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COMPENSATION TO LANDOWNERS FOR PROPERTY LYING WITHIN LIMITS OF ANCIENT TURNPIKES, UPON CHANGE IN TRAVELED WAY

ROBERT T. DONLEY*

It is common knowledge that the State of West Virginia is crossed and recrossed with public highways which, in the earlier history of the state, were established as turnpikes, under the authority of the Virginia legislature. Many of these ancient highways, if not all of them, have lost their character as turnpikes, and have been maintained for years simply under the broad, but rather vague name of "county roads." Indeed, apparently only the oldest citizens of the state remember when these highways were once toll-roads, and the majority of the people are unaware of their historical significance. But aside from their historical and geographical interest, these old turnpikes present legal problems which apparently have never been solved in this state, but upon the solution of which, turn public and private rights of manifest importance.

The situation proposed for examination is shortly this: an ancient turnpike was established by legislative authority, and secured a right of way, (or it may be fee simple title,) for the road, which was sixty feet in width. Years passed, the turnpike company became extinct, and the highway was never improved more than thirty feet in width. Property owners for many years conveyed titles to lands abutting upon the turnpike, with reference to a thirty-foot right of way, and the original sixty-foot way was apparently forgotten. In the year 1927, either the county court or the State Road Commission, as the classification of the road may require, attempts to widen the old road and to assert a forty-foot right of way, without paying the landowner for the land so taken, upon the theory that such land is public property included within the limits of the ancient sixty-foot right of way of the turnpike.

Such a situation presents several questions of law, not all

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of which can be discussed within the limits of this paper, but the most important of which, it is submitted, are those of the nature and extent of the public right in highways; whether those rights may be lost or forfeited; if so, in what manner; the immunity of public corporations, or states, from the doctrines of adverse possession, prescription, estoppel, and the statute of limitations.

In the year 1817, the General Assembly of the Commonwealth of Virginia passed a law entitled, "An Act Prescribing Certain General Regulations for the Incorporation of Turnpike Companies." The first clause stipulated that:

"* * * * the following general provisions shall be deemed and taken to be part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted in reference to any such charter or act, except so far as such special grant, charter or act may otherwise expressly provide; viz: * * * *"

It was further provided that:

"If the president and directors cannot agree with the owner of the land, on the terms upon which the road shall be opened through it, it shall be lawful for them to apply to the court of the county in which such land, or the greater part thereof, may lie; and, * * * * it shall be the duty of the court to appoint five * * * * freeholders, to assess the damages, to such land, which will result from opening the said road through it."

After reciting that the viewers should go upon the land, the statute directed that:

"* * * they shall take into consideration the quantity and quality of the land which the road will occupy, the additional fencing which will be required thereby, and all other inconveniences which will result to the said land from the opening of the said road, and shall combine therewith a just regard to the advantage which the owner of the land will derive from the opening of the road through the same."

Apparently, therefore, the viewers were to consider general benefits resulting from the opening of the road, contrary to the present rule limiting the set-off to special or peculiar

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benefits. But the most pertinent part of this statute, for present purposes, is Section 14, wherein it is directed:

"That the president and directors shall construct bridges over all water courses crossing the said road, where the same shall be found necessary, and shall make the said road in every part thereof, sixty feet wide at least * * * * ."

As bearing upon the question of whether the turnpike corporation would acquire an easement, or a fee simple in the land taken for highway purposes, the statute is rather ambiguous, and declares:

"In consideration of the expenses the proprietors will incur in opening, improving, and repairing the said road, the said road, with all the tolls and profits, shall be, and the same is hereby vested in the respective proprietors forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever."

However, the interest of the company might be forever lost by failure to keep the road in repair for the period of eighteen months. That various turnpikes throughout the commonwealth and in what is now the State of West Virginia, were incorporated in pursuance of this law, there seems to be no doubt, and much positive proof. In the absence of evidence to the contrary, the courts would undoubtedly hold that where a turnpike was incorporated and the highway laid out under the authority of such a statute, the presumption is that the statute was complied with; and therefore that the road was sixty feet wide at the least. Assuming that such sixty-foot way was acquired in the manner prescribed by law, but that the actually improved or opened portion of the road was not more than thirty feet, and that fence lines of abutting owners were erected accordingly and so maintained for perhaps more than a century, what rights have accrued or have been diminished? If, in brief, the public once had a sixty-foot way over lands, can that right or title be diminished by the encroachments of abutting landowners?

