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# Property—Stae Acquires Property Rights Without User or Evidence of Compensation

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tenuous reasoning in the *Incres* case, if the courts continue to extend the arguability rule, it seems certain that the Supreme Court will have to define the scope of the Act more precisely. If this is not done, it is not unlikely that in the near future a court will decide that facts similar to those in the *Benz* case present a case failing within the rule. The danger of calling a black case grey clearly presents itself.

*T. C. L.*

## PROPERTY

STATE ACQUIRES PROPERTY RIGHTS WITHOUT USER OR EVIDENCE OF COMPENSATION

*Schillawski v. State*[1] arises from a claim of several property-owners for damages for de facto appropriation of part of their lands by expansion in 1951-52 of a state highway known as U.S. Route 20. By Chapter 78, Laws of 1800, the Seneca Road Company, a private concern, was authorized to build a toll road, the Seneca Turnpike, from Utica to Canadaigua. A right of way 6 rods wide was granted. Required improvement was to be at least 24 feet. The toll road was to follow the existing Genesee Road, also with right of way of 6 rods. Where deviations were necessary from Genesee Road, the company could purchase or condemn the land needed to fill out the 6 rods. The new road did, in fact, deviate in the area of claimants' land but there was no evidence of payment by the company for the land as required by the statute. Until 1951 the road was never improved to more than 20 feet; then the State widened it to 48 feet. The Court of Claims disallowed the claims, accepting the State's contention that the lands in question were within the boundaries of a pre-existing highway easement.[2] The Appellate Division affirmed.[3] Upon an appeal by permission, the Court of Appeals found that the State had acquired prescriptive rights of 6 rods width along the course of the Seneca Turnpike.

Although the road had only been used to a width of 20 feet (although by the statute it was to have been at least 24) and there was no evidence of the required compensation for land taken at deviation points, the Court held that where the road had been laid out under a statute, the statute, rather than actual user, determined its width, *i.e.*, 99 feet. *Marvin v. Pardee*,[4] cited by appellants, held there was no satisfactory evidence of acquisition of land for a road because there had been no filing of a map or survey of lands acquired by the Seneca Road Company, as required by an 1806 amendment to the 1800 Act. But this case is distinguished by the Court by the lack of any such filing requirement in the 1800 Act itself upon which the instant case turns. However, such a

1. 9 N.Y.2d 235, 213 N.Y.S.2d 68 (1961).
2. 10 Misc. 2d 918, 173 N.Y.S.2d 49 (Ct. Cl. 1958).
3. 8 A.D.2d 992, 188 N.Y.S.2d 968 (4th Dep't 1959).
4. 64 Barb. 353 (1872).

distinction obscures the important similarity in the *Pardee* case and the instant case that in both, land was taken by a government without evidence of compliance with the enabling statutes' provisions: in one case, evidence of compensation by either purchase or condemnation; in the other, evidence of compensation and also a filing of maps and surveys.

The majority applied to this decision a "widely-recognized rule" that where a highway is defectively laid out "under color" of statutory authority, the width created by prescriptive right will be determined by the statute, not the actual user.

Judges Froessel and Foster strongly dissented from the majority holding. They pointed out that although the 1800 statute granted a right of way to the Road Company, where the Turnpike deviated from the Genesee Road the company must purchase or condemn the land thus taken.[5]

The result of the majority opinion is a disturbing one. Appellant notes that to his knowledge the Court of Claims ruling below, here affirmed, is the first case decided in New York in which the width of a highway based on a statute, rather than user, has been upheld where no map or survey of the highway has been recorded.[6] The Legislature in 1800 authorized a company created for private gain to build a highway 99 feet wide, buying or condemning land where necessary. One hundred sixty years later, with no evidence that any land was purchased or condemned and all historical evidence showing actual user of no more than 20 feet, the lower courts, ostensibly in furtherance of their notion of public policy, assume all terms of the statute had been complied with by the officers of the Seneca Road Company. While there is some public policy justification for such an assumption where public officers are involved, little rationale exists where the men charged are interested in personal gains and in opening a passable and thus tollable road as cheaply as possible.

The majority holds that a right of way 99 feet wide was acquired by prescription by the State. The general rule is that prescription only obtains by actual use. One exception to this rule is that of *Walker v. Caywood*:[7] "But where the road has been laid out under a statute, it is the statute and not the user that determines the width. Nor does the failure of the State to occupy the full width, or to improve the road in the manner provided, constitute an abandonment of the easement of the unused portion."[8] However, the dissent counters that *Walker v. Caywood*, regardless of its validity, is not pertinent here because the land in question here was not mentioned in the statute so as to give "notice." This land was a *deviation* from the Genesee Road mentioned in the statute.

But the Court goes much beyond *Walker v. Caywood* and follows what the

5. N.Y. Sess. Laws 1800, ch. 78, pp. 526-527.
6. Brief for Claimants-Appellants, p. 15, Schillawski v. State, supra note 1.
7. 31 N.Y. 51 (1865).
8. Schillawski v. State, supra note 1 at 238, 213 N.Y.S.2d at 70.

dissent labels "an exception apparently recognized in Montana and Maine" that since the company acted "under color" of a statute granting a 99 foot right of way, the State acquired the 99 foot right of way as though the Turnpike Company had properly purchased or condemned all the land needed. The incomprehensibility of this *non sequitur* is apparent. Mere authorization of a road 99 feet wide, although the private company fails to obtain title by proper compensation for the land, creates a 99 foot right of way in the State. The minority properly calls this "bald confiscation." Although there does not seem to be any New York law on point, the reasoning behind this rule appears to be that the statute authorizing the building of the road was sufficient notice to the public of the legislative intent to use specific land for a public highway. But this rationale fails to convince for the same reason the rule taken from *Walker v. Caywood* is not pertinent to the instant case; the land in dispute was a deviation point not mentioned in the statute as to give notice. In addition, the rule begs the question of whether compensation has been or should be paid, regardless of whether the State ultimately obtains the land.[9]

Not mentioned by the majority was the purchase, with State authorization, of land by the county within the 99 foot right of way. This occurred in 1928. If the State had acquired the land through the actions of the Road Company pursuant to the enabling statute of 1800, why did it authorize this unnecessary purchase a century later?

The court, in *Marvin v. Pardee*,[10] expressed an opinion adopted by the dissent in the instant case. Referring to one of the Seneca Turnpike laws, it said the law was not intended to effect a transfer to the company of the title to the land, which it had not obtained by one of the prescribed methods (*i.e.*, purchase or condemnation and then filing). Balancing the public need for state highway improvement against the individual right to property is a delicate task. Property may rightly be taken for necessary public use. About this there is little room for strong argument. But compensation is essential. There was no user to justify the creation of prescriptive rights to 99 feet.[11] Where claimant has made an allegation of no compensation, the State should have the burden of showing that the Road Company had gained proper title to the land by just compensation.[12] Barring such proof, the claims for damages of the titleholders ought to have prevailed, while the public need was amply satisfied by the State's de facto expansion onto the property.

*R. V. B.*

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9. See Rochford v. State, 153 Misc. 239, 244, 274 N.Y. Supp. 656, 660 (Ct. Cl. 1934).
10. Supra note 4.
11. Brief for Respondent, p. 2, Schillawski v. State, supra note 1 at 240, 213 N.Y.S.2d at 73.
12. U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, § 6. See Porter v. State, 5 Misc. 2d 28, 31, 159 N.Y.S.2d 549, 553 (Ct. Cl. 1957), citing Rochford v. State, supra note 9.