Cottrell, 47 S.E.2d at 461.
The court concluded its discussions of estoppels stating:

Treating the statements of the defendant Nurnberger as an oral promise instead of a representation, its nonperformance or its violation does not amount to fraud or create an equitable estoppel, or estoppel in pais, which removes the promise from the operation of the Statute of Frauds. With respect to restrictions which constitute an easement, estoppel does not apply when the restrictions involve a promise for the future rather than a representation of a past or existing fact. 1 Minor on Real Property, Second Edition, Section 105. The mere failure or refusal of the vendor in an oral agreement, which is within the Statute of Frauds and for that reason unenforceable, to recognize it as binding or to comply with it does not in itself amount to fraud or inequitable conduct upon which to base estoppel, when, as here, it does not appear that he intended to violate the oral agreement when it was made.342

Eight years after the court’s decision in Cottrell, the doctrine of estoppel was again considered by the court in Stuart v. Lake Washington Realty Corp.343 The case involved the flooding of the plaintiff’s property caused, or at least contributed to, by a dam across Hurricane Creek in Putnam County.

In 1937, C.W. Stuart (the plaintiff married C.W. Stuart in 1944) organized Stuart Lake, Inc. to develop land on both sides of Hurricane Creek. The development plan involved a dam across Hurricane Creek to create a lake of about 60 acres to be surrounded by about 700 lots. Stuart Lake, Inc. acquired title to 450 acres for the purpose of this subdivision which acreage included the tract of 2.9 acres involved in the instant litigation which was not included as a part of the subdivision. Plans were developed and approved to build a concrete dam sixteen feet in height. However, approval to erect “flashboards” on top of the concrete dam to increase the dam’s height of twenty feet was withheld until a road across a tributary to Hurricane Creek was raised above what would be the level of the water impounded by a dam twenty feet in height. Construction of the dam to a height of sixteen feet was completed in 1938, and lots were offered for sale to the public with the understanding the lake level would be raised upon the completion of the dam to the twenty feet height.344 In 1938, the 2.9 acre parcel was conveyed by Stuart Lake, Inc. to Doctor Henderson who was “familiar with the plan for its development, and knew, as did Stuart, that the completion of the dam to the proposed height of twenty feet would cause water from the lake permanently to encroach and remain upon a portion of the tract of land

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342 Id.
343 92 S.E.2d 891 (W. Va. 1956).
344 Id. at 895–96.
of 2.9 acres.”345 “The deed made by Stuart Lakes, Inc., to Henderson, however, contained no express reservation of any right or easement in the grantor to place or impound water upon the land conveyed and when the deed was made no overflow of water from the lake had occurred upon the tract of 2.9 acres and the grantor had not previously used any part of the land for that purpose.”346

Due to financial difficulties, sometime prior to 1943, Stuart Lake, Inc. lost title to the subdivision property and Stuart lost control and management of the project. In 1943, Lake Washington Realty Corporation became the owner of the subdivision, and, in 1945, it resumed the work of developing the project. The Lake Washington Realty Corporation asked Stuart to assist in the further development of the project with both the engineering and sale of lots. In March of 1946, Stuart’s wife, purchased the 2.9 acre parcel with her own funds and in August of 1946, they moved onto the property.347

The court noted that:

At the time the plaintiff purchased the property she was familiar with the proposed development of the subdivision including the elevation of the dam to the height of twenty feet and knew that when the dam was completed to that elevation it would cause the water from the lake to inundate her land.

Stuart continued in the employment of the defendant until the summer of 1946 and while so employed he assisted in locating a line of stakes to show the level of the lake when the dam was completed to the elevation of twenty feet as originally planned by Stuart Lakes, Inc., and as the agent of the company he negotiated and concluded the sale of twenty nine lots which were sold to various purchasers . . . upon the representation that the level of the lake would be raised to twenty feet by the completion of the dam to that height. The plaintiff assisted her husband in making these sales to the extent of showing lots to some of the purchasers during his absence and in assisting them to meet with him, but she did not at any time act as agent for the defendant or negotiate or conclude for it the sale of any lot in the subdivision.348

Between 1946 and June 1949 when the law suit was filed, with the knowledge of the plaintiff and her husband and without protest, the defendant

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345 Id. at 896.
346 Id.
347 Id.
348 Id.
sold 258 lots upon the representation that the level of the lake when the dam was completed would be raised to and maintained at an elevation of twenty feet.  

On June 8, 1947, after the iron pipes were attached to the dam but before the flashboards were installed, a flood occurred in Hurricane Creek after a heavy rain and the land of the plaintiff was temporarily inundated to a point within approximately six inches below the front porch of the dwelling; and between that date and September 22, 1950, similar floods occurred periodically which temporarily inundated the property of the plaintiff. During each of these floods the overflow of water from the lake interrupted the ordinary and usual access to the property of the plaintiff from the former location of United States Route 60 in front of the dwelling and caused damage to the surface of the tract of 2.9 acres of land owned by the plaintiff.  

By February 8, 1948, the flashboards on the dam were installed and the height of the dam and the elevation of the lake was raised to the originally planned elevation of twenty feet. As a result, a portion of plaintiff’s 2.9 acres was permanently inundated with water from the lake.  

After the flood of June 8, 1947, the plaintiff, by letter sent by registered mail dated June 24, 1947, notified the defendant that its construction of the dam to the height of twenty feet would impound water on her property. By this letter she also notified the defendant to desist from any construction of the dam that would impound water on her property or that would subject it to overflow and warned the defendant that it had no right or permission to accomplish those results or to subject her property “to wash or other damage.”  

After the flashboards were installed on February 8, 1948, “by letter dated March 25, 1949, also sent by registered mail the plaintiff notified the defendant,” “to abate impounding of water” on her property caused by the height of the dam and warned the defendant that its failure to do so would render it necessary for her to take proper action to protect her property against the overflow of water from the lake.

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350 Id.
351 Id.
352 Id.
353 Id. at 897–98.
The court recognized the consequence of reducing the lakes level stating:

It is not disputed that if the present elevation of the dam is lowered as much as 1.9 feet the lots which front on the lake will be rendered practically inaccessible from the lake, the value of all the lots in the subdivision will be greatly and permanently depreciated and impaired, and the defendants and the owners of the lots who, without objection by the plaintiff to the added height of the dam, purchased them upon the representation by the agents of the defendant that the level of the lake would be raised and maintained at an elevation of twenty feet at the dam will suffer heavy financial loss and injury.\(^{354}\)

Among the defenses asserted by the defendant was (1) an implied easement to flood the land (2) that the plaintiff is barred by laches (3) and the plaintiff was estopped.

As he had done five years earlier in *Town of Paden City v. Felton*\(^{355}\) in discussing easements by prescription, Judge Haymond, in *Stuart*, summarized the relevant prior case law in West Virginia and discussed secondary authorities in deciding the case. As to the argument that there was an implied easement, Judge Haymond, writing for the majority, said:

As no servitude or burden to impound water permanently upon the land of the plaintiff or any part of it existed when the land was conveyed by Stuart Lakes, Inc., by the deed to Doctor Henderson in 1938, an easement of that character for the benefit of the land retained by the grantor in the land now owned by the plaintiff was not created by an implied reservation in that deed and no such easement exists in favor of the defendants as its successors in title to the subdivision.\(^{356}\)

As to the assertion the plaintiff was barred by laches, the majority said:

The contention of the defendants that the right of the plaintiff to injunctive relief which she seeks in this suit is barred by laches is devoid of merit. The general rule in equity is that mere lapse of time, unaccompanied by circumstances which create a pre-

\(^{354}\) *Id.* at 898.

\(^{355}\) 66 S.E.2d 289 (W. Va. 1951).

\(^{356}\) *Stuart v. Lake Washington Realty Corp.*, 92 S.E.2d 891, 900–01 (W. Va. 1956).
sumption that the right has been abandoned does not constitute laches. 357

As to whether laches applied to the facts before it, the majority said:

The permanent encroachment of the water from the lake upon the land of the plaintiff did not occur until the completion of the dam to a height of twenty feet on February 8, 1948. Before the dam was so completed, on June 24, 1947, shortly after the first flood, the plaintiff notified the defendant not to construct it to the height and warned the defendant that if it did so water would be impounded upon her land and that the defendant had no right or permission to subject her property “to wash or other damage.” Subsequently on March 25, 1949, the plaintiff notified the defendant “to abate impounding of water” on her property caused by the height of the dam and warned the defendant that its failure to do so would render it necessary for her to take proper action to protect her property against the overflow of water from the lake. 358

Since the suit was filed in June 1949 approximately three months after the March 25, 1949, letter, the court concluded:

In the foregoing circumstances neither of the defendants was prejudiced or adversely affected by any delay of the plaintiff in instituting this suit after the completion of the dam, and the equitable doctrine of laches does not apply to or bar her right to injunctive relief. 359

As to the claim the plaintiff was estopped, the majority noted the evidence established: that the plaintiff knew of the plans to raise the elevation of the dam to twenty feet, that she assisted her husband in the sale of lots as agent of the defendant, and that she remained silent and did not protest until June 24, 1947. However, the court also noted she did not act as agent of the defendant in the sale of lots. 360

As to the elements of estoppel the court said:

The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais

357 Id. at 901.
358 Id. at 902.
359 Id.
360 Id. at 902–03.
there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice. To raise equitable estoppel there must be conduct, acts, language or silence amounting to a representation or a concealment of material facts. Mere silence will not raise an estoppel; to be effective it must appear that the person to be estopped has full knowledge of all facts and of his rights, and intended to mislead or at least was willing that the other party might be misled by his attitude. 361

In concluding that the plaintiff was not estopped, the majority said;

In the light of the established facts and circumstances disclosed by the record relating to the knowledge and the conduct of both the plaintiff and the defendant there can be no estoppel in favor

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361 Id. at 904 (citations omitted). As part of the discussion of the law of estoppel, the court said:

In the leading case of Norfolk and Western Railway Company v. Perdue, 40 W.Va. 442, 21 S.E. 755, this Court has stated the essential elements of equitable estoppel or, as it is frequently called, estoppel in pais, in these words: “First. There must be conduct, acts, language or silence amounting to a representation of a concealment of material facts. Second. These facts must be known to the party estopped at the time of said conduct, or at least the circumstance must be such that knowledge of them is necessarily imputed to him. Third. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time it was acted upon by him. Fourth. The conduct must be done with the expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. Fifth. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. Sixth. He must in fact act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct, and to assert rights inconsistent with it.