2 Supra, n. 1, p. 216.
3 Cf. Moore v. Schoppert, 22 W. Va. 282 (1883), where the court takes judicial notice of the incorporation of such turnpikes under legislative authority.
4 Pillsbury v. Brown, 82 Me. 450, 19 Atl. 828 (1890).
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Effect of Encroachment in General

One of the earliest and most instructive cases upon this subject which the writer has examined, is that of *Peckham v. Henderson,*\(^5\) decided in the year 1858. In 1806 the New York legislature passed an act appointing commissioners to lay out a road at least six rods wide through Genesee County, and directing that a map of said road should be duly recorded in the office of the County Clerk; and that thereafter it should be lawful to improve and open the highway. The survey filed was approximately one-half mile south of the *locus in quo* of the road. In 1809 the highway was opened four rods wide. In 1815 it was re-surveyed under an act of the legislature, and this survey was identical with that portion of the road passing through the plaintiff's property. The evidence showed that the road had been used as early as 1817 and that the fence removed by defendant was constructed in 1823, *within the limits of the six-rod way.* The defendants attempted to remove this fence without making compensation to the plaintiff. The court stated the problem presented, as follows:

"The position of the defendants is that a highway was lawfully laid out six rods wide in 1815; that the public acquired a right to such a road, and that the plaintiff, and those from whom he derived a title, have encroached upon the highway ever since 1823; and that such encroachment may now be removed."

Counsel for defendants proceeded upon the theory that the fence was a public nuisance and therefore could be abated, regardless of how long such nuisance had been in existence. To this the court replied:

"The counsel had assumed that the encroachment, so claimed, was a public nuisance * * * * the very point to be established before the principles, relating to the time of its continuance, can be made applicable. What is a nuisance? *Blackstone* (3 *Com.* 215) says, 'Nuisance, *nocumentum,* or annoyance, signifies anything that worketh hurt, inconvenience, or damage. And nuisances are of two kinds; public or common nuisances, which affect the public and are an annoyance to all the king's subjects, for which reason we must refer them to the class of public wrongs,

\(^5\) 27 Barb. (N. Y.) 207 (1858).
or crimes and misdemeanors; and private nuisances may be
defined anything done to the hurt or annoyance of the lands,
tenements, or hereditaments of another.' * * * And of this
nature (public nuisances) are annoyances in highways,
bridges and public rivers, by rendering the same incon-
venient or dangerous to pass, either positively by actual
obstructions, or negatively by want of reparation * * * *
the annoyance or neglect must be of a real and substantial
nature."

Thus it is apparent that the court meant to distinguish be-
tween active nuisances such as obstructions, and passive
nuisances such as encroachments, which occasion no public
inconvenience or damage. However, it should be noted
that in this case there was involved a statute of limitations
which ran against the state, and that the plaintiff had been
in adverse possession of the enclosed portion of the road
for more than thirty years.

A most instructive case is that of Quinn v. Baage,6 decided
by the Iowa court in 1907. Upon the effect of encroach-
ments by an abutting landowner, the court said:

"Though the authorities are in conflict on the question,
this court is committed to the doctrine that in establishing
and maintaining a highway a municipality exercises gov-
ernmental functions, and for this reason the Statute of
Limitations does not run against it with respect to en-
croachment therein * * * * . But where the road has
been established and continually used, the mere fact that
the fences bordering it are not on the true line, and the
portion beyond has been occupied by the landowner up
to the fence, and not made use of by the public, will not
work an estoppel against the public, but the entire width
of the highway may be appropriated by the public when-
ever required for the purposes of travel * * * the fact
that the entire width has not been appropriated to such
use indicates no more than that in the opinion of the then
road officers all is not immediately necessary to meet the
demands of the traveling public."

