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The Amended and Reenacted Delinquent and Nonentered Land Statutes--The Title Examination Ramifications

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THE AMENDED AND REENACTED DELINQUENT
AND NONENTERED LAND STATUTES — THE
TITLE EXAMINATION RAMIFICATIONS

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I. INTRODUCTION

Black’s Law Dictionary defines an ad valorem tax as that “imposed on the value of property.” In addition, it notes that the “more common ad valorem tax is that imposed by states, counties, and cities on real estate.” Such a value-based tax has been imposed upon the real estate situate within West Virginia since the state’s admittance to the Union. In fact, the ad valorem taxation of real estate lying west of the Allegheny Mountains was originally Virginian in design.

As an incident of real property ownership, the ad valorem taxation of real property constitutes one of the numerous concerns of a title examiner in West Virginia. For instance, on July 1 of each year a lien attaches on all land located within the state for the ensuing year’s real property taxes. That is, on July 1, 1995, a lien attaches for the property taxes assessed for the 1996 tax year. Furthermore, before the sheriff commences collection of the 1996 taxes on, or soon after, July 15, 1996, a lien has already attached to the property as of July 1, 1996, for the 1997 taxes. Therefore, real estate in West Virginia is always encumbered by at least one, and occasionally two or more, property tax liens. In addition, it is the express duty of each land

1. BLACK’S LAW DICTIONARY 51 (6th ed. 1990). In the course of developing this Article, the author relied upon one certain work as a general guide to the issues presented by the delinquent and nonentered land statutes, J. Thomas Lane, Ad Valorem Taxes in West Virginia (1990) (unpublished report, on file with Professor John W. Fisher, II). While this work was not relied upon as an authoritative source, it was extremely helpful as a reference against which my own analyses and theories could be checked.
4. Id.
owner to have "his land entered for taxation on the land books of the appropriate county, have himself charged with the taxes due thereon, and pay the same."\textsuperscript{10}

In the preceding article, Professor John W. Fisher, II discussed the subject of title examination in West Virginia. This discussion concerned topics such as the recording statutes; the legal requirements of deeds; chain of title; actual, constructive, and inquiry notice; and the adversing of owners. The article visited both the substantive law which dictates the perimeters of a title examination, as well as some of the more practical mechanics of an examination. However, the article provides, and was intended as, an overview of the title examination process, rather than an in-depth analysis of each and every facet of the process. Therefore, with the recent repeal of several sections of Article XIII of the West Virginia Constitution,\textsuperscript{11} and the adoption of a relatively new scheme with respect to delinquent and nonentered lands,\textsuperscript{12} Professor Fisher's article is not positioned to bring an in-depth analysis of real property taxation within its scope. Thus, this Article is an attempt to define what the newly enacted statutory scheme requires of a title examiner.

The purpose of this Article is to define, under the new statutory scheme,\textsuperscript{13} what realty tax-related determinations a title examiner must make in rendering a title opinion or certification. In pursuit of this purpose, the scope of this Article is twofold. First, it will present those determinations which the examiner must make in the course of every title examination. And second, it examines the determinations an abstractor should make when his chain of title contains realty conveyed by the clerk of the county commission because of the nonpayment of taxes.\textsuperscript{14}

\textsuperscript{10} W. VA. CODE § 11A-3-37 (1995).
\textsuperscript{11} Sections 3, 4, 5, and 6 of Article XIII were repealed effective July 1, 1993.
\textsuperscript{12} W. VA. CODE §§ 11A-3-1 to -74 (1995); W. VA. CODE §§ 11A-4-1 to -7 (1995).
\textsuperscript{13} The scope of this Article is exclusively limited to the requirements and mandates of the new statutory scheme, and does not include within its scope an analysis of the former scheme, although the former scheme does remain relevant to the title examination process.
\textsuperscript{14} While the new statutory scheme also sets forth a procedure for disposing of nonentered lands which differs from the former system of forfeiture, and a procedure for
II. PERSPECTIVE

Effective July 1, 1994, the West Virginia Legislature amended and reenacted Articles three and four of Chapter eleven-A of the West Virginia Code. \(^{15}\) Behind this amendment and reenactment was the Tax Forfeited Property Project commissioned by the West Virginia Law Institute. \(^{16}\) The underlying objective of the project "was to engage in a lengthy, scholarly examination of West Virginia's system of tax sales, and to eventually propose statutory, and, if necessary, constitutional changes which would enable the State to conduct tax sales in an efficient, yet constitutional, manner." \(^{17}\) "The central issue in reform of the tax sale statutes [was] due process, and the extent to which the United States Constitution limits the ability of the state to take title from a property owner for failure to pay taxes or have property entered on the land books." \(^{18}\) Prompting this effort at reform, and the overall awareness that West Virginia law was in conflict with the United States Constitution, was Mennonite Board of Missions v. Adams. \(^{19}\) The Law Institute, as well as Professor Fisher, \(^{20}\) recognized that Mennonite "directly conflict[ed] with West Virginia law in two respects." \(^{21}\) First, property forfeited for nonentry was being "taken" without notice. \(^{22}\) Second, although the then enacted scheme "provide[d] that lienholders of record [were] entitled to notice by certified mail of a certifying property to the auditor when the tax lien is not purchased at the sheriff's sale, these procedures exceed the scope of this Article. Furthermore, the second focus of the Article is not concerned with the process of applying for a tax deed where a tax lien has been purchased at a sheriff's sale; but, rather, it concerns the determinations that must be made where such a tax deed crops up in the chain of title.

22. id.
sheriff's sale of real property against which they h[e]ld a lien,"23 sheriffs throughout the state were not complying with the requirement.24

In response to these conflicts between due process guarantees and the former system, the new legislation, inter alia, (1) set forth a revamped procedure with respect to nonentered lands, and (2) shifted the burden from sheriffs to lienholders where notice prior to the sheriff's sale was concerned. As a result of these changes, the question arises: What determinations does a title examiner now need to make in order to certify title or render an opinion as to the marketability of title? That is, what are the practical mechanics of a title search after the amendment and reenactment of West Virginia's delinquent and nonentered land statutes?

III. THE MECHANICS

With respect to the role real property taxes play in a title examination, there are three essential determinations to be made. First, has the property been entered on the land books at least every fifth year within the time perimeters of the examination? Second, have the taxes been paid over the past ten consecutive years? And third, which reality taxes constitute a lien against the property, despite the fact that they are not, at the time of the examination, payable?

A. At Least Every Fifth Year

West Virginia Code Section 11A-3-37 provides that:

It is the duty of the owner of land to have his land entered for taxation on the landbooks of the appropriate county, have himself charged with the taxes due thereon, and pay the same. Land which, for any five successive years, shall not have been so entered and charged shall, without any proceedings therefore, be subject to the authority and control of the

23. Porter, supra note 16, at 10 (discussing W. VA. CODE § 11A-3-2 (repealed 1994)).
24. Porter, supra note 16, at 5, 10. As the project notes, this failure on the part of sheriffs to comply with the law was due to inadequate resources. The funds and staffing were simply not available for sheriffs to perform title examinations, even of the most superficial nature, in order to discover the existence and whereabouts of lienholders.
auditor and such nonentered lands shall thereafter be subject to transfer or sale under the provisions of this article relating to the auditor's disposition of lands certified to the auditor pursuant to [West Virginia Code Section 11A-3-8].