Id. at 903.
of the defendants and against the plaintiff of her right to the relief for which she prays in the bill of complaint.\textsuperscript{362}

Over three decades after the court's decision in the Stuart case, the court was presented a set of facts to which estoppel did apply. In Shrewsbury v. Humphrey,\textsuperscript{363} the Supreme Court of Appeals affirmed a circuit court's decision holding that the respective plaintiffs had established a prescriptive easement and an easement by equitable estoppel over the same roadway across property owned by Davis. Factually, the case has its origin when Shrewsbury purchased 81 acres of land in Mercer County in 1976. In 1978, Shrewsbury conveyed 5.05 acres of the 81 acres to plaintiff Roger Sexton, Mrs. Shrewsbury's son by a previous marriage.\textsuperscript{364}

In 1987, Shrewsbury sold about 12 acres to the plaintiff, Bowlings, and sometime thereafter, Davis constructed a barrier across the roadway the plaintiffs used to access their respective properties. In the litigation which ensued, the circuit court held the Shrewsbury were entitled to a prescriptive easement, that Roger Sexton was entitled to an easement by equitable estoppel, and that the Bowlings acquired the right of usage to the roadway through their predecessor in title, the Shrewsbury.\textsuperscript{365} On appeal, the court affirmed the circuit court's holding that the Shrewsbury were entitled to a prescriptive easement.\textsuperscript{366} As to Mr. Sexton's easement gained by equitable estoppel, the court summarized prior West Virginia cases by saying: "Thus, there must be a showing that a representation was made and that the party relied upon that representation before an easement by estoppel can be established."\textsuperscript{367} As to the facts in the instant case, the court said:

There was evidence before the circuit court that Mr. Sexton had agreed to purchase a tract of land located a greater distance from Wright Mountain Road so that the Wright Mountain

\textsuperscript{362} Stuart v. Lake Washington Realty Corp., 92 S.E.2d 891, 904 (W. Va. 1956). The court also rejected the defendant's argument that the equitable doctrine of the balance of conveniences should prevent the plaintiff from obtaining injunctive relief. The court, quoting County Court of Harrison County v. West Virginia Air Services, Inc., 132 W. Va. 1, 54 S.E.2d 1, said:

So we are of opinion that the instant case, involving as it does, tortious, continuous acts on the part of the defendant to the irreparable damage of the plaintiff, and in contravention of plaintiff’s clear legal right of control of the airport as provide by statute, the doctrine of the balance of conveniences should not be applied.

Id. at 905.

\textsuperscript{363} 395 S.E.2d 535 (W. Va. 1990).

\textsuperscript{364} Id. at 536.

\textsuperscript{365} Id. at 536–37.

\textsuperscript{366} Id. at 537.

\textsuperscript{367} Id. at 538.
Community Church could purchase a tract of land originally offered to Mr. Sexton. Two of the appellants, Mr. Davis and Mr. Humphrey, were trustees of the church. Mr. Sexton testified that he accepted the property on the representation of Mr. Davis that he could use the roadway. Mr. Sexton further testified that he believed he had a right to use the roadway and that the right of way had served this property for several years. Finally, Mr. Sexton testified that he maintained the roadway in the winter and improved it with gravel. Mr. Sexton used the roadway from 1979 until 1987.368

The testimony of Mr. Humphrey, also a trustee of the church, collaborated Mr. Sexton’s testimony.369

In affirming the circuit court’s holding of an easement by equitable estoppel, the court said “we conclude that the evidence does not preponderate against the trial court’s finding on this issue.”370

The question of an easement by equitable estoppel was again before the court in the recent case of Folio v. City of Clarksburg.371 The litigation in Folio grows out of a sale of property by Grandeotto, Inc., a closely-held corporation owned primarily by Mr. Folio and his children, to the City of Clarksburg. The City indicated that it was interested in acquiring the property for the purpose of building a parking garage. Before the property was sold to the City, Grandeotto executed two agreements to create rights of way across the property for pedestrian and sewer access to other commercial properties that Grandeotto owned nearby. These “right-of-way[s] were expressly mentioned in the sales agreement and the deed.”372

After the conveyance of the parcel to the City, the validity of these easements became the subject of litigation summarized by the court as follows:

The conveyance of the property was made subject to all exceptions, covenants, restrictions, and easements and the aforesaid rights-of-way were expressly mentioned in the sales agreement and the deed. After the conveyance was completed, the city of

368 Id.
370 Id. at 539. As to the Bowlings’ right of way, the court said: “Since Mr. and Mrs. Shrewsbury established a prescriptive easement over the roadway, that prescriptive easement became appurtenant to their land and thus may pass with the conveyance of that land.” However, the Bowlings, “had no right to remove Mr. Davis fence, which was maintained during the prescriptive period to gain access to the roadway. The rights of Mr. & Mrs. Bowling are limited to the use of the roadway for ingress or egress to their property by the same access used by their predecessor in title.” Id. at 539–40.
371 655 S.E.2d 143 (W. Va. 2007).
372 Id. at 146.
Clarksburg never demolished the commercial building on the property. On December 7, 2004, Grandeotto filed suit against the City of Clarksburg seeking specific performance and enforcement with respect to the rights-of-way. On March 1, 2006, the circuit court granted summary judgment in favor of the City of Clarksburg finding that Grandeotto had no valid rights-of-way in the property. The Court determined that the language in the right-of-way agreements was ambiguous and the doctrine of merger applied. Thereafter, Grandeotto filed a second suit against the City of Clarksburg alleging fraudulent and/or negligent misrepresentation. The City filed a motion to dismiss which was converted to a motion for summary judgment by the circuit court and granted in favor of the City on May 25, 2006. These appeals followed.373

The Supreme Court of Appeals affirmed the circuit court as to the inadequacy of the description374 and concluded “that the rights-of-way, even if they were valid, were automatically extinguished upon creation because of the doctrine of merger.”375

373 Id.

374 The court stated:

The agreements did not establish a beginning point but, rather, indicated that the rights-of-way would “be located in the discretion of said Grantee to Pike Street over a reasonable route as necessary . . . .” Clearly, the language in the agreements is insufficient to serve as a guide to identify the location of the right-of-way. Accordingly, we do not believe that the circuit court erred by finding the agreements were ambiguous and inadequate to convey the rights-of-way.

Id. at 148.

375 The court explained the merger as follows:

Likewise, we cannot say that the circuit court erred in concluding that the rights-of-way, even if they were valid, were automatically extinguished upon creation because of the doctrine of merger. It seems to be firmly established that where the owner of land over which an easement is claimed as appurtenant to another tract of land becomes also the owner of such other tract, the easement is merged in his superior estate. No one can use part of his own estate adversely to another part, and the proposition, therefore, must be true that if the owner of one of the estates, whether the dominant or servient one, becomes the owner of the other, the servitude which one owes to the other is merged in such ownership, and thereby extinguished.

Pingley v. Pinley, 82 W.Va. 228, 229, 95 S.E.860, 861 (1918): See also 25 Am.Jur.2d Easements and Licenses in Real Property § 1 (2004) (“A person may not have an easement in his or her own land because an easement merges with the title, and while both are under the same ownership the easement does not constitute a separate estate.”). Here, Grandeotto clearly owned both the dominant estate and the servient estate at the time the right-of-way agreements were executed. Both agreements were signed by Mr. Folio as Chairman of the
However, as to the possibility of an easement by equitable estoppel, the court stated:

While we find no error with the circuit court’s conclusions, we, nonetheless, believe that the circuit court prematurely granted summary judgment in favor of the City. In that regard, we believe that genuine issues of material fact exist concerning whether an easement was created by equitable estoppel as a result of representations made by the City at the time of the conveyance.\(^{376}\)

VII. EASEMENTS IMPLIED FROM QUASI-EASEMENTS

“Easements implied from quasi-easements are often simply called implied easements or easements by implication. However, these labels can create confusion, because easements are implied in several circumstances not involving prior use.”\(^{377}\) Therefore, to avoid confusion a definition of the term as used herein will be helpful.

Easements implied from quasi-easements are based on the inferred intention of the parties involved in the transfer of the quasi-servient tenement or the quasi-dominant tenement. The grantor and the grantee are presumed to have intended to include in the transaction any easement necessary for the beneficial enjoyment of either the parcel transferred or the parcel retained. Courts focus on the nature of the grantor’s prior use and the reasonable expectations of the claimant.\(^{378}\)

Professors Bruce & Ely note the elements of easement implied from quasi-easements as follows:

Courts recognize the grant or reservation of an easement implied from a quasi-easement when the claimant establishes the following elements:

1. Prior common ownership of the dominant and the servient estates.

Board of Grandeotto, as grantor and grantee, and were executed and recorded prior to the sale and conveyance of the property to the City.

\(^{376}\) Id.

\(^{377}\) Id.

\(^{378}\) BRUCE & ELY, supra note 1, at § 4.15, at 4-57.