While this excerpt shows that the court discusses the statute
of limitations, the doctrine of estoppel, and by implication
the doctrine of abandonment, it is clear that mere encroach-
ments upon a right of way not opened to the full width,
confer no rights upon the encroacher as against the public.
The case goes on to say:

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6 188 Ta. 426, 114 N. W. 205 (1907).
But that in such a case, the doctrine of acquiescence is inapplicable, the court stated:

"As an official of the county or township is (not) authorized to establish the line other than in its true location, it follows that the public cannot be bound by such an agreement, if made, or by acquiescence in a line erroneously treated as correct, no matter for how long a time."

The Quinn Case overruled the earlier Iowa decision of Axmear v. Richards, and commented upon Davies v. Huebner. In the latter case an adjoining landowner had erected a house in the year 1846, within the sixty feet set apart for a highway. However, a total abandonment by the public was shown. In discussing this phase of the question, the court in the Quinn Case went on to say:

"Where the nonuser has continued for such a length of time, and private rights of such character have been acquired by long continued possession and consequent transfer of lands by purchase and sales, justice demands the public should be estopped from asserting the right to open the highway. The first requisite to establish such estoppel should be that the adverse possession should continue for 10 years by analogy to the statute of limitations. Then it should be shown that there has been a total abandonment of the road for at least the period of ten years."

Quinn v. Baage was cited with approval in Pine v. Reynolds, a later Iowa case decided in 1919. The same rules are enunciated in Webb v. Butler County, by the supreme court of Kansas. There, the plaintiff's bill showed the authorization and establishment of a forty-foot highway on his prem-

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7 112 Ia. 657, 84 N. W. 686 (1900).
8 46 Ia. 574 (1887).
9 137 Ia. 579, 124 N. W. 257 (1919). An instructive note to this case, discussing the effect of encroachment in general is contained in 6 A. L. R. 1206.
10 62 Kan. 375, 34 Pac. 973 (1893).
is, in the year 1872, but the road was not actually traveled the full width, and the plaintiff had been in possession up to the traveled way for seventeen years at least. The court held:

"Having been legally authorized, laid out, and used, it is, in legal contemplation, a public highway. The fact that the public may not use or travel over the full width of such a highway will not operate to narrow it * * * * such limited use will not lessen the right of the public to use the entire width of the highway when the increased travel and the exigencies of the public make it necessary. It has been held that where an easement is obtained by adverse use alone, the extent of the easement must be measured by the actual use; but this rule has no application to a road of a certain width, authorized and established in pursuance of statute."

Keeping in mind that in this discussion it has been assumed at the outset that the ancient turnpikes in West Virginia were established by legislative authority, and in accordance therewith, sixty feet in width, it must be conceded that whatever rights the public may now have in those highways will be measured with reference thereto, and not with reference to the actual extent of the user. The reasons in support of this contention are well set-forth in the Maine case of Pillsbury v. Brown,11 decided in 1890. There the defendants acting in behalf of their town, widened a street in front of the plaintiff's hotel. Plaintiff sued in trespass, and the evidence showed that the street had been actually located on the ground and that the plaintiff's grantor had the lot surveyed with reference to such location. The court said:

" * * * when an easement of any kind is obtained by adverse use alone, its extent must be measured by its use. But this rule does not apply to ways which have commenced under an actual and recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law. In such cases, the use is presumed to be coextensive with the land purporting to have been conveyed by it. This result is sometimes reached by the presumption of a dedication, and sometimes by the presumption that the proceedings were all regular. In this

11 Supra, n. 4.
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state, the latter mode has been adopted ** ** **. It is the location de facto that by the lapse of time ripens into the location de jure. To rest such a result on a presumption of regularity is to rest it on a fiction; and to rest it on the presumption of a dedication would be equally so. We think it would be better to avoid these unnecessary fictions, and let the result rest on a positive rule of law, which, like all limitation laws, has the public good and the public convenience for a foundation. The rule of law is this: that after the lapse of 20 years, accompanied by adverse use, a location de facto becomes a location de jure.”