Therefore, the new statutory scheme, as did the old, makes it "the duty of the owner of land to have his land entered for taxation on the land books of the appropriate county, have himself charged with the taxes due thereon, and pay the same." Thus, the burden of ensuring that property is entered on the rolls and charged with taxes falls, not on the assessor, but on the landowner. In addition, the statute further provides that land "which, for any five successive years," is not "so entered and charged shall, without any proceedings therefor, be subject to the authority and control of the auditor," who shall certify it to the deputy commissioner of delinquent and nonentered lands for its ultimate disposition.

Therefore, given the duty imposed upon landowners to have their property entered on the land books and charged with taxes, and the consequences resulting from their failure to do so, it is apparent that the examiner must ensure that there are no "gaps" of five or more successive years during which the real estate went unentered. That is, the examiner must determine that the property was in fact entered on the land books at least every fifth year within the time perimeters of the examination. For instance, if in January, 1996, an examiner is searching title for the previous sixty years, he should check that the property was entered upon the land books of the appropriate tax dis-

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27. See generally Don S. Co., 285 S.E.2d at 492.
31. Id.
32. See LARRY L. SKEEN, WEST VIRGINIA OIL AND GAS LAW § 10.9, at 174 (1984) [hereinafter SKEEN] ("Code § 11A-4-2 [(repealed and succeeded by West Virginia Code Section 11A-3-37)] provides that lands and interests in land must be assessed in the appropriate county land books at least once each five years; otherwise the title to the non-listed realty or realty interest automatically forfeits to the state. For this reason the land books should be consulted at least once every fifth year during the period of the search to verify appropriate listings.")
dict for 1995, 1990, 1985, 1980, and so on back until the year 1935. By determining that the property has been assessed at least every fifth year, the examiner is ensuring that the property has not, by operation of law, become subject to the authority and control of the auditor and a candidate for sale by the deputy commissioner. Furthermore, this determination also ensures that title to the property was not forfeited to the state for nonentry under the former statutory scheme (arguments as to its constitutional validity aside).  

33. The 1995 land books would have been put of record in the office of the clerk of the county commission as of July 1, 1995. W. VA. CODE § 11-3-19 (1995). The land books containing the assessments pertaining to the 1996 tax year would not be put of record until July 1, 1996. Id.

34. See W. VA. CODE § 11A-3-72 (1995) (providing that “all taxes, interest and charges that may be due on any real estate in this state for assessment year [1935] and for all years prior thereto [are released], and all such taxes, interest and charges are hereby declared to be fully paid.”). Of note is the fact that the statute only addresses the release of “taxes, interest and charges,” and does not address whether the state’s title and claim to, or control of, nonentered lands is also released. Id. That is, the statute does not in any express way address those lands which forfeited to the state for nonentry prior to the 1936 tax year, and does not appear to afford its protection to lands not entered prior to 1936. Therefore, because of the conspicuous absence of any reference to forfeitures or nonentries, it seems that the examiner should look before 1936 for entries on the land books, if the time frame of the search so requires. However, in response, it is arguable that the declaration that all taxes, interest, and charges are deemed fully paid and released, implicitly carries with it an exoneration for those properties which were not entered. That is, all taxes are fully paid for all real estate situate within the state, not just that realty entered on the land books for 1935 and before. With respect to these opposing arguments, I believe the former to be the more persuasive, and thus advocate verifying entry within the entire time period of the search, notwithstanding the pre-1936 moratorium. In addition, the real estate, or interest therein, might have been forfeited and subsequently sold by a deputy commissioner prior to enactment of the moratorium statute.


37. W. VA. CODE § 11A-4-2 (repealed 1994) (codifying W. VA. CONST. art. XIII, § 6 (repealed July 1, 1993)). Section 11A-3-68 provides that “[a]ll lands which have heretofore been forfeited to the state pursuant to the provisions of former article four of this chapter, and which have not been certified to the circuit court for sale pursuant to such article, shall be deemed nonentered pursuant to” Section 11A-3-37 and shall be ultimately subject to sale by the deputy commissioner. W. VA. CODE § 11A-3-68 (1995). The statute treats those lands which were forfeited under the former system as actually being “forfeited” under the new system. Id. Thus, while the property was forfeited to the state, and the state took title by such forfeiture (due process arguments aside), the nonentered property, having not been certified to the circuit court for sale, is now deemed to be subject to the authority and control of the auditor, and not “owned” by the state. That is, while property may have been
B. Ten Consecutive Years

In addition to determining that the property has been entered on the land books at least every fifth year, the title examiner should also determine whether the property taxes have been paid for each of the past ten years.38 The reasons underlying this determination are essentially threefold. First, the examiner needs to determine that the statute of limitation as to delinquent tax liens has run. Second, that whatever title, claim, or control the state may have with respect to the property, if any, has been released. And third, that no tax liens arising within the past ten years remain as encumbrances on the property.

1. Statute of Limitation as to Tax Liens

The first purpose served by determining whether the property taxes have been paid for the past ten successive years concerns the statute of limitation set forth in West Virginia Code Section 11A-3-70. This Section provides:

In view of the desirability of stable land titles and to encourage landowners to cause their lands to be assessed and pay the taxes thereon, it is the purpose and intent of the Legislature to release all of the state’s title and claim and the authority and control of the auditor to any real estate on which all taxes have been paid for ten consecutive years and release all taxes prior to such ten-year period. If, heretofore or hereafter, all taxes due on any parcel of land for ten consecutive years have been fully paid,

38. As footnoted above, supra note 33, land books are put of record in the office of the clerk of the county commission on July 1 of each tax year. W. VA. CODE § 11-3-19 (1995). For instance, the land books for the 1996 tax year are placed of record on July 1, 1996, notwithstanding the fact that the lien for the 1996 taxes attached to the property on July 1, 1995. W. VA. CODE § 11A-1-2 (1995). Therefore, when running title in the early part of the year, prior to July 1, the latest land book of record will be for the previous tax year. Furthermore, taxes for any given year do not become payable until about two weeks after the land books for that year are put of record. W. VA. CODE § 11A-1-6 (1995) (stating that the sheriff shall commence collection on, or soon after, July 15). Thus, as a general statement, the only taxes which are payable and extinguishable as a lien against the property are those for which a land book is of record.
all title to any such land acquired by the state prior to said ten-year period or all real property tax liens which subject the land to the authority and control of the auditor prior to said ten-year period shall be and is hereby released to the person who would be the owner thereof but for the title of the state or the real property tax liens which subject the lands to the authority and control of the auditor so released and all unpaid taxes prior to said ten-year period are declared to be fully paid.39

The statute provides that if taxes are paid for ten successive years, all tax liens which exist for years prior to the ten-year period are released and no longer constitute an encumbrance on the property. Therefore, to foreclose the issue of outstanding tax liens from decades past, the statute of limitation provision of West Virginia Code Section 11A-3-70 is a basis for determining that the property taxes have been paid for the last ten consecutive years.