\(^{378}\) Id. at § 4.15, at 4-58 (citations omitted).
2. The common owner’s apparent and continuous use of part of the land to benefit another part (quasi-easement)

3. Transfer of one of the parcels (severance)

4. Necessity at severance for the preexisting use to continue.

In some jurisdictions, the claimant must prove these elements by clear and convincing evidence rather than by the usual preponderance of the evidence.379

An early case in which the court applied the principle of quasi easement was Johnson v. Gould380 in which the litigation arose out of a partition of real estate between heirs. In Johnson, the court held there was a “quasi easement” of water from a spring on a parcel assigned to one heir for the benefit of a parcel assigned to another heir. The court’s Syllabus explains the relevant law as follows:

Upon partition of real estate descended, between heirs, each heir takes his share of land subject to any apparent, permanent, continuous, and reasonably necessary quasi easement which existed thereon, for the benefit of another part of such real estate, at the death of the ancestor, unless the existence of such quasi easement has been discontinued by the heirs before partition, or provision is made by the partition for its discontinuance.381

Five years later, it what is the first substantive discussion of its elements, the court again recognized a “quasi easement” as defined above, in Hoffman v. Shoemaker.382 The somewhat involved set of facts is simplified as follows. Hoffman sought to enjoin Shoemaker from using a right of way across his land. The right of way in question had been used for access to the Shoemaker land for 40 to 50 years. The lands involved, i.e., the dominant and servient estate, were at one time owned by the same person, James B. Rees. The predecessor in title to the Shoemaker tract was Leatherman. Leatherman acquired title to eighteen acres over which the right of way passed from Rees in 1889, but was unable to pay for the eighteen acres, and therefore sold the eighteen acres back to Rees in 1895 without reserving a right of way across it. Rees sold the eighteen acres to Hoffman in 1900. After Rees reacquired the eighteen acres,

379 Id. at § 4.16, at 4-60 to -61 (citations omitted).
380 53 S.E. 798 (W. Va. 1906).
381 Id. at 798.
382 71 S.E. 198 (W. Va. 1911).
Leatherman and then Shoemaker continued to use the road until Hoffman built a fence across it in 1903. Apparently from 1903 until 1908 when the litigation was commenced, Shoemaker used the road with Hoffman’s permission. While the case is not an easy read, it provides insight into the development of the elements of easements implied from quasi-easements as adopted in West Virginia. The court noted: “The all-important question remaining to be considered is the effect of the deed made by Williams S. Leatherman to S. S. Rees, conveying land on which a part of the road is without a reservation thereof.” The court explained the law as follows:

Ordinarily a grantor is not permitted to set up by parol any reservation against his deed purporting on its face to grant all of his right, title, and interest in a tract or parcel of land. Of course, he cannot claim any of the land against his deed. Such a construction of a deed would render it nugatory and defeat its purpose in whole or in part. Under a well-settled rule, it must be so constructed as to give it effect to the extent of its entire subject-matter. It is nevertheless possible for a grantor to claim, under exceptional and peculiar circumstances, an easement over the land granted as appurtenant to other lands retained by him. This easement is not the land itself, and the retention thereof does not wholly defeat the deed as to any part of it. It is a mere right of use, not title. In such cases the question is one of intention, but the circumstances must be such as to disclose the existence of that intent beyond any reasonable doubt and such intent must arise from room necessity, else the doubt is not excluded and the reservation cannot be maintained.

As to the elements of quasi-easements, the court explained:

In the text-books and decided cases we are told that the easement to pass to the grantee, or be retained by the grantor by implication only, must be apparent, continuous, and necessary. Naturally the use of these terms is sometimes confusing, for the reason that they are employed in the long course of discussion, and not always defined. Each has its own definition with which the reader is supposed to be familiar. An apparent easement need not be actually visible. It is enough that the facts and circumstances fairly construed will disclose it, as in the case of a drainpipe under the surface into which the water is conducted.

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383 See id. at 198–99.
384 Id. at 199.
385 Id.
from a roof. There are different kinds of necessity. A thing may be necessary in the physical sense or in a practical or legal sense. So the word “continuous” has its different meanings. In a practical sense a road is continuous as long as it is maintained and used, although the use is unautomatic, and from necessity intermittent. But it is not continuous within the meaning of the technical law of easements. 386

After discussing the use of “apparent” and continuous” in cases involving “drainage,” the court noted that as to rights of way it added “necessary,” 387 concluding its discussion by noting:

“... I take it that the rule of implication is founded upon the mere necessity of the case, and the impossibility of admitting that the contract and the intention of the parties to it would be complete without the implication. The subject of the implication is held to have been involved in the terms of the contract, and the justice and honesty of the transaction require that the law should supply that, the expression of which by the inadvertence of the parties has not been expressed in words. Upon this principle every one of the cases referred to is founded, and all are reconcilable; and no case has been cited, nor, as I believe, can any be found, in which an implication has been made not based upon necessity and the justice which that necessity imperatively calls into active operation.” This is a broad and liberal view, stripped of all fanciful, narrow, and technical considerations, not applicable to any particular kind of easements, but universally reducing the whole question to one of intent, determinable by the rule of necessity. 388

As to the facts before it, the court stated:

These authorities amply justify the view that Leatherman impliedly reserved the right of way over the land he granted by his deed of December 11, 1895, if such right of way was strictly necessary to the enjoyment of his property. He clearly has a right of way by prescription over the Parish and Burkhisier lands down to the public road. He had formerly enjoyed the use of a road over the Rees-Leatherman 18 acres, down to the terminus of the old road at the northern Parish line. The reservation of

386 Id. at 200.
387 See id. at 200–01.
this, if sustainable, completed his outlet to the public road. Was such reservation necessary to the enjoyment of his land in the strict and extreme sense of the term? On this question the evidence is not as complete as it might have been made. 389

After discussing the testimony of various witnesses, including that of Hoffman, the court said, “On the whole, we think it sufficiently appears that neither the defendant nor his predecessor could get out over his own land to any public road or had any right of way over any lands, other than those in question here.” 390

A year after the court’s decision in Hoffman v. Shoemaker, the court decided Bennett v. Booth 391 involving the flooding of the plaintiff’s property by a milldam on the defendant’s property. The facts reveal that both the plaintiff’s and defendant’s properties were previously owned by a common grantor, that the common grantor sold 102 acres to his son in 1887, and that this land was sold by judicial sale to the plaintiff in 1906. In about 1901, a part of the dam was washed away and not repaired for six or seven years. When it was repaired, some of the plaintiff’s land was flooded and the instant litigation ensued.

Without citing Hoffman v. Shoemaker, the court held:

When a landowner has created a servitude upon one portion of his land for the benefit of another portion, and conveys the servient part, there is an implied reservation of the easement, if it is essential to the use and enjoyment of the land reserved, and such right passes with the dominant estate, as appurtenant thereto. Nor does the existence of such an easement constitute a breach of the covenant of general warranty, if the easement is so open and apparent that the contracting parties must have known of it. In such case the parties are presumed to have contracted with reference to the condition in which the land then was, and it is not to be supposed that the purchaser agreed to pay any more for the land than he thought it was worth with the burden on it. Such a burden has been held not to constitute a breach of covenant against incumbrances. 392

As to the facts before it, the court held:

A milldam is essential to a water power gristmill. Without it the mill, which is a part of the realty on which it stands, would

389 Id. at 202.
390 Id.
391 73 S.E. 909 (W. Va. 1912).
392 Id. at 909 (citation omitted).
be useless. Plaintiffs’ predecessor in title knew that it backed the water upon his land. It had done so for many years before he bought it, and he is presumed to have taken the land subject to a continuation of that condition. Plaintiffs, his privies in estate, took the land subject to the burden upon it as appurtenant to the other tract of land with the mill on it, and the mill, together with the appurtenant easement, passed to defendant.

The fact that the mill and dam were in a dilapidated condition at the time plaintiffs purchased does not affect the case. Defendant’s right was appurtenant to the dominant land and passed with it. It was such a right as could be lost only by adverse possession by the owner of the servient land, for such length of time as would bar an action of ejectment.\(^{393}\)

The issue of an implied easement was again before the court in Miller v. Skaggs.\(^{394}\) In contrast with the Bennett v. Booth case, which did not cite the Hoffman v. Shoemaker case or apply the elements as discussed therein, the court in Miller did cite and apply Hoffman. In Miller v. Skaggs, the issue involved a sanitary and storm sewer which crossed the defendant’s lot in a natural drainage channel for surface water. The defendant had blocked the private sewer line causing the water and sewage to back up into the plaintiff’s house. The facts established the common ownership of both plaintiff’s and defendant’s properties, and that there were no express grants or reservation of any easements over the defendant’s lot in the chain of title. After citing Hoffman v. Shoemaker for the elements of an “implied easement,” the court added:

And there seems to be no material distinction in the application of this principle between an implied reservation and implied grant of such an easement, except that in a grant the terms of the grant according to the general rule is to be construed most strongly against the grantor in favor of the grantee.\(^{395}\)

The Miller v. Skaggs court also observed:

That an underground pipe or conduit, such as a sewer, constitutes a servitude within the meaning of the authorities needs no further elaboration. The distinction between a way or road and an easement for a pipe line or sewer is noted in Hoffman v. Shoemaker, supra. Its continuous character is determined by

\(^{393}\) Id. at 910 (citation omitted).

\(^{394}\) 91 S.E. 536 (W. Va. 1917).

\(^{395}\) Id. at 537 (citation omitted).
the fact that it needs no intervention of other agency to keep it alive, and because in its nature it is continuous.\[396\]

In response to the defendant’s assertion that the alleged easement was neither apparent nor strictly necessary, the court responded:

We said in Hoffman v. Shoemaker, supra, 69 W. Va. page 238, 71 S. E. 200, 34 L. R. A. (N. S.) 632, in accordance with the great weight of authority, that “an apparent easement need not be actually visible. It is enough that the facts and circumstances, fairly construed, will disclose it, as in the case of a drain pipe under the surface into which the water is conducted form a roof.” In 10 Am. & Eng. Ency. Law, 405, apparent easements are defined as “Those the existence of which appears from the construction or condition of one of the tenements, so as to be capable of being seen or known on inspection.” And in Larsen v. Peterson, 53 N. J. Eq. 88, 30 Atl. 1094, it was said that the mere fact that a drain or aqueduct may be concealed form casual vision will not prevent it from being apparent in the sense in which that word is used.

In the case in hand the general lay of the land, the natural drainage, all tending from both sides of the sewer to that point; the knowledge which defendant must have had from the connections therewith form plaintiff’s property, and from his own and other properties; the absolute necessity for some drainage and sewerage for the reasonable use of these properties, we think were sufficient, and must have rendered the existence of the sewer through his property reasonably apparent, and so as to charge him with notice thereof. The authorities cited and many that might be cited support this conclusion.