Having held that irregularity in the original proceedings could not diminish the public right, the court went on to say as follows:

“Where ** ** ** a tract 3 or 4 rods wide, such as is usually laid out as a highway, has been used as a highway, although 20 or 30 feet only have been used as a traveled path, still, this is such a use of the whole as constitutes evidence of the right of the public to use it for a highway, by widening the traveled path, or otherwise, as the increased travel and the exigencies of the public may require ** ** ** we hold in this case that the public is entitled to a way three rods wide, as originally laid out, notwithstanding the wrought part of it, and the part actually used by travelers, may have been very much less than that; and that the traveled path may from time to time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out.”

The principles enunciated in the foregoing cases, it is believed, are supported by the weight of authority in this country,12 and it is submitted that as a bare proposition of law, without regard to modifications by statute, it must be said that where a highway is legally established and located, but not actually used for the full width, abutting landowners cannot, without more, acquire any portion of the land within the limits of such way.

THE MICHIGAN RULE

It is now proposed, for the purposes of discussion, to ex-

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12 See cases collated in 6 A. L. R. 1206. Also cf. County of Piatt v. Goodell, 97 Ill. 84 (1889); Hamilton v. State, 106 Ind. 331 (1885); Fox v. Hart, 11 Oh. 414 (1842); Childs v. Nelson, 69 Wis. 125, 33 N. W. 557 (1887); ELLIOT, ROADS AND STREETS, 4th ed., §441 and n., p. 504.
amine the minority view, set forth by the supreme court of Michigan, in several cases. In *Lyle v. Leasia,* the plaintiff sought an injunction to restrain the defendants from plowing and ditching on his premises, on that portion of the latter which had been virtually abandoned for twelve years. The defendants sought to show that the vacating of the road was illegal because the records did not show that certain required notices had been given. But the court said:

"** * * * the action of the commissioners has for 12 years been accepted as valid by everyone concerned or interested in the premises, as well as by the public generally, we do not think the public authorities can now be heard to establish the illegality of their own proceedings in order to acquire the lands of the complainant for public use without compensation. Under their actions, in which all have acquiesced, he has gone on and improved the premises, and perhaps repurchased them, relying upon the fact that the road was abandoned, as he bought the land since the discontinuance of the highway. There is no principle of equity that will sanction or sustain the action of defendants in now seeking to rehabilitate this extinct road with the life it may have once had by reason of its user before its abandonment."

This would seem to be in accord with *Davies v. Huebner,* since, as said in that case, the two requisites to establish an estoppel were adverse possession for ten years and a total abandonment of the road; and it is upon that theory that the cases can be reconciled. However, *Coleman v. Railroad Company,* decided the same year, goes further. In that case, the plaintiff sued for the value of a horse killed by the defendant's cars. The railroad company maintained a fence at a crossing on the highway, assuming the latter to be four rods wide. But the plaintiff maintained his fence only fifteen feet from the center of the highway, thus leaving a break or gap between the two. The final question for decision resolved itself into this: within what limits was the defendant bound to maintain a fence? The evidence disclosed that the highway was laid out in 1832 and used for forty years, and the plaintiff had maintained his fence fifteen feet from the center of the way, for a period of thirty years. A further

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13 64 Mich. 16, 31 N. W. 23 (1887).
14 *Supra*, n. 8.
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consideration was that a statute adopted in 1881 made "all highways that are or may become such (public highways) by time and use, shall be four rods in width." The opinion goes on to state:

"In this case the fact that the road was never opened and worked by the authorities inside the line of the plaintiff's fence, but outside of it; that the public use and travel have also been outside of such fence, the plaintiff for over thirty years cultivating and holding the premises as his private property, and subject to no easement of the public, * * * is sufficient to rebut any presumption of any donation * * * ."

As to the effect of the statute, the court said:

"The legislature, in my opinion, in 1881, could not alter or change the vested rights of the plaintiff in the premises. It would be taking the land of the plaintiff, without compensation, for public use, and without his consent."