2. The Automatic Cure

a. Nonentry Prior to Reenactment

As with the first purpose for determining whether taxes have been paid for the past decade, the second also finds its foundation in West Virginia Code Section 11A-3-70. In addition to releasing "tax liens which subject the land to the authority and control of the auditor,"40 this Section also effects an automatic release of all title posited in the state under the former forfeiture system.41

Section 11A-3-37 imposes a duty upon landowners to have their property entered and charged. The penalty resulting from the failure to satisfy that duty is a harsh one. Any property not entered on the land books and charged with taxes for five successive years is automatically "subject to the authority and control of the auditor,"42 and ultimately a candidate for sale by the deputy commissioner of delinquent and nonentered lands.43 The predecessor to this section, former Section

41. Id. The statute expressly releases "all title to any such land acquired by the state prior to said ten-year period." Id.
11A-4-2, also imposed on landowners the duty to have their realty entered and charged with taxes. However, in contrast to the new system, under the former statute, title to land not entered for five successive years was forfeited to the state, rather than made subject to the auditor's control.\(^\text{45}\)

Prior to the recognition that former Section 11A-4-2\(^\text{46}\) was "in direct conflict with the United States Constitution, as it strip[ped] owners of property rights without notice," the payment of taxes for ten successive years effectively negated any prior nonentries.\(^\text{48}\) Therefore, paying taxes for ten consecutive years cured forfeiture to the state if the property had not already been the subject of a sale by the deputy commissioner.\(^\text{49}\)

The new system with respect to nonentered lands was enacted because the old system was recognized as being violative of the Fourteenth Amendment's due process guarantee. Former Section 11A-4-2 provided that title to land unentered for five successive years became automatically vested in the state without notice being afforded to property owners. In response to this due process concern, the new nonentry scheme provides not for forfeiture of title to the state, but that the property becomes "subject to the authority and control of the auditor"\(^\text{50}\) and his ability to dispose of the nonentered property through the deputy commissioner of delinquent and nonentered lands.\(^\text{51}\) In addition, Section 11A-3-68 provides that "[a]ll lands which have hereto-

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44. W. VA. CODE § 11A-4-2 (repealed 1994).
46. Former Section 11A-4-2 codified former Article XIII, Section 6, of the West Virginia Constitution.
48. Skeen, supra note 32, § 10.9, at 174 ("If the realty was not listed and the forfeiture which consequently ensued was not forgiven by Code § 11A-4-39, but the forfeited interest has been assessed and taxes paid in ten consecutive years subsequent to the forfeiture, again the Legislature provides a forgiveness statute, Code § 11A-4-39b [(superseded by West Virginia Code Section 11A-3-70)], which cures this defect or encumbrance on title.").
49. Former West Virginia Code Section 11A-4-39b, and its successor, Section 11A-3-70, both provide that the title released shall be "released to the person who would be the owner thereof but for the title of the state." See infra note 72.
fore been forfeited to the state pursuant to the provisions of former article four of this chapter, and which have not been certified to the circuit court for sale pursuant to such title, shall be deemed nonentered pursuant to [West Virginia Code Section 11A-3-37], and shall be subject to redemption and sale as provided herein." Thus, the Legislature recognized the due process violation set forth by the former scheme and "deemed" that the title to property not entered prior to reenactment be, not vested in the state, but rather, subject to the auditor’s control.

Notwithstanding the recognition that the former forfeiture system was violative of due process guarantees, and the fact that the Legislature has set forth a provision whereby lands that were considered forfeited for nonentry under the former system, but not certified to the circuit court for disposition, are now deemed certified to the auditor\(^2\) for ultimate disposition by the deputy commissioner of delinquent and nonentered lands,\(^3\) Section 11A-3-70 addresses title acquired by the state. Taken in conjunction with Section 11A-3-69,\(^4\) it appears that the release of title effected by Section 11A-3-70 applies to those lands which were forfeited for nonentry prior to the reenactment of the delinquent and nonentered land statutes, and upon which the taxes have been paid for ten consecutive years. By paying taxes on an interest in land formerly forfeited, the landowner "established or accrued" rights under the former scheme. Section 11A-3-69 provides that the enactment of the new scheme shall not affect such rights. Therefore, notwithstanding the provision of Section 11A-3-68 which treats those lands forfeited under the former scheme as being "subject to the authority and control of the auditor,"\(^5\) the statute automatically releases the title or claim acquired by the state under the former forfeiture system and against which the landowner had begun to effect a release.

\(^3\) W. VA. CODE §§ 11A-3-37, -44 (1995).
\(^4\) W. VA. CODE § 11A-3-69 (1995) (Providing:
The repeal of the provisions of sections thirty-nine, thirty-nine-a, thirty-nine-b, and forty-ones, article four of this chapter which was affected by the recodification of this article and article four of this chapter as the result of the enactment of chapter eighty-seven, acts of the Legislature, regular session, one thousand nine hundred ninety-four, shall not be construed to affect any right established or accrued pursuant to those provisions.).
Thus, by ascertaining that the property taxes have been paid for the past ten consecutive years, the examiner is determining that any title or claim of the state that may have arisen as a result of nonentry for five or more successive years prior to July 1, 1994, has been released to the "person who would be the owner thereof but for the title of the state."57

b. Nonentry Post Reenactment

But what about lands not entered for five or more successive years only subsequent to the reenactment? That is, with respect to nonentered lands, West Virginia Code Section 11A-3-70 releases title taken by the state, but does it release the control taken by the state under the new system where the state does not take any title? It appears that such lands are afforded forgiveness, but only by looking to the preamble of Section 11A-3-70.

Under the new scheme, it is clear that the state takes no title for nonentry; thus, there is no title to release under Section 11A-3-70. Property not entered for five successive years or more is "subject to the authority and control of the auditor," and ultimately, disposition by the deputy commissioner, but no title vests in the state. In addition to providing for release of the state's title, Section 11A-3-70, provides, where its predecessor under the former scheme did not, that the payment of taxes for ten consecutive years will also release any "real property tax liens which subject the lands to the authority and control of the auditor." However, "real property tax liens which subject the lands to the authority and control of the auditor" would not appear to equate to nonentry which subjects the lands to the authority and control of the auditor.