But was easement claimed one of strict necessity within the meaning of the authorities referred to? The rule of strict necessity has not been uniformly defined by the courts. But the greater number in weight and reason hold this rule not to be limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience.\[397\]

In Sharp v. Kline,\[398\] the court was presented with “facts [that] are somewhat unusual.”\[399\] In summary, James Gibson, Jr. was the owner of ap-
proximately 154 acres, which he divided into five tracts (51 acres, 33 acres, 27 acres, 29 acres, and 9 ½ acres), and sold the five tracts to four different individuals by deeds all dated April 6, 1898. (The 51 acres and the 33-acre parcels were conveyed to the same person). The question the court posed was could it imply an easement by quasi easement where the grantor had not retained any of the land? The court answered in the affirmative stating:

If Gibson had retained the 33-acre tract, the facts and circumstances would have sustained a claim of right of ingress and egress over the other tracts, under principles declared in Hoffman v. Shoemaker, 69 W. Va. 233, 71 S.E. 198, 34 L.R.A. (N. S.) 632. The existence of the old road might not of itself suffice to give such way by implied reservation, but that, together with the lack of any other outlet, would make the unexpressed intention clear. Though he did not retain it, the same facts and circumstances were known to all of the grantees. They saw the old road and the situation of the 33-acre tract, and took their conveyances with full knowledge of facts raising a presumption of intent so strong that the contrary thereof cannot be supposed. In claiming against them, Mrs. Sharp does not claim against the words of her own deed, as Gibson would have been compelled to do, if he had retained this tract, wherefore it is easier to justify her claim than it would have been to justify his, in the case supposed. Her situation is similar to that of a grantee taking land with an apparent easement over the remaining lands of the grantor. If the fiction of priority of the grants of the other tracts could be indulged, her right would be that of a grantor holding an impliedly reserved way over them, for Gibson had it and she took such right as he had. If it could be said she took her conveyance first, she had the way by implied grant. The case seems, however, to fall more clearly within the principles announced in Johnson v. Gould, 60 W. Va. 84, 53 S.E. 798. Though the grantees were not all cotenants, they all took conveyances by which an entire tract of land was divided among them, and the old road was an apparent easement necessary to complete enjoyment of all the parts into which the tract was divided, particularly the 9 1/2, 29, 27, and 33 acre tracts, none of which had any outlet otherwise than by this road. The two circumstances, an apparent easement and lack of outlet by any other way, sustain Mrs. Sharp's claim under any of these theories. Even if the latter element did not exist, principles an-

399 Id. at 441.
400 Id.
nounced in Scott v. Moore, 98 Va. 668, 37 S.E. 342, 81 Am.St.Rep. 749, would justify her claim.\(^{401}\)

In Stuart v. Lake Washington Realty Corp.,\(^{402}\) one of the defenses raised by the defendant was an “implied easement.” The majority, after discussing secondary authorities and Miller v. Skaggs, Bennett v. Booth, and Hoffman v. Shoemaker, concluded:

As no servitude or burden to impound water permanently upon the land of the plaintiff or any part of it existed when the land was conveyed by Stuart Lakes, Inc., by the deed to Doctor Henderson in 1938, an easement of that character for the benefit of the land retained by the grantor in the land now owned by the plaintiff was not created by an implied reservation in that deed and no such easement exists in favor of the defendants as its successors in title to the subdivision.

Because the facts in the cases of Miller v. Skaggs, 79 W.Va. 645, 91 S.E. 536, Ann. Cas. 1918D, 929; Bennett v. Booth, 70 W.Va. 264, 73 S.E. 909, 39 L.R.A., N.S., 618, and Hoffman v. Shoemaker, 69 W.Va. 233, 71 S.E.198, 34 L.R.A., N.S., 632, in each of which this Court held that an easement by implied reservation existed, are entirely different from the facts in this suit those cases are readily distinguishable from the case at bar. In each of them an apparent, continuous and necessary servitude existed upon the land conveyed by the grantor for the benefit of other land retained by him when the deed was made for the land conveyed to the grantee.\(^{403}\)

In Myers v. Stickley,\(^{404}\) a ten-acre tract was subdivided in seven lots. At the time of the subdivision, the ten-acre tract had two “roads,” an old logging road and a dirt farm road. In order to achieve lots of more equal acreage, the surveyor used the old logging road as the right of access for the lots. The owner of the property sold the lots identifying their location in relation to the farm road. Some of the purchasers built on these lots according to incorrect information provided to them at the time they purchased. The lawsuit was instituted to reform the deed description by redrawing the plat based upon the farm road as the access for the lots.

\(^{401}\) Id. at 442.

\(^{402}\) 92 S.E.2d 891 (W. Va. 1956).

\(^{403}\) Id. at 900–01. The dissent believed that since Doctor Henderson was an active associate in the affairs of Stuart Lake, Inc. and since he had full knowledge that at the 20 feet level the 2.9 acres would be partially flooded, that an implied flowage easement was created. See id. at 906–08.

\(^{404}\) 375 S.E.2d 595 (W. Va. 1988).
The trial court reformed the lots to conform to the dirt road being used for access and the plaintiff appealed. The Supreme Court reversed the trial court’s decision holding that the plaintiffs were bona fide purchasers and therefore their deed was not subject to reformation. In resolving the case, the court also addressed the trial court’s conclusion that the existing farm road was an “easement by necessity.” After quoting Syllabus Point I of the Miller v. Skaggs case, which set forth the elements necessary for an implied easement, the court said:

In the present case, the evidence presented by the appellees is not clear and convincing that at the time of the deed dated October 26, 1977, to the Days, the dirt farm road constituted an apparent, continuous and necessary reservation. The record does not show that the reservation was apparent because the tract, according to the plat attached to each deed, had a right-of-way in the old logging road. The record does not show that the reservation was strictly necessary, although there was testimony that in 1985 the farm road was in better condition and more convenient than the logging road right-of-way. In Syllabus Point 4, Miller v. Skaggs, 79 W.Va. 645, 91 S.E. 536 (1917), we stated:

The rule of strict necessity applicable to an implied reservation or grant of an easement is not limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience.

We believe that the appellees failed to establish that the existing farm road constituted an apparent and necessary easement at the time of the deed.

In Robertson v. B.A. Mullican Lumber & Manufacturing Co., L.P., the court upheld a lower court finding that an easement by implication had been created and that its use for timbering purposes was supported by the evidence. The court concluded its opinion with the following observation:

Finally, it is significant to note that the lower court ruled that “the easement consists only of this roadway, which cannot be expanded or widened.” Moreover, the trial court opined that the

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405 See id. at 596–98.
406 Id. at 598. Although the trial court used the term “easement by necessity,” the Court of Appeals resolved it on the bases of Miller v. Skaggs.
407 Id.
408 537 S.E.2d 317 (W. Va. 2000).
Appellee “has no right to modify the existing easement or create an unreasonable burden on the . . . [Appellants’] servient estate.” Accordingly, if the Appellee abuses these limitations of the implied easement or if the Appellee “create[s] an unreasonable burden” on the Appellants’ property, nothing precludes the Appellants from seeking damages from the Appellee.409

VIII. MISCELLANEOUS

A. Man-Made Lakes

Several cases tangentially related to “easement law” are discussed in this section. Ours v. Grace Property, Inc.410 is a case of first impression in West Virginia that answers the question of who has control over the use of surface waters above a man-made lake bed owned by two or more adjoining land owners.411 Shook’s Run Lake is a man-made lake flood control impoundment constructed on land owned by the litigants. Ours, the plaintiff, owns approximately ninety-eight percent of the land, and Grace Property, Inc., the defendant, owns about two percent, which is comprised of a narrow strip of land located in the southeastern corner of the lake. Grace Property, who has 400 shareholders, owns about 12,000 acres, which are used for hunting and recreational purposes for its members and their guests.412

As to Shook’s Run Lake, the shareholders of the corporation were told:

that “[a] small section of the shoreline of the Shook[‘]s Run Lake is on the [corporation’s] property,” and that “[s]hareholders, family members and guests may fish from the shoreline owned by the corporation or from boats that are launched from the shoreline owned by the corporation. (Please remember that the other owners of the shoreline have the same rights).”413

A dispute over access to, and use of, the lake lead to litigation, in which the circuit court granted a permanent injunction against the Corporation. Grace Property appealed the adverse decision in the circuit court to the West Virginia Supreme Court of Appeals.

409 Id. at 319. In addition to the majority opinion, there was a concurring in part and dissenting in part opinion by Justice McGraw which concurred with the majority that an easement by implication was created but dissented from the portion of the opinion that held it could be used for timbering. See id. at 319–20.
411 Id. at 493.
412 See id. at 492.
413 Id.
As to the issue of the owner of the land controlling the surface water above, the court noted that there is a split of authority among our sister jurisdictions stating:

The majority of courts have followed the common-law rule. Under the common-law rule, the owner of a portion of the land underlying surface waters has the exclusive right to control the water above that property.

Other jurisdictions have adopted a civil-law rule. Utilizing this rule, the owner of part of the land underlying a lake has the right to the reasonable use and enjoyment of the entire lake. The states which have adopted the civil-law rule have been concerned with promoting the recreational use and enjoyment of lakes, have an extensive number of lakes with recreational value, or have been concerned with attempts to establish and obey definite property lines where several adjoining owners are involved.414

The court noted that Virginia, in a similar case,415 had followed the common law rule holding:

"[T]he complainants [Swifts] have exclusive control and use of the waters above their portion of the bed of the pond, and . . . they have the right to erect a fence on their boundary line across the pond to prohibit others from boating, fishing and trapping on their property."416

As to the case before it, the court said:

Similarly, the facts of this case quite clearly demonstrate that the appellees own the majority of the land beneath Shook’s Run Lake. Moreover, a clear harm will be inflicted upon the appellees’ use and enjoyment of their property if the appellant is permitted to have control over the entire lake based upon a mere 2% ownership of the lake. This harm arises from the appellant’s disproportionate amount of potential users of the lake in relation to the appellant’s ownership. Finally, there is nothing in the record which would indicate that when the appellees granted the easement which allowed for the construction of the

414 Id. at 493 (citations omitted).
dam, that the lake was going to bring a substantial number of recreational users onto their land.

Based upon these facts, we also choose to follow the common-law rule in holding that where ownership of the land underlying a man-made lake is clear and distinct, the owner of a portion of the lake bed has the exclusive control and use of the water above the portion of the lake bed which he owns. Further, the owner has a right to exclude others, including other adjoining owners of the lake bed, by erecting a fence or other barrier to prohibit others from utilizing the water which overlies his property.\(^\text{417}\)

In affirming the circuit court’s decision, the court also rejected Grace Property’s arguments based on the easement language granted to the Potomac Valley Soil Conservation District for the construction, operation, and maintenance of the dam on riparian rights. As to the easement argument,\(^\text{418}\) the court said:

\begin{quote}
It is evident from the easement granted to Potomac Valley by the appellees that nothing more than the right to construct, operate and maintain a dam located on the appellees’ and the appellant’s property was acquired by Potomac Valley. The appellant’s attempt to persuade this Court to find anything more than this acquisition by Potomac Valley is tenuous at best.\(^\text{419}\)
\end{quote}

The court also noted that in addition to the easement language relied upon by the Grace Property, Ours had specifically restricted the grant of this easement in the following provision:

\begin{quote}
There is reserved to the Grantor, his heirs and assigns, the right and privilege to use the above described land of the Grantor at
\end{quote}

\(^{417}\) Id. at 493–94.