That the court meant to establish a doctrine favorable to encroaching landowners is shown by point two of the syllabus, which is as follows:

"Where a highway, as used and worked for thirty years, is less than 4 rods wide, and the owner of the adjoining land has used and occupied the land up to the boundary of the road as used for that period, he acquires title to the land up to that line, whether the road was regularly laid out as a highway or became such by user, and the true boundary of the road is the boundary of the land used as such."

This is in effect, a doctrine of adverse possession as against the public, or it may be considered as a theory of partial abandonment by nonuser. Thus, as said by the court in Gregory v. Knight, by way of dicta:

"It would be wrong and illegal to put a highway, as against long possession, on any better footing than other property. Highways may be wholly, and there is no reason to hold they may not be partially, discontinued by nonuser. It is the business of the authorities when roads are laid out to take some pains to designate the boundaries on the ground, and to have the lines visibly defined. If this is not done, the mischief of unsettling

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10 Italics writer's.
11 14 Mich. 700 (1883).
what is generally accepted will be very great, and the
rights of parties, whether depending on surveys or pos-
session, will be protected by the ordinary courts of jus-
tice."

As would be supposed, however, the Michigan court holds
that these principles have no application to that part of
the way which has been kept in use for public travel.18

We therefore perceive, as was said in Quinn v. Baage,19 a
conflict in the authorities. Courts have, in holding to the
majority view, evidently been imbued with the notion that
there is a more or less mysterious sanctity in the "public
right." It is not difficult to reach such a conclusion by
relying upon such impeccable maxims as "Rex non potest
pecare." Yet, it is submitted, to hurl such quotations at the
rural West Virginian, in the year 1927, and explain that by
reason of legal necromancy, filtering through the ages, his
choice farmland is to be taken for a highway without com-
 pensation, is to pile insult upon injury. And it is immu-
terial that the farmland may not be choice. The result is
the same; for the taking of the property is not the thing of
value; it is the infringement of the supposed legal right.
Such was once the view of our own supreme court.

THE WEST VIRGINIA DECISIONS

In City of Wheeling v. Campbell,20 the plaintiff applied for
an injunction to restrain the defendants from erecting a
building in the city street, which was shown to have been
laid out pursuant to an act of the Virginia Assembly and
surveyed as sixty-six feet wide. The defendants and their
grantors claimed to have held adversely since the year
1847, which was forty years prior to the institution of the
suit. The court was cognizant of the maxim "nullum tempus
occurat regi," but considered whether it should apply to munici-
pal corporations, and said:

"Public corporations, as distinguished from private
corporations, are such as exist for public political pur-
poses only, such as counties, cities, towns, and villages
* * * *. But the reason which upholds the rule of
nullum tempus, etc., when applied to the sovereign, does not

19 Supra, n. 6.
20 12 W. Va. 36 (1877).
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in our opinion, excuse the *laches* of the officers of these small communities. The plea of *nullum tempus*, etc., is as before mentioned, one that peculiarly belongs to the sovereign, or to the commonwealth, to be exercised for the public good * * * *. The King, or State cannot be presumed to mean wrong, or to have an interest inconsistent with justice. But these communities, like the individuals who compose them, have no such legal presumption in their favor."

At that time, the statute of limitations running against the state, was worded thus: "Every statute of limitation, unless otherwise expressly provided, shall apply to the State, but as to claims heretofore accrued, the time shall be computed as commencing when this chapter takes effect." As it now reads, in Chapter 35, §20 of the Code, very little change has been made. The present form of statute was enacted on February 9, 1882, and has been held constitutional.21 Perhaps the first intimation of a change in the doctrine of *City of Wheeling v. Campbell*, was contained in a dictum in *Foley v. County Court*.22 Judge Brannon, referring to a Georgia case, said:

" * * * even where there is a statute making adverse possession apply to the state, the statute is to be construed as intended to apply only to such property as is held by the state like an individual proprietor * * * * and as not intended to apply to property held by the state for purely governmental purposes."