60. W. VA. CODE § 11A-4-39b (repealed 1994).


62. Id.
If the property has gone unentered, would any tax liens be imposed upon it? Section 11A-1-2 provides that "[t]here shall be a lien on all real property for the taxes assessed thereon . . . ."63 Furthermore, Section 11A-3-37 provides that it is the express duty of the landowner to have his property entered for real property taxation purposes and charged with such taxes. This Section implies that taxes are charged against property only upon the satisfaction of a certain precondition — that the property be entered on the land books. These sections seem to support the proposition that if property has gone unentered, no taxes have been charged against it, and therefore, no tax liens have attached to secure the payment of those taxes.64

Thus, it appears that Section 11A-3-70 expressly releases, first, certain outstanding tax liens which exist against entered property and, second, any title or claim that the state acquired prior to July 1, 1994, as a result of nonentry for five successive years. What it omits is an express release of that authority and control which the auditor gains over property entered prior to reenactment, but not entered subsequent to reenactment. That is, it does not expressly release the auditor's authority and control over real estate which was not forfeited under the former scheme, but rather, real estate which went unentered for five or more successive years only after the reenactment. By not forfeiting to the state under the former scheme, the state took no title to the property; but where it has since gone unentered, it has become subject to the auditor's authority and control as a result of such nonentry.65

However, while such an express release is absent from the curative statute, it would seem that the preamble to Section 11A-3-70 draws

64. In furtherance of this proposition is an excerpt taken from Cunningham v. Brown, 20 S.E. 615 (W. Va. 1894). In addressing the validity of an assessment pertaining to a thirty-four acre tract situate in Preston County, the court commented that "unless the thirty-four acre-tract was thus legally assessed against her, the conceded freehold owner, there could be, under this proceeding, no lien against her land for the taxes of that year, and, there being none, the sheriff could enforce none by his sale . . . ." Id. at 619. Moreover, toward the end of the decision it is expressed that "there was against her no legal assessment of her tract of thirty four acres for the year 1883, and therefore no lien . . . ." Id. at 620. This language supports the proposition that the entrance of the realty on the land books is a prerequisite to the attachment of a tax lien.
within its protection those lands which first go unentered for five or more successive years subsequent to the reenactment.

The preamble to West Virginia Code Section 11A-3-70 declares that "it is the purpose and intent of the Legislature to release all of the state's title and claim and the authority and control of the auditor to any real estate on which all taxes have been paid for ten consecutive years ...."\(^{66}\) Notwithstanding the language later in the statute which refers only to "real property tax liens which subject the lands to the authority and control of the auditor,"\(^ {67}\) the policy set forth in the preamble reflects the Legislature's intent to release the auditor's authority and control to all real estate impacted by the delinquent and nonentered lands statutes, whether such impact is a result of delinquent taxes or nonentry. To hold that the statute has any other effect would be too anomalous with the general forgiveness the Legislature has enacted with respect to forfeited title under the old scheme,\(^ {68}\) outstanding tax liens under the new system,\(^ {69}\) and taxes, interest, and charges which accrued prior to 1936.\(^ {70}\) Thus, notwithstanding the new statute's omission of an express release with respect to lands which were not forfeited to the state under the former system, but first go unentered under the new system, the determination of whether the property taxes have been paid for the past ten years serves the purpose of ensuring that any claims or penalties imposed for nonentry have been released.\(^ {71}\)

67. Id.
68. Id.
69. Id.
71. As footnoted above, supra note 50, West Virginia Code Section 11A-3-70 only releases title or control of property to that "person who would be the owner thereof but for the title of the state or the real property tax liens which subject the lands to the authority and control of the auditor." Thus, if the property was previously sold for delinquent taxes or nonentry, the fact that the former owner later paid the taxes for ten consecutive years would not release to him any title or control of the state. But see Roger v. Jewell, 520 F. Supp. 243 (S.D.W. Va. 1981) (finding that where Rogers purchased property from the deputy commissioner in 1962 for 1958 taxes, but the deed was not delivered until 1973, and Jewell had the property entered and paid taxes thereon from 1959 through 1973, remained vested in the state absent delivery of the deed, and that the state's title was released to Jewell prior to delivery of the deed under the ten-year provision of former West Virginia
3. Tax Liens of the Past Ten Years

The third purpose for determining that the realty taxes have been paid for the past ten consecutive years goes to the presence of any tax liens not cured by West Virginia Code Section 11A-3-70. That Section deals with those tax encumbrances which arose over a decade in the past, it does not concern those which occurred in the past decade. Thus, to ensure that no tax liens exist as encumbrances from the time period not covered by the curative statute, the examiner must determine that the taxes for each of the past ten years have been paid in full.

C. Taxes Not Yet Payable

As noted in Part I, on July 1 of each year a lien attaches to land for the ensuing year’s realty taxes. That is, on July 1, 1995, a lien attaches for the property taxes assessed for the 1996 tax year. And while these taxes constitute a lien against the property, they are not extinguishable as such for more than a year because they do not become payable until the sheriff commences collection the following July 15, or soon thereafter. Furthermore, before the sheriff commences collection of the 1996 taxes on, or soon after, July 15, 1996, a lien has already attached to the property as of July 1, 1996, for the 1997 taxes. Therefore, real estate situated in West Virginia is always encumbered by at least one, and occasionally two or more, property tax liens.

Code Section 11A-4-39b, the predecessor to Section 11A-3-70).
73. See supra note 6 and accompanying text.
74. W. Va. Code § 11A-1-6 (1995). While the sheriff is directed to commence the collection of realty taxes on, or soon after July 15 of each year, Section 11A-1-6, such taxes are payable on an installment basis. W. Va. Code § 11A-1-3(a) (1995). The latter section provides that the “first installment shall be payable on September first of the year for which the assessment is made, and shall become delinquent on October first; the second installment shall be payable on the first day of the following March and shall become delinquent on April first.” W. Va. Code § 11A-1-3(a) (1995).
77. See Don S. Co., 285 S.E.2d at 492.
Because of this temporarily unextinguishable lien, an examiner should always make any title opinion or certification subject to those taxes which constitute a lien but are not yet payable. For instance, if the examiner were certifying title as of January, 1996, he should make his title opinion or certification subject to the fact that the taxes for 1996 constitute a lien against the property, notwithstanding the fact that they will not become payable until July 15, 1996, at the earliest. 78

IV. THE VALIDITY OF THE LAND SALE PROCESS

Effective July 1, 1994, the West Virginia Legislature amended and reenacted the statutes under which realty tax liens are enforced. 79 As noted above, this action by the Legislature was in response to the Supreme Court’s decision in Mennonite Board of Missions v. Adams. 80 With respect to West Virginia’s former delinquency scheme, the project commissioned by the West Virginia Law Institute commented as follows:

A second, less complex problem arising from Mennonite is the rights of lienholders to notice of a pending tax sale. Mennonite, [sic] at the very least, mandates that lienholders are entitled to mailed notice of a pending tax sale. In 1985, the West Virginia legislature amended § 11A-3-2 to provide that lienholders of record are entitled to notice by certified mail of a sheriff’s sale of real property against which they hold a lien. This requirement arguably met the Mennonite standard, but it has proven to be impossible to obey, because the sheriffs simply do not have the staff to perform even a lien search on the many parcels to be sold each year. Thus, although, the letter of our law complies with Mennonite in this respect, the operation of the law has not changed. Lienholders are, in most cases, simply not receiving the constitutionally required notice. 81

Given this conflict between the practical operation of the former delinquency scheme and the due process guarantees recognized in Mennonite, [sic]...
nite, the Legislature amended the delinquency statutes. However, these amendments did more than merely alter the process by which lienholders are afforded notice. Therefore, this Part of the Article, in response to the new scheme, examines the determinations which a title searcher should make when his chain of title contains realty conveyed by the clerk of the county commission for the nonpayment of taxes.