\(^{418}\) The language granting the easement specifically stated that the appellees as grantor do[ ] hereby grant, bargain, sell, convey and release unto Potomac Valley Soil Conservation District... an easement in, over and upon a portion of the following described land... for the purposes of: For or in connection with the construction, operation, maintenance, and inspection of a floodwater retarding structure, designated as site [No.] or #1 in the plans for South Fork... Watershed, to be located on the above described land; for the flowage of any waters in, over, upon, or through such structure; and for the permanent storage and temporary detention, either or both, of any waters that are impounded, stored or detained by such structure.

\(^{419}\) Id. at 494.

\(^{419}\) Id.
any time, in any manner and for any purpose not inconsistent with the full use and enjoyment by the Grantee, its successors and assigns, of the rights and privileges herein granted.

Consequently, when these provisions are read together, it is obvious that the appellees did not grant to Potomac Valley any right to convey to any other person or entity the right to use the appellees’ property for anything other than constructing, maintaining and operating the dam.\textsuperscript{420}

The court, also, rejected the corporation argument based on riparian rights. In essence, the corporation riparian rights argument was that, as the owner of a portion of the shoreline of the lake, it had the right to use all of the waters of the lake.\textsuperscript{421} The court, after noting that “the general rule is that riparian rights do not ordinarily attach to artificial bodies of water which necessarily includes a man-made lake,”\textsuperscript{422} stated:

It is clear from the facts before this Court that riparian rights are not involved since the lake is man-made and since claim to ownership in the lake is based upon deeds acquired by each of the parties which granted the respective parties a portion of the lake bed.

Therefore, we adhere to the general rule that

‘[i]n cases where various parts of the soil under a private lake are owned by different persons, and in which it does not appear that ownership was based on riparian rights, it has generally been held that each owner has exclusive rights to the use of the surface of the water over his land, or at least that the owner of a larger portion can exclude from it the owner of a small portion.’

\textit{Wickouski}, 124 S.E.2d at 894 (quoting Annotation, \textit{Rights of Fishing, Boating, Bathing, or the Like in Inland Lakes}, 57 A.L.R.2d 569, 592 §10 (1958)).\textsuperscript{423}

\textbf{B. Lateral Support}

The court, in \textit{Noone v. Price},\textsuperscript{424} provides a good discussion of lateral support. While the issue on appeal was whether it was error for the circuit court

\textsuperscript{420} \textit{Id.} at 494–95.
\textsuperscript{421} \textit{See id.} at 495.
\textsuperscript{423} \textit{Id.}
to have granted a partial summary judgment, the court said: “This case provides an opportunity that we have not had for many years to address the obligations of adjoining land owners to provide lateral support to each other’s land.”

The plaintiff was the owner of a house “located on the side of a mountain in the Glen Ferris, West Virginia” directly above the property of the defendant. Located on the property of the defendant was a wall 100 to 125 feet long, approximately four feet high and of varying thicknesses. This wall was entirely on the defendant’s property and was located ten to twelve feet from the property line between the plaintiff’s and defendant’s properties.

The plaintiff’s suit alleges damage to their property and house because the defendant’s failure to properly maintain the wall. In reversing the grant of the partial summary judgment in favor of the defendant, the court stated:

While an adjacent landowner has an obligation only to support his neighbor’s property in its raw or natural condition, if the support for land in its raw, natural condition is insufficient and the land slips, the adjacent landowner is liable for both the damage to the land and the damage to any buildings that might be on the land.

The court begins its discussion by explaining:

As a general rule, “[a] landowner is entitled, ex jure naturae, to lateral support in the adjacent land for his soil.” Point 2, syllabus, McCabe v. City of Parkersburg, 138 W. Va. 830, 79 S.E.2d 87 (1953). Therefore, as we said in syllabus point 2 of Walker, supra:

“An excavation, made by an adjacent owner, so as to take away the lateral support, afforded to his neighbor’s ground, by the earth so removed, and cause it, of its own weight, to fall, slide or break away, makes the former liable for the injury, no matter how carefully he may have excavated. Such right of support is a property right and absolute.”

An adjacent landowner is strictly liable for acts of commission and omission on his part that result in the withdrawal of lateral support to his neighbor’s property. This strict liability, howev-
er, is limited to land in its natural state; there is no obligation to support the added weight of buildings or other structures that land cannot naturally support. However, the majority of American jurisdictions hold that if land in its natural state would be capable of supporting the weight of a building or other structure, and such building or other structure is damaged because of the subsidence of the land itself, then the owner of the land on which the building or structure is constructed can recover damages for both the injury to his land and the injury to his building or structure. The West Virginia cases are largely consistent with this position, although none has expressly so held.\(^{429}\)

The court continued its discussion stating:

The converse of the preceding rule is also the law: where an adjacent landowner provides sufficient support to sustain the weight of land in its natural state, but the land slips as a direct result of the additional weight of a building or other structure, then in the absence of negligence on the part of the adjoining landowner, there is no cause of action against such adjoining landowner for damage either to the land, the building, or other structure.\(^{430}\)

As to whether the obligation of support “runs with the land,” the court noted:

The weight of authority appears to be that where an actor, whether he be an owner, possessor, lessee, or third-party stranger, removes necessary support he is liable, and an owner cannot avoid this liability by transferring the land to another. Nevertheless, when an actor who removes natural lateral support substitutes artificial support to replace it, such as a retaining wall, the wall then becomes an incident to and a burden on the land upon which it is constructed, and subsequent owners and possessors have an obligation to maintain it.\(^{431}\)

As to the allegation of negligence, the court said:

In general, it has been held that while an adjoining landowner has no obligation to support the buildings and other structures on his neighbor’s land, nonetheless, if those structures are ac-

\(^{429}\) Id.
\(^{431}\) Id.
tually being supported, a neighbor who withdraws such support must do it in a non-negligent way. In an action predicated on strict liability for removing support for the land in its natural state, the kind of lateral support withdrawn is material, but the quality of the actor’s conduct is immaterial; however, in a proceeding based upon negligence, the kind of lateral support withdrawn is immaterial, and the quality of the actor’s conduct is material. Comment e, Restatement (Second) of Torts § 819 succinctly explains the nature of liability for negligence.

“The owner of land may be unreasonable in withdrawing lateral support needed by his neighbor for artificial conditions on the neighbor’s land in either of two respects. First, he may make an unnecessary excavation, believing correctly that it will cause his neighbor’s land to subside because of the pressure of artificial structures on the neighbor’s land. If his conduct is unreasonable either in the digging or in the intentional failure to warn his neighbor of it, he is subject to liability to the neighbor for the harm caused by it. The high regard that the law has by long tradition shown for the interest of the owner in the improvement and utilization of his land weighs heavily in his favor in determining what constitutes unreasonable conduct on his part in such a case. Normally the owner of the supporting land may withdraw lateral support that is not naturally necessary, for any purpose that he regards as useful provided that the manner in which it is done is reasonable. But all the factors that enter into the determination of the reasonableness or unreasonableness of the actor’s conduct must be considered, and in a particular case the withdrawal itself may be unreasonable.

“Secondly, the owner of land may be negligent in failing to provide against the risk of harm to his neighbor’s structures. This negligence may occur either when the actor does not realize that any harm will occur to his neighbor’s structures or when the actor realizes that there is a substantial risk to his neighbor’s land and fails to take adequate provisions to prevent subsidence, either by himself taking precautions or by giving his neighbor an opportunity to take precautions. Although the law accords the owner of the supporting land great freedom in withdrawing from another’s land support that is not naturally necessary in respect to the withdrawal itself, it does not excuse withdrawal in a manner that involves an unreasonable risk of harm to the land of another. The owner in making the excavation is therefore required to
take reasonable precautions to minimize the risk of causing subsidence of his neighbor’s land. In determining whether a particular precaution is reasonably required, the extent of the burden that the taking of it will impose upon the actor is a factor of great importance.”

In the case of Walker v. Strosnider, supra, Judge Poffenbarger, speaking for a unanimous court, explained the law of West Virginia in a way completely in accord with the modern Restatement. 432

In applying the law of lateral support to the instant case, the court concluded:

It would appear that the case before us either stands or falls on a question of strict liability. It is admitted that the retaining wall on the defendant’s property was constructed at least sixty years ago, before the construction of the plaintiffs’ house, and that all parties to this action were aware of the condition of the wall. Furthermore, there is no allegation that the defendant did anything to cause the collapse of the wall, but rather only failed to keep it in repair. Therefore, if the plaintiffs can recover, they must do so by proving that the disrepair of the retaining wall would have led ineluctably to the subsidence of their land in its natural condition. If, on the other hand, the land would not have subsided but for the weight of the plaintiffs’ house, then they can recover nothing. 433

C. “Ancient Lights”

The West Virginia Code, in § 2-1-2 entitled “Ancient lights,” provides: “The common law of England in regard to Ancient Lights is not in force in this state.” 434 This section was added to the Code in 1868. Although the statute leaves no doubt as to its purpose and became effective April 1, 1869, 435 the court failed to discuss the statute in Powell v. Sims, 436 a case decided in the July 1871 term of the court. The court in Powell began its opinion by discussing whether West Virginia was bound by the common law of England, and concluded that “[t]he common law of England is in force in this State only so far as

432 Id. at 223–24.
433 Id. at 225.
434 W. VA. CODE § 2-1-2 (1923).
436 5 W. Va. 1 (1871).
it is in harmony with its institutions, and its principles applicable to the state of
the country and the condition of society."\(^{437}\)

Following an analysis of the relevant cases, the court noted that in this country "[t]he English common law doctrine of Ancient Lights is disapproved,"\(^ {438}\) and summarized its holding in Syllabus Point 3 as follows:

An implied grant of an easement of light will be sustained only in cases of real necessity; and will be denied or rejected in cases when it appears that the owner claiming the easement can, at a reasonable cost, have or substitute other lights to his building.\(^ {439}\)

Nearly seven decades after the court's decision in Powell, the issue of the right to light and air through windows on the side of a building in South Charleston was before the court in Nomar v. Ballard.\(^ {440}\) The case was before the court following the circuit court's overruling of defendant's demurrer to plaintiff's amended complaint, and the circuit court's certifying its ruling to the West Virginia Supreme Court of Appeals.