Continuing, Judge Brannon further said:

"A county or town is not the state. The state does not own a court house lot or street or road; indeed, I go further and say that as to a highway neither the county nor town owns it; nobody owns it; only that non-corporate, indefinable 'public' owns it, if ownership any where there is * * * *. The statute of limitations supposes a right in one party to be made good by time, and a right in another to be defeated by time. Who has the right in a highway to be defeated by time? There is no legal entity to which the statute can apply, no person against whom it can run, no individual right."

No mention was made in the last-cited case, of *Wheeling v. Campbell*. Apparently it was overlooked. The dictum of

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22 54 W. Va. 16, 46 S. E. 246 (1903).
Judge Brannon, as above quoted, will be of interest to students of the law of titles to real property. In *State v. Harman*,23 it was held that the statute of limitations runs against the State as to its land not used in governmental administration, i.e., "wild land." In *State v. Mines*,24 our court held that the provision of the Code of 1868, was not repealed by Chapter 55, Section 19 of the Acts of 1875, which latter provision was that "There shall be no limitation to proceedings on judgments on behalf of the State or any claim due the State," but that the latter simply took out of the statute of limitations, judgments and money claims of the state; and that when the said Act of 1875 was itself repealed, such judgments and claims of the state were again made subject to the statute of limitations.

For sixteen years, the doctrine of *City of Wheeling v. Campbell* was the law of this state. But in 1899 it was overruled by *Ralston v. Town of Weston*.25 Judge Dent, delivering the opinion, stated:

> "The case of *City of Wheeling v. Campbell*, while ably considered in following the supposed weight of authority, is a plain and palpable misapplication of the statute of limitations to the sovereign rights of the people. That the statute of limitations applies to municipal corporations there can be no question; * * * but it does not apply to the sovereign rights of the people, except as they are restricted in the constitution by their manifest will therein contained."26

The court did not state whether by "municipal corporations," it meant to include county courts, but such is not the inference from the following:

> " * * * we can well say that its highways are the only property the people of West Virginia hold in their sovereignty capacity, and in these every individual has the same right, from the least to the greatest, and from which no one, however weak or small or mean, can be excluded * * * * . It matters not whether they be in the town or country, the same protecting egis watches over them and this is the sovereignty of the people. The public do not hold the title in fee. It may be in the original owner,

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23 57 W. Va. 447, 50 S. E. 828 (1905).
24 Supra, n. 21.
25 46 W. Va. 544.
26 46 W. Va. 544, 547.
the abutting lot owners, the municipality, or State, and there it rests in abeyance as long as the land is needed by the public, who hold only an easement therein."

It is submitted that the last phrase of the above quotation is erroneous if meant to apply to turnpikes, in view of our statute, of which more will be said later. The court went on to argue that since the public had the right to take private property for public use, the right to keep it inviolate for the same use, should be coextensive. The doctrine of public nuisances was discussed, but no such distinction was made as in the New York case, between active and passive. Our court said:

"If the easement is interfered with by an individual while it is alive, such interference is a public nuisance, and it matters not how long it is continued, it can never destroy the easement; for it is under the ban of the law, and subject to abatement at any time. ** Once a nuisance, always a nuisance; once a highway, always a highway, until legally discontinued, changed, or altered. ** So it may be said of the county, so it may be said of the State, and every public officer or agency; for they are all merely trustees and servants of the people." "

Returning to City of Wheeling v. Campbell, Judge Dent finally said:

"The oversight in the learned JUDGE'S opinion, and the numerous decisions on which he places his reliance, is his failure to distinguish the municipality in its private, ministerial, and local governmental capacities, from the municipality in its higher governmental capacity as the agent of the public, charged with the duty of preserving the sovereign rights of the people. The municipality, though it may own the fee, is not the owner of the public easement in the land."

It is submitted that this is loose language. In one paragraph the court speaks as if it meant that the particular governmental agency held the fee, in trust, so to speak, for the beneficial use of the general public. In another, it mentions easements, as apart from a trustee relationship. Certainly, it serves no purpose to be unduly insistent upon tech-

\[^{27} 46 W. Va. 544, 548.\]
\[^{28} 46 W. Va. 544, 551. Italics writer's.\]
\[^{29} 46 W. Va. 544, 552.\]
nical points of law; but it seems equally certain that loose language may often be the result of loose thinking, with a consequent erroneous conclusion. And, it is submitted, such conclusions are more apt to be reached when the court of to-day applies the words of yesterday to the facts in hand.