To begin, West Virginia Code Section 11A-3-37 imposes upon landowners the duty of having their property entered on the land books and charged with taxes. It also imposes upon landowners the duty to pay those taxes charged. In addition, the taxes imposed are secured by a lien which attaches more than twelve months before the taxes may be paid. As a means of ensuring that the state coffers receive the taxes imposed, Section 11A-2-10 provides that these tax liens may be sold. And ultimately, if the property is not redeemed, it may be conveyed to the individual who purchased the tax lien. The question is, what determinations must the title examiner make when his chain of title contains a clerk-issued tax deed?

A. Validity of the Assessment

The first determination which a title examiner must make in response to this inquiry relates to the validity of the assessment upon which the purchased tax lien is based. While this is not a determination expressly mandated by the new delinquency scheme, it is a determination of such import that it must be brought forth. Simply put, "[a]
tax sale based upon an invalid assessment is void, and a deed made by the county clerk to a tax purchaser, pursuant to such sale, constitutes a cloud on the owner’s title, which the latter has the right to have removed in a court of equity. 86 Even simpler, “[a] deed made pursuant to a tax sale under a void assessment is void.” 87 The rationale behind this rule is that the assessment, being invalid, represents no interest in reality, and therefore, the sale of a tax lien securing the taxes levied on the assessment transfers an invalid lien. Furthermore, West Virginia Code Section 11A-3-30(a) provides that when the purchaser of a tax lien receives his tax deed, he “thereby acquire[s] all such right, title and interest, in and to the real estate, as was, at the time of the execution and delivery of the deed, vested in or held by any person who was entitled to redeem.” Thus, where the assessment underlying the tax deed is void and represents no interest in real estate, the resulting tax deed is void and conveys no interest or title. Therefore, it is clear under this general rule that the examiner must ensure that the assessment underlying the tax sale was in itself valid.

B. Statutory Grounds for Voiding the Tax Deed

Turning to the determinations required under the new delinquency scheme with respect to the tax deed, a proper perspective is essential. In Shaffer v. Mareve Oil, 88 the court considered the validity of a tax deed where the purchaser at the sheriff’s sale had failed to comply with the requirements imposed under former Section 11A-3-20, effectively the predecessor to Section 11A-3-19. The former Section required purchasers at a sheriff’s sale to, inter alia, “search the title records to ascertain the owners of the delinquent property and furnish their names to the county clerk.” 89 In considering whether a three-year statute of limitation contained within the delinquency scheme prohibited the plaintiffs from setting aside the tax deed because of the defendant’s failure to comply with former Section 11A-3-20, the court set forth an

88. 204 S.E.2d 404 (W. Va. 1974).
89. Id. at 406.
historical review of the means by which legislatures have attempted to instill stability within their delinquent land systems:

Statutory provisions for the sale of delinquent lands, as an adjunct to the enforcement of [the] tax laws, and the tax deeds obtained thereby have been a part of the administrative procedure and jurisprudence of this country throughout the history of our government. Since these statutes are in derogation of the common law, and because the policy of courts in our early history was to protect landowners, the procedures for acquiring tax deeds were meticulously scrutinized and narrowly construed against the tax purchaser and in favor of the original landowner.

There were early attempts by most state legislatures to give some certainty to tax deeds in furtherance of the public policy concerning the stability of land titles in general. In the late 1920's and 1930's this effort was given major impetus by the economic condition of the country. More comprehensive laws concerning tax sales were enacted to bolster declining public treasuries. There were concomitant public policies to produce certainty in land titles and to vest title to real estate in responsible individuals who would bear their share of the tax burden.

To accomplish these purposes, the various state legislatures generally enacted one or more of three types of statutes: The presumptive statute which makes the deed either a prima facie or conclusive presumption that the various requirements of the statute have been met; the curative statute which generally provides that the tax deed is valid notwithstanding irregularities of various kinds; and lastly, the short statute of limitations which bars the right to bring an action to set aside the deed on specified grounds after a stated period of time.90

The new statutory scheme, as was the old, is comprised of all three types. First, the presumptive statute is codified at West Virginia Code Section 11A-3-30(a). Second, there are two separate curative statutes.91 And third, there are three sections providing “short statute of limitations.”92

In Shaffer, the court recognized “the universal rule that presumption and curative provisions relate only to voidable deeds and not to

90. Id. at 408.
deeds which are void because of jurisdictional defects.”93 However, in contrast, the court declared that “[a] short statute of limitations may validly bar an attack on a jurisdictionally defective or void tax deed. A statutory provision prohibiting action to set aside such deeds after a reasonable period of time is constitutional and not violative of the Due Process Clause of the Fourteenth Amendment.”94

However, despite this conclusion with respect to presumptive, curative, and limiting statutes, and their relation to void and voidable tax deeds, it is submitted that the delinquency scheme does not produce void tax deeds per se, but rather, voidable tax deeds. The single exception to this rule being those tax deeds based upon void assessments. This position is premised on the “well established rule . . . that a void deed passes no title, and cannot be made the foundation of a good title even under the equitable doctrine of a bona fide purchaser.”95

Section 11A-3-31 provides that:

No irregularity, error or mistake in respect to any step in the procedure leading up to and including delivery of the tax deed by the clerk shall invalidate the title acquired by the purchaser unless such irregularity, error or mistake is, by the provisions of [(Sections 11A-3-6, 11A-4-2, 11A-4-3, 11A-4-4, or 11A-4-6)] expressly made ground for instituting a suit to set aside the sale or the deed.

Effectively, this Section provides that nothing in the delinquency proceedings shall invalidate a tax deed unless it is specifically made a ground for invalidating a tax deed. Furthermore, each of these grounds is made subject to some type of limitation, predominantly a time-based statute of limitation.96 By making the invalidation of a tax deed contingent upon the bringing of an action within a certain time period, the

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93. 204 S.E.2d at 408-09.
94. Id. at 409.
95. 26 C.J.S. Deeds § 68a (1956).
96. Sections 11A-4-2, -3, -4, and -6 each rely upon a statute of limitation to foreclose an action challenging a tax deed. Of the sections which provide a ground for setting aside a tax deed, only West Virginia Code Section 11A-3-6 does not use a statute of limitation; rather, it relies on the property being transferred into the hands of a bona fide purchaser. W. VA. CODE § 11A-3-6 (1995).
The delinquency scheme is declaring defective tax deeds to be voidable, as opposed to void. The sections provide that after the running of the statute of limitation, the deed can no longer be challenged and set aside, in effect, it is valid. It becomes an effective instrument passing title. This is the definition of a voidable deed rather than a void deed. As set forth above, "a void deed passes no title, and cannot be made the foundation of a good title."97 By limiting the time frame during which a tax deed may be invalidated, the delinquency statutes are establishing challengeable tax deeds as conduits of good title upon the expiration of the time limitation. In contrast, a void deed, whether it is challenged within the statutorily prescribed time or not, cannot pass title. Therefore, based on this assertion, Section 11A-3-31 is the determinative statute with respect to answering the inquiry set forth above — what determinations is a title examiner required to make when his chain of title contains a clerk-issued tax deed?