The court noted:

It is admitted by all parties that the common law doctrine of ancient lights no longer prevails in West Virginia. Code, 2-1-2. It is conceded by plaintiffs that an easement of light and air cannot, under the laws of this State, be acquired by prescription. The sole contention of plaintiffs is that some character of servitude in respect to light and air was imposed on Lot No. 27, by implications arising from the very nature of the situation as it existed at the time Lot No. 27 was conveyed by the deed of January 25, 1935, to defendants' predecessors in title.\(^ {441}\)

The court recognized that:

The questions presented to the Court in the case at bar grow out of the abolition in this State of the common law doctrine of ancient lights, as that doctrine was established in England before the American Revolution, and as recognized by some of the States subsequent to that event.\(^ {442}\)

\(^{437}\) Id. at Syl. Pt. 1.

\(^{438}\) Id. at Syl. Pt. 2.

\(^{439}\) Id. at Syl. Pt. 3.

\(^{440}\) 60 S.E.2d 710 (W. Va. 1950).

\(^{441}\) Id. at 714.

\(^{442}\) Id.
After an extensive discussion of earlier West Virginia cases and the decision in sister jurisdictions, the court noted:

The case of *Powell v. Sims* has not been overruled or departed from since it was decided in the year 1871, and has, we think, become a rule of property entitled to be maintained and enforced for the protection of persons who have acquired property in the light of the ruling there made.\(^{443}\)

In affirming, the circuit court’s decision overruling the demurrer, the court explained:

The rule laid down in *Powell v. Sims*, should not be applied except in a case where there is a clear showing of necessity therefor, and we are not foreclosing the view that even in such a situation it should not be allowed to impede progress by prohibiting improvements to property necessary to keep in line with the development of the community in which the same is located. We know that in the development of our towns and cities, the first step is the erection of buildings of one and two stories, which are later replaced by more substantial buildings of greater height. It would be dangerous to establish a rule by which progress of a community would be hampered by implied restrictions, or for the mere convenience of people who may elect to keep their property in its original state . . . . As the matter stands, we can only accept as true the allegations of plaintiffs’ bill. Accepting these allegations as true, it may be questioned whether they present a situation where, as a matter of law, we can say they are entitled to the relief prayed for; but, on the other hand, we feel that the allegations are sufficient to call for further development of the case, and justify us in refusing to sustain the demurrer, the effect of which, in the absence of an amendment, would be to call for the dismissal of plaintiffs’ bill.\(^{444}\)

The dissent of two Justices began:

The deed from Downey to Sims, considered in *Powell v. Sims*, 5 W.Va. 1, 13 Am.Rep. 629, relied upon by the majority, was dated March 29, 1869. The provision of the 1868 Code, now Code, 2-1-2, providing that ‘It is hereby declared that the common law of England, touching ancient lights, is not and never

\(^{443}\) Id. at 718.

\(^{444}\) Id. at 719.
has been, in force in this State', did not become effective until April 1, 1869. The Powell case was not decided until the July term, 1871, and does not mention the statute, but clearly bases its authority upon the common law rule relating to implied grants of easements for light, and very materially limits that rule by declaring: ‘The common law of England is in force in this State only so far as it is in harmony with its institutions, and its principles applicable to the state of the country and the condition of society.’ Since the statute above quoted declared the common law rule relating to ancient lights not to be the law of this State, and since the effective date of the statute was subsequent to the date of the deed, I am of the view that the Powell case can not be considered authority for the position of the majority in the instant case. The common law rule permitted an easement for air and light only upon the presumption of an implied grant. When the rule was abrogated by the statute the right to imply such a grant was necessarily destroyed.\textsuperscript{445}

The dissent continued:

Assuming, however, that the rule of the Powell case remains the law of this State, I can not believe it was intended to be given the broad meaning attributed to it by the majority in the instant case. . . . I think that the rule intended to be laid down in the Powell case was that the necessity for the easement must be absolute and also obvious. . . . Since it is admitted in this case that light and air can be obtained otherwise than by virtue of the claimed easement, and there is no absolute and obvious necessity for the easement, I would reverse the rulings of the lower court.\textsuperscript{446}

The dissent further noted:

If forced to the conclusion of the majority, I would not hesitate to overrule the Powell case. Less harm would result, I believe, by doing so than to permit to stand such a plainly erroneous decision, one almost universally condemned.\textsuperscript{447}

\textsuperscript{445} Id. at 719-20.

\textsuperscript{446} Nomar v. Ballard, 60 S.E.2d 710, 720 (W. Va. 1950).

\textsuperscript{447} Id.
While a discussion of Article VIII, section 13 of the Constitution of West Virginia,\textsuperscript{448} and of West Virginia Code, Chapter 2, Article 1, section 1\textsuperscript{449} is beyond the scope of this Article,\textsuperscript{450} it is submitted that the failure of the court in Powell in 1871 to acknowledge enactment of West Virginia Code § 2-1-2 just three years earlier in 1868,\textsuperscript{451} or to discuss its relevance or application to the case before the court, raises legitimate questions as to how much deference should be given to the Powell decision. It is submitted that a “fair” reading of the Powell case suggests that the court, apparently unaware of the passage of West Virginia Code § 2-2-2, was attempting to limit the English common law rule under the then wording of the West Virginia Constitutional provision stating the common law was in effect.\textsuperscript{452}

Following a discussion of the English decisions, and after noting “[t]he question of easement of light does not appear ever to have been before the court of appeals of Virginia,”\textsuperscript{453} and after discussing the American authorities, the court concluded:

\begin{quote}
[T]hat an implied grant of an easement of light will be sustained only in cases of real and obvious necessity, and will be denied or rejected in cases when it appears that the owner of the dominant estate can, at a reasonable cost and expenditure, have or substitute other lights to his building, so that he may continue and have the reasonable enjoyment of the same; leaving the
\end{quote}

\textsuperscript{448} “Except as otherwise provided in this article, such parts of the common law, and of the laws of this state as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature.”

\textsuperscript{449} W. VA. CODE § 2-1-1 (1923) provides:

\begin{quote}
Common Law — 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.
\end{quote}


\textsuperscript{451} W. VA. CODE § 2-1-2 provides: “Ancient Lights. The common law of England in regard to ancient lights is not in force in this State.”

\textsuperscript{452} To what extent, then, is the Common Law of England in force in this State? By section 8 of Article II of the Constitution, it is provided that “such 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 not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature.”

Powell v. Sims, 5 W. Va. 1, 3 (1871).

\textsuperscript{453} \textit{Id.} at 1.
owner of the servient estate also to the enjoyment of his own property free from the restriction and burden that would otherwise be imposed upon it.\textsuperscript{454}

In dissolving the injunction granted by the circuit court prohibiting Powell from erecting a porch which block Sim’s windows, the court said: “Applying this principle to the case before us, it is easily settled, it being clear from the testimony in the record, that the appellee, for a very moderate and reasonable expenditure, can obtain other lights and air sufficient for the useful and reasonable enjoyment of the property in controversy . . . “\textsuperscript{455}

As evidenced by the above discussion, the majority of the court in Nomar is, in essence, viewing the Powell decision as intending to create an “exception” to the statute which unambiguously states “the common law of England in regards to ancient lights is not in force in the state.”\textsuperscript{456}

The court in Nomar does not attempt to explain the “legal basis” of the “exception” it believes that Powell created. The majority simply said, “In our opinion, the situation presented in the case at bar would not justify us in overruling Powell v. Sims, and, until we do so, we are of the opinion that plaintiff's cause of action, as set up in their bill, comes within the general principles enunciated therein.”\textsuperscript{457}

The fact that it has been sixty years since the court decided Nomar and there have been no reported cases relying upon the Nomar majority’s reading of Powell is some evidence of its questionable precedential value.

IX. Termination

A. Abandonment

One of the earliest cases in West Virginia in which there was significant discussion of abandonment of an easement is Scott v. Black.\textsuperscript{458} In Scott, there was an easement by grant which was used for fifteen or twenty years. After a bridge across a creek washed out, a portion of the right of way was relocated by parol agreement of the owners of the dominant and servient estates. Because of

\textsuperscript{454} Id. at 4–5.

\textsuperscript{455} Id. at 5.

\textsuperscript{456} W. VA. CODE § 2-1-2 (1923).

\textsuperscript{457} Nomar v. Ballard, 60 S.E.2d 710, 718 (W. Va. 1950).

\textsuperscript{458} 120 S.E. 167 (W. Va. 1923). In the 1874 case of Warren v. Syme, 7 W. Va. 474 (1874), the court's Syllabus Point 15 deals with abandonment of an easement, and the principle of abandonment is discussed in the opinion at page 17. As the Scott court notes, the Warren case was not decided “on the issue of whether or not the right had been abandoned, but on the fact that plaintiffs had neither proved their title to the dominant tenement, nor defendant's alleged obstruction of the easement, which obstruction was denied in the answer of the defendant.” See Scott, 120 S.E. at 170.
a change in the creek bed, this relocated portion of the right of way was used for another fifteen or sixteen years. After a change in ownership of the servient estate, the new owner obstructed the relocated portion of the road and tried to make the owner of the dominant estate use the entire length of the original right of way as opposed to the relocated portion of the right of way. The owner of the servient estate, the defendant, argued he could bar use of the relocated portion of the right of way because the owners of the dominant estate, the plaintiffs, had not abandoned the original right of way, and, therefore, he should be required to use the original right of way.