It would seem that the holding of the court required no decision as to the applicability of the doctrine of equitable estoppel. However we find the following:

"The cases of City of Wheeling v. Campbell, Forsyth v. City of Wheeling, and Teas v. City of St. Albans, in so far as they hold that public easements in the public highways can be destroyed by private individuals contrary to the sovereign will of the people, are hereby disapproved as erroneously propounding the law.

"Nor does the doctrine of estoppel apply in such cases. [Citing cases.] The statute of limitations is a mere legal estoppel, and, if not applying to legalize a public nuisance, neither does equitable estoppel; for equity follows the law, and will grant no relief to a lawbreaker or wrongdoer. Clean hands and a clear title are always equitable requirements."

However, succeeding sentences seem to show that the court was referring to cases in which there was a wilful attempt upon the part of the landowner to acquire property which he knew to be charged with the public easement. This is illustrated by the following:

"There may arise cases of particular hardship, where, through negligence or mistake of the public officers, valuable improvements, under a bona fide claim of right, may be erected by the abutting lot owners, invading and destroying, without wrongful intent, the public easement in a portion of the adjacent street. * * * * Such invasion is sometimes slight in comparison with the improvements made, and at other times it is much more serious. * * * * To abate such structure as an ordinary nuisance would be a tyrannical act of governmental power, which finds no lodgement in the breasts of a free and just people. The mistake having been mutual or occasioned by the negligence of the public, and the property owner being free from evil intent, the loss should fall on the people, as most able to bear it, rather than on the individual, who

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31 46 W. Va. 544, 554-555.
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may be rendered bankrupt if he must endure it.”

It must be fairly admitted that here the court had in mind an urban situation, and not one such as we have supposed in this discussion. Quaere: Should the same principle apply? Ralston v. Town of Weston has been approved in subsequent decisions, and is seemingly the law of this state in so far as it is applicable to similar states of fact. We now come to a consideration of the effect of statutory enactments. Chapter 39, Section 21 of the Code provides that:

“The interest which belonged to the State on the first day of July, one thousand eight hundred and sixty-eight (whether as owner, or one of several owners, or a shareholder or stockholder) in any road (including turnpikes and plank roads) lying wholly or in part within the limits of a county, is transferred to and shall continue vested in such county so far as such road, bridge, or public landing is within said county; together with all the rights and powers of the State pertaining thereto as such owners.”

Before discussing this, §23 of the same chapter should be noted:

“* * * * And when any county acquires the interest of the State, or any other stockholder in any road, bridge, or public landing, under either of the two preceding sections, the county court of such county shall have all powers, rights, and privileges, perform all duties and be subject to the same liabilities that were vested in, held, exercised or required to be performed by or imposed upon the State or other former stockholders therein.”

If the county court thereby acquires the interest of the state, or any other stockholder, it becomes pertinent to remember that the ancient Virginia statute first referred to, enacted that “the said road, with all the tolls and profits, shall be, and the same is hereby vested in the respective proprietors forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever.” Does then, the county court have only personal estate by force of §23? Certainly, by virtue thereof alone, it could not acquire more than the former stockholders of a turnpike company had,

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BARNES' W. VA. CODE, 1923.
Parentheses writer's.
which as we have shown is deemed to be personal property. But to argue that such a result would obtain, it is submitted, is to put too great a strain upon words and logic. Surely the Virginia Assembly in the year 1817, still imbued with the common law of England, did not intend to revolutionize the law of real property. At least, they did not intend so to alter it that the ancient and hallowed doctrines of adverse possession, abandonment, and the like would be cast aside, and to enact that in determining the legal rights pertaining to a public highway, the courts should peer into authorities upon the law of personal estate. But let us have what light the decisions of the court throw upon the statute. In *Moore v. Schoppert*, it was said:

"This legislation, it seems to me, was intended to transfer to the different counties the interest of the State in the turnpike roads or parts of such roads, lying in the respective counties and to confer upon the county courts of such counties the control of the interests of the State thus transferred to the respective counties, and also to give the county courts control of such roads, or parts of roads, as any county may by agreement, condemnation, or otherwise, acquire * * * *, or of such roads as may have been entirely abandoned by the corporation or private stockholders."