Section 11A-3-31 sets forth five statutes which limit the grounds upon which a tax deed can be invalidated. Therefore, these sections, by laying out the bases upon which a tax deed may be voided, govern the scope of the title examiner's search where a tax deed appears in his chain of title. It is these sections which dictate the determinations the examiner must make. Furthermore, in addition to limiting the grounds upon which the tax deed can be challenged, these statutes limit the time frame within which the challenges must issue.

1. West Virginia Code Section 11A-3-6

The first section setting forth a ground for challenging the delinquency procedure is West Virginia Code Section 11A-3-6. Subsection (a) provides that the "sale of any tax lien on any real estate, or the conveyance of such real estate by tax deed, to [a sheriff, clerk of the county commission, clerk of the circuit court, assessor, or deputy of any of them, whether directly or indirectly,] shall be voidable, at the instance of any person having the right to redeem, until such real estate reaches the hands of a bona fide purchaser."98 Therefore, where a

97. 26 C.J.S. Deeds § 68a (1956).
tax deed crops up in a title examiner’s chain of title, he must make several determinations with respect to the tax deed’s grantee or the grantee’s assignor.

First, was the tax lien purchased by one of the officers enumerated in the statute? Second, on the basis that the statute prohibits such officers from becoming a purchaser, either “directly or indirectly,”99 of a tax lien or a recipient of a tax deed,100 was the purchased tax lien assigned to one of the officers set forth in the statute? And third, is the grantee in the tax deed such an officer?101 If any of the three inquiries is answered in the affirmative, the deed is voidable, subject to a statutorily provided exception. Section 11A-3-6(a) provides, as a limitation to its general rule, that where the property has reached the hands of a bona fide purchaser, the deed is no longer voidable. Therefore, with respect to the first ground upon which a tax deed may be set aside, the examiner must make at least three initial determinations, and dependent upon those findings, possibly a fourth.

2. West Virginia Code Section 11A-4-2

The second ground for voiding a tax deed arises where the taxes were in fact paid prior to the sheriff’s sale.102 Where the tax deed has been delivered to the purchaser, notwithstanding the fact that the taxes were paid prior to the sheriff’s sale, a civil action may be brought to set aside the deed; however, such action is subject to a three-year statute of limitation which begins to run upon the delivery of the tax deed.103 With respect to determining that this avenue to invalidating the tax deed has been foreclosed, the examiner has two

99. Id.
100. Id.
101. While Section 11A-3-6(a) expressly prohibits the enumerated officers from being purchasers at a sheriff’s sale and recipients of a tax deed, and thereby, assignees of such a purchaser, it would seem that an argument exists that a tax deed where such an officer is a grantee would not be voidable, despite the express language of the statute, on the basis that he took as an heir of a purchaser or heir of an assignee of a purchaser, and as such he had no control over the circumstances, either directly or indirectly, which made him a recipient of the tax deed.
103. Id.
considerations — first, has the statute of limitation run, and second, was the property listed as delinquent and unredeemed prior to the sheriff’s sale?

a. The First Determination

With respect to the first consideration presented by Section 11A-4-2, a tax deed conveying property for the nonpayment of taxes cannot be set aside subsequent to the third anniversary of such deed being delivered to the purchaser. Thus, where the three-year statute of limitation has run, a tax deed cannot be set aside on the basis that the taxes were in fact paid before the sheriff’s sale, and the deed is effectively validated.\(^\text{104}\)

b. The Second Determination

The latter of the two considerations presented by Section 11A-4-2 is dependent upon the first. That is, if the examiner determines that the three-year statute of limitation has run, the second determination need not be made. The second consideration requires the examiner to determine whether the property was listed as delinquent and unredeemed prior to the sheriff’s sale.\(^\text{105}\) To properly bring this determination into focus, a short summary of the delinquency process is called for.

The taxes imposed for a given year are payable in two installments.\(^\text{106}\) “The first installment shall be payable on September first of the year for which the assessment is made, and shall become delin-

\(^{104}\) As a practical and general rule, the three-year time frame expires on the third anniversary of the tax deed being put of record. Under Section 11A-3-27, “the clerk shall execute the deed and acknowledge the same, record the deed in the clerk’s office and deliver the original thereof to the purchaser.” W. VA. CODE § 11A-3-27 (1995). Thus, presumptively, the date of recording is the date of delivery, and three years after that date, the statute of limitation forecloses any action under Section 11A-4-2.

\(^{105}\) If the property is in fact listed on the records as being delinquent and unredeemed prior to the sheriff’s sale, despite the fact that the taxes were paid, the setting aside of the tax deed should not result in any liability on the part of the examiner in that he reviewed the appropriate records, it just happens that those records were erroneous because of a mistake on the part of the sheriff.

quent on October first; the second installment shall be payable on the first day of the following March and shall become delinquent on April first.\textsuperscript{107} That is, the first installment for the 1996 taxes is payable on September 1, 1996, while the second installment is payable as of March 1, 1997, twenty-one months after the lien for the 1996 taxes first attached. As noted above, where the realty taxes are not paid in full for a given year, Section 11A-2-10 provides that the tax lien attached to an interest in real estate may be sold as a means of collection. This process first initiates after the second installment has become delinquent.\textsuperscript{108} "On or after April first of each year, the sheriff may prepare and publish a notice stating in effect that the taxes assessed for the previous year have become delinquent, and that unless paid by April thirtieth will be included for publication in the forthcoming delinquent lists."\textsuperscript{109} The first of these delinquent lists must be prepared by May 1,\textsuperscript{110} and be posted and published at least two weeks prior to its submission to the county commission.\textsuperscript{111}

This list presented to the county commission, is, after the commission is satisfied as to its correctness, placed of record by the clerk of the county commission.\textsuperscript{112} Following the preparation, posting, publication, and recording of the May delinquency list, the next step in the enforcement procedure is the preparation of the September delinquency list.\textsuperscript{113} After the list is prepared, the sheriff is required to publish the list as a Class III-0 legal advertisement within the county.\textsuperscript{114}

\textsuperscript{107} Id.
\textsuperscript{109} Id.
\textsuperscript{112} W. VA. CODE § 11A-2-14 (1995).
\textsuperscript{113} See W. VA. CODE § 11A-3-2(a) ("On or before the tenth day of September of each year, the sheriff shall prepare a second list of delinquent lands, which shall include all real estate in his county remaining delinquent as of the first day of September . . . "). This is the September next following the September for which the first installment became payable. Thus, for the 1996 taxes, the second delinquency list is prepared in September, 1997.
\textsuperscript{114} W. VA. CODE § 11A-3-2(a) (1995).
In addition to publishing the list on a county-wide basis, the sheriff is also required to:

[S]end a notice of such delinquency and the date of sale[115] by certified mail: (1) To the last known address of each person listed in the land books whose taxes are delinquent; (2) to each person having a lien on real property upon which the taxes are due as disclosed by a statement filed with the sheriff pursuant to the provisions of section three of this article; (3) to each other person with an interest in the property or with a fiduciary relationship to a person with an interest in the property who has in writing delivered to the sheriff on a form prescribed by the tax commissioner a request for such notice of delinquency; and (4) in the case of property which includes a mineral interest but does not include an interest in the surface other than an interest for the purpose of developing the minerals, to each person who has in writing delivered to the sheriff, on a form prescribed by the tax commissioner, a request for such notice which identifies the person as an owner of an interest in the surface of real property that is included in the boundaries of such property . . . .[116]

Such notice must be sent no less than thirty days prior to the sheriff's sale.[117]

Under West Virginia Code Section 11A-3-4, "[a]ny of the real estate included in the [September list] may be redeemed at any time before" the sheriff's sale. Furthermore, subsequent to the sheriff's sale, the sheriff is required to prepare a list of those tax liens purchased at the sale, suspended from the sale, redeemed prior to the sale, or certified to the auditor.118 This list is to then be delivered to the clerk within one month of the sale and put of record.119 In addition to putting this land sales list of record, the clerk is further required to note such sale, suspension, redemption, or certification on the delin-

115. The sale of which the statute speaks is the sheriff's sale of delinquent tax liens provided for in Section 11A-3-5. W. VA. CODE § 11A-3-5 (1995).
117. W. VA. CODE § 11A-3-3 (1995). Pursuant to Section 11A-3-5, the sheriff's sale is to occur "between the hours of ten in the morning and four in the afternoon on any business working day after the fourteenth day of October and before the twenty-third day of November." W. VA. CODE § 11A-3-5 (1995).
118. W. VA. CODE § 11A-3-9 (1995). This list is referred to in the statutes as the List of Sales, Suspensions, Redemptions, and Certifications. Once put of record in the clerk's office, it is commonly referred to as the land sales book.
quent land records. Therefore, with respect to determining that the taxes were not paid prior to the sheriff's sale, the examiner must determine that the property was listed as delinquent on the delinquent land book, and that that book, along with the land sales book, did not note the property as being redeemed prior to the sheriff's sale.

3. West Virginia Code Section 11A-4-3

The third ground for voiding a tax deed is set forth in West Virginia Code Section 11A-4-3. This section provides, in pertinent part, that:

Whenever the clerk of the county commission has delivered a deed to the purchaser after the time specified in [Section 11A-3-27], or within that time, has delivered a deed to a purchaser who was not entitled thereto either because of his failure to meet the requirements of [Section 11A-3-19], or because the property conveyed had been redeemed, the owner of such property, his heirs and assigns, or the person who redeemed the property, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed.

Thus, this Section provides within its framework, three separate bases for setting aside a tax deed issued by the clerk.

a. The First Basis

First, the deed may be set aside where it was delivered subsequent to the time constraints imposed by Section 11A-3-27. That section makes the issuance and delivery of a tax deed by the clerk subject to the provisions of Section 11A-3-18. Subsection (b) of Section 11A-3-18 provides that:

No tax deed shall issue on any tax sale evidenced by a tax certificate of sale where such certificate has ceased to be a lien pursuant to the provisions of this section and application for such tax deed is not pending at

\[\text{https://researchrepository.wvu.edu/wvlr/vol98/iss2/5}\]
the time of the expiration of the limitation period provided for in this section.

Under Section 11A-3-14, the sheriff is required to issue to the purchaser of a tax lien a certificate of sale.\footnote{123} Section 11A-3-18(a) provides that the lien evidenced by such a certificate shall not remain a lien on the property for a period in excess of eighteen months after the certificate is issued. Under subsection (b), set out above, where the certificate has ceased to be a lien on the property, a tax deed cannot be issued to the purchaser unless an application for such a deed is pending at the time of expiration. It is this eighteen-month time limitation to which Section 11A-4-3(a) refers. Essentially, it provides a right to set aside a tax deed which has been issued despite expiration of the tax lien. Therefore, it is incumbent upon the examiner to determine whether the tax lien expired prior to the purchaser applying for the tax deed.

It would seem that this creates a problem for the title examiner where the certificate was not put of record by the purchaser.\footnote{124} Under such circumstances, the original date of issuance would not be determinable; and therefore, the examiner could not determine whether the eighteen-month period had expired prior to the tax deed application. However, Section 11A-3-18(c) provides that, upon the expiration of the lien evidenced by the certificate, the clerk “shall immediately issue and record a certificate of cancellation describing the real estate included in the certificate of purchase or tax certificate.” The statute further provides that the certificate of cancellation “and the record thereof shall be prima facie evidence of the cancellation of the certificate of sale and of the release of the lien of such certificate on the lands therein described.”\footnote{125} Therefore, the new scheme provides a mechanism

\footnote{123} W. VA. \textsc{code} § 11A-3-14 (1995). Section 11A-3-15 provides that these certificates are “assignable by endorsement, and an assignment thereof, when entered upon the delinquent lands book of the clerk of the county commission, shall vest in the assignee or his legal representative all the right and title of the original purchaser.” W. VA. \textsc{code} § 11A-3-15 (1995).

\footnote{124} In Monongalia County, the clerk records a copy of the invoice issued by the sheriff when a tax lien is purchased or the subsequent years’ taxes are paid.

\footnote{125} W. VA. \textsc{code} § 11A-3-18(c) (1995).
whereby the title examiner can determine whether the tax lien expired prior to the issuance of a tax deed.

However, the absence of such a certificate of cancellation is not conclusive evidence that the lien did not expire within the eighteen-month window. Subsection (c) also provides that the "[f]ailure to record such certificate of cancellation shall not extend the lien evidenced by the certificate of sale."\(^{126}\) Therefore, the potential exists for a tax deed to issue, despite the expiration of the tax lien, without evidence of the expiration on the records. However, notwithstanding this caveat providing for the clerk’s failure to perform, the examiner should search for a certificate of cancellation to determine that the first of the bases for setting aside a tax deed under Section 11A-4-3(a) has been foreclosed. Furthermore, many counties note the date on which a tax lien was purchased in both the delinquent books and land sales books.

b. The Second Basis

Second, the deed may be set aside where the purchaser of the tax lien failed to satisfy the requirements of West Virginia Code Section 11A-3-19. Under subsection (a), the purchaser at the sheriff’s sale has three obligations to meet between November 1 and December 31 of the year next following the sheriff’s sale at which he purchased the tax lien.\(^{127}\) That is, where the tax lien for the 1996 tax year was sold at the sheriff’s sale which occurred in the Fall of 1997, these three requirements of the purchaser must be fulfilled sometime within November or December of 1998. Section 11A-3-19(a) requires that:

\[\text{[T]he purchaser, his heirs or assigns, in order to secure a deed for the real estate subject to the tax lien or liens purchased, shall: (1) Prepare a list of those to be served with notice to redeem and request the clerk to prepare}\]

\(^{126}\) Id.