The court, citing cases from other jurisdictions and secondary authorities, stated that an easement held “under a grant,” is not lost by mere nonuse and “that in proving a case of abandonment it is not only necessary to prove a physical nonuse of the easement, but that nothing short of proof of intention to abandon the right will suffice.”\(^{459}\) After discussing similar cases from other jurisdictions, the court concluded that the facts before it proved:

\[\text{Not only plaintiff's abandonment of the old right of way, but their right to the unobstructed enjoyment of the new, not by reason of any prescriptive use of the new road, but by virtue of the agreement of exchange, executed by the subsequent acts of the plaintiffs in using it, and of the defendant in acquiescing in that use.}\(^{460}\)

In \textit{Moyer v. Martin},\(^{461}\) an easement was created by grant as part of the partition of land. In rejecting the argument that the owners of the dominant estate had lost the easement by nonuse, the court noted that abandonment does not result from mere nonuse, but that an intention to abandon is also necessary. The court in \textit{Moyer} explained, “The use of the brickyard route over the lands of another by plaintiffs and their predecessors, whether that easement was acquired by purchase or by prescription, is not an extinguishment of the easement through the farm granted by the partition decree.”\(^{462}\)

The most significant abandonment decision in West Virginia is the relatively recent decision in \textit{Strahin v. Lantz}.\(^{463}\) The issue in the \textit{Strahin} case was whether the prescriptive easement was extinguished by abandonment.\(^{464}\) After noting that “[t]his Court has never directly addressed the factors necessary to

\(^{459}\) Id. at 169 (citation omitted).
\(^{460}\) Id. at 170.
\(^{461}\) 131 S.E. 859 (W. Va. 1926).
\(^{462}\) Id. at 861 (citation omitted).
\(^{463}\) 456 S.E.2d 12 (W. Va. 1995).
\(^{464}\) Id. at 14. Earlier in the decision, the court stated, “The evidence is undisputed that a prescriptive easement was created across Miner Road.” Id.
show termination of a prescriptive easement by abandonment,\textsuperscript{465} the court, in footnote five, said:

We find the criteria listed in Moyer persuasive because it has been argued that prescriptive easements should be treated the same as easements created by deed:

“An easement established by prescription is just as well established as one originating in the most formal deed. The methods of extinguishment of prescriptive easements and easements created by deed should be identical. Either nonuser should be effective as to both, or as to neither. The Restatement of Property takes the position that nonuser alone is never sufficient to prove abandonment as to any variety of easement, but constitutes relevant evidence which, with other accompanying facts, can justify a finding of abandonment.”\textsuperscript{466}

After briefly quoting from secondary authorities, the court stated in its holding that the easement was not extinguished:

We hereby adopt the foregoing rule and hold that abandonment of an easement by prescription is a question of intention that may be proved by nonuse combined with circumstances which evidence an intent to abandon the right. It is the burden of the party asserting the absence of an easement by prescription to prove abandonment by clear and convincing evidence. 6B Michie’s Jurisprudence Easements § 18 at 167.

What particular actions would constitute proof of intent to abandon an easement by prescription would necessarily depend on the unique facts of each case.\textsuperscript{467}

In Walls \textit{v.} DeNoone,\textsuperscript{468} the court applied the law relating to abandonment as set forth in Strahin in reversing the judgment of the circuit court on the application of the law to the facts of that case stating:

As indicated in Strahin \textit{v.} Lantz, \textit{supra}, for an abandonment of a right-of-way to occur, there must be a clear showing that the owner does not intend to exercise his rights in the future.

\textsuperscript{465} Id. at 15.
\textsuperscript{466} Id. at n.5 (citation omitted).
\textsuperscript{467} Id. at 15.
\textsuperscript{468} 550 S.E.2d 653 (W. Va. 2001).
In the present case, the Court believes that the facts do not clearly show that the various owners of the DeNoone property intended to give up their rights, and consequently the Court concludes that the circuit court erred in holding that there was an abandonment. Clearly, the right-of-way was used for both pedestrian property and vehicular traffic after the gate was erected. The only dispute is whether there was vehicular passage over the final few feet of the easement into what became the DeNoone property, and the evidence on that point is conflicting.  

B. Adverse Possession

The difficulty of establishing the termination of an easement by adverse possession is illustrated by a comment made by the court in Wooldridge v. Coughlin. In Wooldridge, Coughlin argued that if a way of necessity existed (the court found there was a way of necessity):

[It was lost by the statute of limitations, because it was not used from its birth on the conveyance from Cabell to Hurley, September 2, 1871, until after June 27, 1882, when Wooldridge moved upon the land, — a period of more than 10 years; and it is claimed that this period barred the easement, as Coughlin was in actual possession of his land during that period, and the right of way was not exercised.

In response to this argument, the court explained:

It seems to me that mere nonuser of a way appurtenant to wild land would not destroy the right of way. The fact that Coughlin had possession of his land is not a material element, and would not affect the right of way, as Coughlin’s possession was a matter of course, and it could co-exist with right of way, and would

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469 Id. at 658. A claim of extinguishing the easement by adverse possession was also raised and rejected by the court, stating:

[T]here is conclusive evidence that whoever erected the gate at the edge of what became the DeNoone property did not take exclusive possession of the right-of-way at the time of the erection of the gate or at any time thereafter.

A review of the evidence also shows conclusively that the right-of-way was used at least to provide some pedestrian access to what became the DeNoone property even after a gate was erected.

470 33 S.E. 233 (W. Va. 1899).

471 Id. at 234.
not be in antagonism per se with that right of way. In almost
every case of conceded right of way, whether by grant or neces-
sity, there is actual possession of the land subject to such right
of way. Arnold v. Stevens, 35 Am. Dec. 305; Gray v. Bartlett,
32 Am. Dec. 208, note. The statute limiting actions for re-
cov- er of actual possession of land does not, in terms, apply to in-
corporeal hereditaments, such as mere easements. If the owner
of the servient land deny the easement, and his denial is known
to the owner of the dominant land, and there were nonuser the-
reafter of the way for the statutory period of 10 years, it would
defeat the right of way; but I do not see that such private right
of way, once brought into being, could be defeated by simple
nonuser. 472

In Rudolph v. Glendale Improvement Co., 473 the litigation arose from an
effort to replat the land in a subdivision including the relocation of streets. One
of the arguments of the defendants was that if the plaintiff had gained private
easements to roadways and the planned park, they had lost those easements
through abandonment and adverse possession. 474

In rejecting the adverse possession argument, the court said:

Nor can we see much strength in the contention of adverse pos-
session of Erskine and defendant. The adverse possession ne-
cessary to extinguish an easement of right of way by express
grant must be wholly inconsistent with the right to enjoy the
easement and amount to a disseisin or ouster. Parker v. Swett,
40 Cal. App. 68, 180 P. 351; Perry v. Wiley, 285 Ill. 25, 120 N.
E. 455; Seymour Water Co. v. Lebline, 105 Ind. 481, 144 N.E.
30, 145 N.E. 704, where it is said that in order to effect an extin-
guishment of such right of way there must be an absolute denial
of the right to the easement, and the occupancy by the servient
owner must be so adverse and hostile that the owner of the
easement could have maintained an action for obstructing his
enjoyment of it. And in Marshall v. Pfeiffer, 314 III. 286, 145
N.E. 411, it was held that to constitute adverse possession of
platted streets the possession must have been hostile in incep-
tion, adverse, actual, visible, open, notorious, exclusive, and
continuous, and under claim of ownership, and that the doctrine
of estoppel in pais held not to apply as against town lot owners
su ing to enjoin obstruction of platted streets by adjoining own-

472 Id. (citation omitted).
473 137 S.E. 349 (W. Va. 1927).
474 See id. at 352.
ers, where the possession and use of the latter, though long continued, was suffered by plaintiffs only until changing conditions required opening of streets. In the instant case Erskine, trustee, continued in possession of the lots, streets, alleys, and parks at the time the map and dedication were filed. There was no change in the physical aspect of the property, except that trees were planted by him around the circular park. It remained as when dedicated — an open field. His possession was not adverse, and was consistent with his dedication.\textsuperscript{475}

In \textit{Bauer Enterprises, Inc. v. City of Elkins},\textsuperscript{476} the court noted the difference between private easements and public ways by explaining:

Private easements differ from public ways in two regards. First, private easements can be used by their owners only for the purpose of reasonable ingress and egress to their property, whereas public ways can be used by the general public without reference to their destination. Second, public authorities have no obligation to maintain private easements whereas they do have an obligation to maintain public ways. \textit{Rose v. Fisher}, 130 W.Va. at 57, 42 S.E.2d at 252. In addition, there can be no adverse possession of a public way, \textit{Huddleston v. Deans}, \textit{supra}, but if the elements of adverse possession are present a private easement may be extinguished. \textit{Rudolph v. Glendale Improvement Co.}, 103 W.Va. 81, 137 S.E. 349 (1927).\textsuperscript{477}

In \textit{Higgins v. Suburban Improvement Co.},\textsuperscript{478} the court was again presented a case involving platted but unopened streets. In \textit{Higgins}, there was a platted street fifty feet in width extending along the rear of lots 12 through 24 in a north to south direction. From the northeast corner of lot 15 in a southerly direction, “The terrain rose so steeply to the east from the National Road and was so precipitous . . . as to make it impossible for vehicular traffic to use the platted street in traveling from lots 12, 13, and 14 southwardly to the other lots of the addition.”\textsuperscript{479} The unopen road was usable behind lots 12, 13, and 14 and was used, in part, by the owner of lot 12 to access a stable on the rear of her lot. Mrs. Howard, the successor to the person who originally platted the subdivision, began placing valuable improvements on the fifty foot platted right of way

\textsuperscript{475} Id. The fourth paragraph of the court Syllabus reads: “Adverse possession of such easement must be hostile at its inception, adverse, actual, visible, open, notorious, exclusive, under claim of ownership, and continuous for the statutory period.” \textit{Id}. at 349.

\textsuperscript{476} 317 S.E.2d 798 (W. Va. 1984).

\textsuperscript{477} \textit{Id}. at 801.

\textsuperscript{478} 151 S.E. 842 (W. Va. 1930).