However, even this statement does not purport to vest in the counties more than the state or the turnpike corporation had therein. But it seems that the court will take judicial notice of that interest, whatever it may be. Witness the following, quoted from the same case:

"While the record does not show any interest in the county, it may be assumed the court judicially knows that, by the policy adopted by the State of Virginia and which was carried on when said road was constructed, the said State, for the encouragement of internal improvements and the development of the State, made liberal subscriptions to the capital stock of almost every company incorporated by it for works of internal improvement and especially companies incorporated for the construction of turnpike roads."

But it is perhaps useless to cite cases and quote from decisions further. From the foregoing, several conclusions

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*22 W. Va. 282 (1888).*
COMPENSATION TO LANDOWNERS FOR PROPERTY

would seem to be justified: That the turnpike corporations, proceeding under the old Virginia statute, acquired a fee simple to sixty feet of land all along the location of their roads; at least something greater than an easement. That such interest in fee, is now vested in the respective county courts of those counties through which the ancient road passed. That such interest has, from the moment of its creation, been held subject to the public right. If so, how can an adjoining landowner, or group of landowners, acquire a portion of that fee, and thereby a portion of the public right? We have seen that the majority of courts refuse to permit an acquisition by the landowner under the doctrine of adverse possession. Likewise under the doctrine of abandonment, unless such abandonment be total. Likewise as to the theory of acquiescence, upon the ground that there is no legal entity authorized to acquiesce on behalf of the public. As to estoppel, the landowner finds more encouragement.35

No attempt has been made in this discussion to argue upon either side of the question. But the points here raised, it is submitted, will at some time, necessarily be determined by our court. The problem for every lawyer involved in such a case will be, of course, what is the law? An historical and mechanical jurisprudence would seem to reply in favor of the public right to claim the entire sixty feet. But a sociological jurisprudence may take into account the result to be reached. In the final analysis, which is the more socially desirable result: that the state or county should build roads and in doing so, take what for scores of years has been considered by the public in general as private property; or that a fair compensation should be made to bona fide purchasers of property, who have been lulled into security by the negligence and ignorance of the public officials? Another distinction should be noted. That is, that the very great mass, if not indeed all, of the decisions of the courts, both in this and in other states, involving the rights of abutting landowners, have been cases of isolated or individual encroachment. Should it make a difference

35 Recent West Virginia cases pertinent to the entire subject are State v. Road Commission, 96 W. Va. 184, 122 S. E. 527 (1924); County Court v. Hamlett, et al., 101 W. Va. 676, 133 S. E. 388 (1926).
in the rule when not one, or two, or six landowners have encroached, but hundreds? This is a small "public" in itself. True, a thousand trespasses or nuisances could not render one legal. But the number may be important upon the question of abandonment, which, after all is a question of intention. In the face of such preponderant evidence, could it not be construed as evincing an intention upon the part of the public, through its officials, to abandon fifteen feet on each side of the ancient turnpikes? And, as said by the Michigan court, if there can be a total abandonment, no reason is perceived why there cannot be a partial abandonment. It is a novel proposition that the parts may be greater than the whole.

Upon the other hand, the admitted advantages which accrue to landowners when a highway is improved by the public authorities, almost always confer a benefit greater in value than the market value of the land taken, plus damages to the residue. Admitting that these are "general benefits" which would be disregarded in a condemnation proceeding, still it is submitted that the court might properly take them into consideration if it attempted to apply the doctrine of equitable estoppel. Upon the whole question, we may reach opposite conclusions, depending upon whether we regard the law as that which is contained in reported decisions, or with Mr. Justice Holmes, only a prophecy of what the courts will do in fact.

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38 Supra, n. 17.