\(^{127}\) In State ex rel. Morgan v. Miller, 350 S.E.2d 724, 730 (W. Va. 1986), the court declared, with respect to the former statute setting forth the mandatory obligations of the purchaser, that “the filing of the [information] required from the purchaser before the expiration of the statutory filing period is mandatory, and the failure of a purchaser of land sold for delinquent taxes to comply with the filing requirements is a fatal defect with regard to the preliminary procedures necessary to give the clerk of the county commission power to make a tax deed.” Thus, the December 31 deadline must be met.
and serve the notice as provided in [Sections 11A-3-21 and -22]; (2) deposit, or offer to deposit, with the clerk a sum sufficient to cover the costs of preparing and serving the notice; and (3) present the purchaser’s certificate of sale . . . .[128] For failure to meet these requirements, the purchaser shall lose all the benefits of his purchase.129

Based upon the purchaser’s list of persons to be notified, the clerk is required to prepare a notice of redemption130 and serve it upon all persons named on the list.131 The purpose of such notice is to afford interested parties with the knowledge that they may redeem the property subject to the purchaser’s tax lien at any time prior to March 31 of the next year.132 Under Section 11A-3-27, when the tax deed conveying the property is finally executed, acknowledged, and delivered to the purchaser at the sheriff’s sale, the clerk shall place of record, together with the deed, the “assignment from the purchaser, if one was made, the notice to redeem, the return of service of such notice, the affidavit of publication, if the notice was served by publication, and any return receipts for notices sent by certified mail.” Therefore, to determine whether the purchaser complied with the requirements of Section 11A-3-19, the examiner should determine whether all the persons required to be served with notice to redeem133 were in fact served with such

128. See W. VA. CODE § 11A-3-19(b) (“If the person requesting preparation and service of the notice is an assignee of the purchaser, he shall, at the time of the request, file with the clerk a written assignment to him of the purchaser’s rights, executed, acknowledged and certified in the manner required to make a valid deed.”). Thus, if such an assignment occurs in the examiner’s chain of title, s/he must determine whether the assignment instrument meets the requirements of an instrument entitled to be put of record.

133. With respect to whom is to be served with notice to redeem, Syllabus Point 1 of Anderson v. Jackson, 375 S.E.2d 827 (W. Va. 1988), although discussing notice prior to the sheriff’s sale, is definitive:

There are certain constitutional due process requirements for notice of a tax sale of real property. Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice. Included within the class of “part[ies] having an interest in the property” are lienholders of record. Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).
notice as dictated by Section 11A-3-22, by looking to the instruments and documents recorded with the tax deed.

c. The Third Basis

Third, under Section 11A-4-3, a tax deed may be set aside if the property was redeemed. Section 11A-4-2 provides that a tax deed may be set aside if the taxes on the property "had in fact been paid before the [sheriff's] sale." The third basis under Section 11A-4-3 is distinguishable on the ground that it provides for a challenge to the tax deed where the taxes were paid or redeemed even after the sheriff's sale. However, notwithstanding this distinction, the process of making this determination from the examiner's point of view is the same. He must look to the delinquent land books and land sales records to see if the property is noted as being redeemed.\(^{134}\)

d. The Super-imposed Statute of Limitation

While there are three bases upon which a tax deed may be set aside under Section 11A-4-3, there is an overriding exception. As does Section 11A-4-2, West Virginia Code Section 11A-4-3(a) provides a statute of limitation which prohibits the deed from being set aside after the third year following the delivery of the tax deed to the purchaser, his heirs or assigns.

4. West Virginia Code Section 11A-4-4

Section 11A-4-4(a) provides that if any person entitled to a notice to redeem:

[1]s not served with the notice as [required by Section 11A-3-22], and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property, he, his heirs

\(^{134}\) Taken together, Sections 11A-3-4 and -23 provide that real estate for which a tax lien was purchased at the sheriff's sale may be redeemed "at any time before a tax deed is issued," whether it be pre- or post-sheriff's sale.
and assigns, may, before the expiration of three years following the delivery of the deed, institute a civil action to set the deed aside.

To foreclose this avenue of attack against the tax deed, the title examiner is presented with two determinations. First, he must determine whether the three-year statute of limitation has expired. Second, if it has not, he must determine whether the notice to redeem was sent to all interested parties as prescribed in Section 11A-3-22.

As to the statute of limitation, the determination is based upon the analysis and practical rule of thumb set forth with respect to Section 11A-4-2. As to the question of service of notice and actual knowledge, the examiner must look to the notice instruments placed of record with the tax deed and ascertain whether all persons entitled to notice were afforded such notice as set forth in Section 11A-3-22.

5. West Virginia Code Section 11A-4-6

The final section providing a ground for setting aside a tax deed is West Virginia Code Section 11A-4-6. However, unlike the previous statutory provisions discussed, this section does not provide that a suit may be brought to set aside the deed; rather, it provides that the property may be redeemed from the purchaser directly.135 Section 11A-4-6 provides, in pertinent part, that:

[A]ny infant or mentally incapacitated person whose real estate was, during such disability, conveyed by tax deed pursuant to this chapter to an individual purchaser, may redeem such real estate by paying to the purchaser, or his heirs or assigns, before the expiration of one year after removal of the disability, but in no event more than twenty years after the deed was obtained, the amount of the purchase money, together with the necessary charges incurred in obtaining the deed, and any taxes paid on the property since the sale, with interest on such items at the rate of twelve percent per annum from the date each was paid.

Based on this language and language which appears later in the statute, the examiner must make three determinations. First, was the owner of the real estate under a disability at the time the real estate

was conveyed? While this a determination that is required of the examiner, practically it is probably not possible. Second, has the twenty year statute of limitation elapsed? And third, do the lis pendens records reveal the presence of any suits or proceedings against the purchaser, his heirs, or assigns?

Under Section 11A-4-6, in the event the parties "cannot agree on the amount to be paid, any of them may . . . petition . . . to have the matter referred to a commissioner to ascertain the proper amount to be paid." Furthermore, the formerly disabled party may apply to the circuit court to have a deed executed where the purchaser, his heirs, or assigns refuses to execute a deed conveying the property.136 Therefore, because of these provisions, and in addition to the other determinations required to be made with respect to the statute, the examiner must determine that no such petitions or applications have been made with respect to the property.

V. CONCLUSION

In 1993, West Virginia, with the repeal of Sections three through six of Article XIII of the West Virginia Constitution, began down a path intended to cure the ailments afflicting the delinquent and nonentered land statutes. In 1994, the Legislature furthered progress down this avenue when it amended and reenacted Articles three and four of Chapter eleven-A of the West Virginia Code. And, in 1995, the Legislature took the latest leg of the journey aimed at bringing these statutes into conformity with the United States Constitution and its application by way of Mennonite.

In summary, this Article has attempted to define what the newly enacted delinquent and nonentered land statutes require of a title examiner. It has examined these requirements from a twofold aspect. First, those requirements imposed in the course of all title examinations, and second, those imposed where the examination reveals a clerk-issued tax deed in the chain of title. In addition, in the course of discussion, this article has summarized the delinquency procedure up through and fol-

136. Id.
lowing the sheriff’s sale. And finally, it has attempted to provide some practical commentary with respect to the role the new statutes play within the title examination process.