\textsuperscript{479} \textit{Id}. at 842-43.
shortly after she acquired her title in 1903. The improvements were in the portion of the right of way south of lot 15. In 1928, the defendant company, owned by Mrs. Howard and her husband, started to construct a stable in the fifty foot right of way behind lot 12, which was owned by the plaintiff. The instant litigation was to enjoin the construction of that stable. The court stated the issue as whether the principle that “adverse possession of a part of a tract by one holding under color of title extends to all the land comprehended in his title papers” applies to this case. 480 The court applied the law of the Rudolph case as set forth above in the quoted Syllabus to hold that Mrs. Howard had gained title to the easements area except for the easements behind lots 12, 13, and 14, and a twenty foot easement along the northern boundary of lot 13 leading from the National Road to the fifty foot easement. 481

The holding as to the portion of the fifty foot easement behind lots 12, 13 and 14, and the twenty foot easement, is summarized in the court’s Syllabus as follows:

Where the owner of the servient estate over which has been granted by deed a right of way obstructs a portion thereof which before the obstruction could not used by the owner of the easement because of natural barriers, such obstruction will not be deemed to extinguish by acquiescence other portions of the right of way necessary to and in use by the owner of the easement. 482

In White v. Lambert, 483 the issue on appeal was “(1) whether property can be acquired through adverse possession where no ‘color of title’ exists; and (2) whether a right-of-way granted by deed can be extinguished by non-use of a portion of the easement for a continuous period of more than ten years.” 484 The court, relying upon the Higgins decision, said, “The law is clear that a claim of adverse possession can be made on an express easement,” 485 and cited Somon v. Murphy Fabrication & Erection Co. 486 as holding, “The sixth element of the Somon formulation can be satisfied by showing possession under either ‘claim of title’ or ‘color of title.’” 487

480 *Id.* at 844.
481 *See id.* at 845.
482 *Id.* at 842.
483 332 S.E.2d 266 (W. Va. 1985).
484 *Id.* at 268.
485 *Id.* at 268 (citation omitted).
487 *White*, 332 S.E.2d at 268. The Somon court cited earlier West Virginia case law defining the terms as follows:

“A claim of title has generally been held to mean nothing more than the disseisor enters upon the land with the intent to claim it as his own. Heavner v.
As to the second issue, the court had identified as presented by the appeal, the per curiam decision stated:

In this case, the evidence of the Lamberts’ adverse use of a portion of the deeded right-of-way for more than ten years is sufficient to establish a “claim of title.” Although the trial court in his letter opinion and order used the phrase “color of title” rather than “claim of title,” we believe this was done inadvertently since the relief granted by the court was limited to the physical area over which the Lamberts exercised actual dominion.\(^\text{488}\)

In *Norman v. Belcher*,\(^\text{489}\) after concluding that the defendants, the Belchers, had failed to meet their burden of proof to establish a prescriptive easement, the court in dictum noted:

A private easement may be extinguished by adverse possession wholly inconsistent with the use of the easement.\(^\text{490}\)

By way of explanation, the court, after summarizing the elements of adverse possession, said,

Here, Kinniman Belcher’s use of the 62.5-acre tract as an enclosed garden during the 1920’s and 1930’s satisfies these requirements. His use of the property in such a manner was wholly inconsistent with the use of the roadway as a means of ingress and egress to the 15-acre tract. He expressly refused to allow others to use the roadway for vehicular access during that period. Indeed, there is no evidence that the roadway was used for any vehicular traffic after 1918 or 1919. We believe the evidence here clearly justified the conclusion that any easement acquired by the defendant’s predecessors in title had been extinguished by the adverse possession of Kinniman Belcher.\(^\text{491}\)

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*Morgan* [41 W.Va. 428, 23 S.E. 874 (1895)]. Whereas, ‘color of title’ imports there is an instrument giving the appearance of title, but which instrument in point of law does not. In other words, the title paper is found to be defective in conveying the legal title. *Stover v. Stover*, 60 W.Va. 285, 54 S.E. 350 (1906).” 160 W.Va. at 91-92, 232 S.E.2d at 529.

\(^{488}\) *Id.* at 268–69.

\(^{489}\) *Id.* at 269.

\(^{489}\) 378 S.E.2d 446 (W. Va. 1989).

\(^{490}\) *Id.* at 448 (citation omitted).

\(^{491}\) *Id.* at 449.
C. **Merger**

Both the principle of law and the explanation of the principle of merger are succinctly stated in *Pingley v. Pingley*\(^{492}\) as follows:

It seems to be firmly established that where the owner of land over which an easement is claimed as appurtenant to another tract of land becomes also the owner of such other tract, the easement is merged in his superior estate. No one can use part of his own estate adversely to another part, and the proposition, therefore, must be true that, if the owner of one of the estates, whether the dominant or servient one, becomes the owner of the other, the servitude which one owes to the other is merged in such ownership, and thereby extinguished.\(^{493}\)

In *Pingley*, while the case was pending, the owner of the servient estate acquired title to the dominant estate. Therefore, the appeal was dismissed as moot.\(^{494}\)

In *Perdue v. Ballengee*,\(^{495}\) when a party obtained three tracts of land that had at one time been a part of the same tract of land, an easement that had been appurtenant to one of those tracts merged, and was extinguished and, therefore, no longer existed when that tract was reconveyed.\(^{496}\)

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\(^{492}\) 95 S.E. 860 (W. Va. 1918).

\(^{493}\) *Id.* at 861 (citation omitted).

\(^{494}\) “Both the dominant and servient estate having become vested in the defendant, the easement claimed is thereby extinguished, and leaves nothing upon which any judgment rendered by this Court could operate.

It therefore follows that the appeal must be dismissed as presenting only a moot question.” *Id.*

\(^{495}\) 105 S.E. 767 (W. Va. 1921).

\(^{496}\) In the words of the court:

It is clearly established that, when the owner of a tract of land to which an easement is appurtenant acquires the tract upon which the easement is a burden, the subservient and dominant estates become merged, and thereafter there exists but one estate. The easement ceases to exist. See *Pingley v. Pingley*, 82 W.Va. 228, 95 S.E. 860, and authorities there cited. It is quite clear that during the time that Mrs. Ballengee was the owner of this land there was in existence no easement over any part of it as appurtenant to any other part. The easement that had been theretofore appurtenant to the 37 ½-acre tract became merged in the other estates owned by her in the land, and passed out of existence.

*Id.* at 769.
Similarly, in *Henline v. Miller*, 497 when the title of the dominant and servient estates were united in the same owner, the merger extinguished the right of way. 498

While the court in *Highway Properties v. Dollar Savings Bank* 499 recognized that the law supported the trial court’s conclusion that the easement had been extinguished by merger, 500 it affirmed the decision on the basis of an inadequate description of the easement. 501

However, after citing the above discussed West Virginia cases and quoting from *Henline* and *Pingley*, the *Highway Properties* court added in footnote four the following:

There are limitations to the concept of merger, as summarized in 28 C.J.S. *Easements* § 57(b) (1941):

“In order to extinguish an easement by merger, there must be unity of title and, according to some decisions, of possession and enjoyment of the dominant and servient estates, coextensive in validity, quality, and all other circumstances of right. Ways of necessity and natural easements are, strictly speaking, not subject to the doctrine of merger.”

497 185 S.E. 852 (W. Va. 1936).

498 The conveyance by which H. W. Karickhoff became the owner of the tract of 13 9/10 acres was made at a time when he was also the owner of the tract of 1 acre, 2 4/10 poles. This common ownership of both the dominant and the servient estate had the effect of extinguishing the right of way. *Pingley v. Pingley*, 82 W.Va. 228, 95 S.E. 860; *Perdue v. Ballengee*, 87 W.Va. 618, 105 S.E. 767. The user of the roadway during this period of ownership of both of the tracts of land by H. W. Karickhoff did not operate to perpetuate or preserve the right of way. An owner of land cannot claim adversely to himself, and undoubtedly he cannot own a right of way over his own land.

Id. at 854.

499 431 S.E.2d 95 (W. Va. 1993).

500 At the urging of Dollar Savings and New Market, the court below decided that a merger between the dominant and servient estates occurred in the 1983 deed and the easements were extinguished. Merger occurred in spite of the fact the deed contained easement language, reciting reciprocal rights-of-way for ingress and egress and parking on the five tracts, because Fayette Square received fee simple title to the five parcels.

Id. at 98.

501 “From the foregoing law and aside from the merger question, it is our conclusion that the easement sought to be created in this case in the 1983 deed to Fayette Square was insufficient as a matter of law as to its description.” Id. at 99.
See McNeil v. Kennedy, 88 W. Va. 524, 529, 107 S.E. 203, 205 (1921) (Merger “would not debar him from his right of way acquired by prescription through the lands of other servient owners.”).502

In the recent case Folio v. City of Clarksburg,503 the court again found the lower court was correct in concluding there had been merger but reversed the grant of summary judgment on other grounds.504 As to the merger, the court said, after quoting from Pingley:

“Here, Grandeotto clearly owned both the dominant estate and the servient estate at the time the right-of-way agreements were executed. Both agreements were signed by Mr. Folio as Chairman of the Board of Grandeotto, as grantor and grantee, and were executed and recorded prior to the sale and conveyance of the property to the City.”505

X. CONCLUSION

It is fair to speculate that Judge Frank C. Haymond506 believed the court needed seminal opinions relating to the law of servitudes in West Virginia. The earlier opinions in this area of the law had been relatively short, tended to focus on the specific element or legal principle relevant to the case before the court, and resolved the issue. In contrast, Judge Haymond’s opinions in Cottrell v. Nurnberger,507 Town of Paden City v. Felton,508 and Stuart v. Lake Washington Realty Corp.509 summarized prior West Virginia decisions and discussed secondary authorities and cases from other sister jurisdictions. As noted above, these three decisions have provided comprehensive discussions of servitudes in West Virginia.

From the vantage point provided by the passage of over a half century, the three cases have proved instructive in a way that it is doubtful that Judge Haymond would have anticipated. Each of the three opinions was decided by votes of three to two. In all three, the main thrust of the dissents was not a disa-

502 Id. at 98 n.4.
503 655 S.E.2d 143 (W. Va. 2007).
504 “[W]e believe that genuine issues of material fact exist concerning whether an easement was created by equitable estoppel as a result of representation made by the City at the time of the conveyance.” Id. at 148.
505 Id.
506 Judge Haymond served on the West Virginia Court of Appeals from July 1, 1945, until June 10, 1972.
507 47 S.E.2d 454 (W. Va. 1948).
508 66 S.E.2d 280 (W. Va. 1951).
509 92 S.E.2d 891 (W. Va. 1956).
agreement as to the law as articulated by the majority, but rather its application to the facts of each case. In *Hock v. City of Morgantown*, Justice Richard Neely in writing for the court said:

Predictability is at the heart of the doctrine of *Stare decisis*, and regardless of what we think of the merits of this case, we must be true to a reasonable interpretation of prior law in the area of property where certainty above all else is the preeminent compelling public policy to be served.

In the area of easement law, the court in West Virginia has provided us with sets of principles which it has adhered to over the years, and while there may be occasions to disagree with the application of the various elements of the law of easements to a particular set of facts, the principles have remained consistent and, therefore, predictable.

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511 *Id.* at 388.
XI. Table of Authorities

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