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Property

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PROPERTY

During the survey period, the West Virginia Supreme Court of Appeals dealt with issues concerning the application of estoppel to real estate brokerage contracts, the right of a landlord to choose his tenants, the measure of "true and actual value" in property tax assessments, forfeiture and abandonment of oil and gas leases, and the rights of creditors to force the partition and sale of a joint tenancy where only one of the joint tenants is a debtor.

I. THE STATUTE OF FRAUDS AND REAL ESTATE BROKERAGE CONTRACTS


Among the various statutes of frauds found in the West Virginia Code is one which applies to real estate brokerage contracts. As with other statutes of frauds, a written account of the transaction is required in order for it to be enforceable in a court of law. In *Everett v. Brown*, the court was presented with a situation in which one party to the transaction was misled by the other party into believing that there was a binding oral agreement. The court was then called upon to either declare the contract invalid because of its noncompliance with the statute of frauds or to rule that the misleading party was estopped from asserting the statute of frauds as a defense to the existence of a contract because of their misleading behavior.

In *Everett*, the property owners, Mr. and Mrs. Brown, had entered into an exclusive listing agreement with a realty company. The agreement expired by its own terms before the property was sold. Although the written agreement had expired, the realty company's agents continued to show the property to prospective purchasers. One of these showings resulted in the eventual sale of the property on the terms asked for by the sellers. The sellers of the property, the Browns, refused to pay the real estate agency its commission. The Browns contended that they no longer had a written agreement with the realty company, and that therefore they owed no commission to its agent. Mr. Everett, the agent of the realty company, alleged that there had been an oral extension of the prior listing agreement. The lower court concluded that there was no agreement between the parties at the time.

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1. W. Va. Code § 47-12-17(c) (1980) provides:
A broker or salesmen who obtains a listing shall, at the time of securing such listing, give the person or persons signing such a listing a true, legible copy thereof. Every listing agreement, exclusive or non-exclusive, shall have set forth in its terms a definite expiration date; it shall contain no provision requiring the party signing such listing to notify the broker of his intention to cancel such listing after such definite expiration date; however, an exclusive listing agreement may provide that upon the expiration of the exclusive feature the listing shall continue to a definite expiration date as a nonexclusive listing only.

2. *Everett*, 321 S.E.2d 685


4. *Id.* at 686-87.

5. *Id.* at 687.

6. *Id.* at 688.
the property was sold and that therefore the Browns properly refused to pay the commission.\(^7\)

On appeal, the West Virginia Supreme Court of Appeals found that the lower court's findings of fact were contrary to the weight of evidence. Although there was no evidence of a valid written contract in effect at the time the house was sold, there was undisputed circumstantial evidence of the existence of an oral contract between the parties.\(^8\) The behavior of the parties demonstrated this fact. Because the Browns allowed the realty company to continue to show their home, the existence of an oral contract was manifest.\(^9\)

In the lower court, the Browns based their argument on West Virginia Code section 47-12-17(c) which requires all real estate brokerage contracts to be in writing in order to be enforceable.\(^10\) The supreme court recognized this section as a statute of frauds, and as such, it is subject to the common law exception applicable to other statutes of frauds that equity will not allow the statute of frauds to become an instrument of fraud itself.\(^11\)

This principle was clearly enunciated in West Virginia by Ross v. Midelburg.\(^12\) Based on the principles outlined in Ross, because the Browns deliberately misled Mr. Everett into believing an agreement still existed, they were estopped from asserting the statute of frauds defense.\(^13\)

The court adopted the criteria of the Restatement (Second) of Contracts as the criteria that should be used in determining whether a party should be estopped from asserting the statute of frauds as a defense to the existence of a real estate brokerage contract.\(^14\)

\(^7\) Id. at 687.
\(^8\) Id. at 688.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id. at 689.
\(^12\) See Ross v. Midelburg, 129 W. Va. 851, 42 S.E.2d 185 (1947), where the court said: Though an oral contract for the sale of land is within the statute of frauds and is for that reason unenforceable, such an agreement may be removed from the operation of the statute by the conduct of the party who would, because of the statute, deny the binding effect of the agreement. . . . It is a most important principle, thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud. . . .
\(^13\) Everett, 321 S.E.2d at 689.
\(^14\) Id. (citing Restatement (Second) of Contracts § 139 (1979)).
Section 139 provides:
A promise, which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
In determining whether injustice can be avoided only by enforcement of the pro-
While the supreme court has clearly extended the doctrine of estoppel into statute of frauds pertaining to real estate brokerage contracts, other jurisdictions have refused to do so.\[15\]

In awarding Everett his broker's commission, the court followed the majority view that a broker earns his commission when he procures a buyer ready, willing, and able to purchase the property at the terms specified by the contract.\[16\] The fact that the seller did not complete the transaction does not deny the broker of his right to his commission.\[17\] A minority of other jurisdictions have adopted the rule that a broker only earns his commission when a sale is finalized or when the seller unjustly blocks the sale.\[18\] The minority rule was clearly designed with the seller in mind, in belief that the brokerage commission is taken out of the purchase price.

II. THE RIGHT OF A PRIVATE LANDLORD TO CHOOSE HIS TENANTS: THE PERMISSIBLE CRITERIA


*Collins v. AAA Homebuilders, Inc.*,\[19\] placed in issue before the court the question of whether or not a private landlord can exclude prospective tenants based on their prior criminal records.

In *Collins*, the plaintiff in the previous action below, John Collins had applied for housing in a housing project operated by the defendants, AAA Homebuilders, Inc. Mr. Collins had a prior criminal record and at the time of his application was on probation. The defendants, upon learning of Mr. Collins' record, rejected his housing application by letter stating: "We do not knowingly admit any persons with prior criminal records to our apartments . . . .\[20\] The lower court presented this case to the West Virginia Supreme Court of Appeals on a certified question.\[21\]

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mise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor.

\[15\] See Heyman v. Adeack Realty Co., 102 R.I. 105, 228 A.2d 578 (1967). The court reasoned that brokers know or should know that all contracts must be in writing; therefore, any reliance they place in the oral representations of their clients is unreasonable.

\[16\] *Everett*, 321 S.E.2d at 690.

\[17\] *Id.* (citing Dotson v. Milliken, 209 U.S. 237 (1908)).


\[20\] *Id.* at 792.

\[21\] *Id.*
The supreme court held that the defendant could properly refuse to rent an apartment to the plaintiff. In deciding whether or not to rent to a particular individual, a private landlord may consider all factors which may affect the health or safety of other tenants, including prior criminal convictions.\(^{22}\)

The right of a private landlord to treat his property as he wishes is protected by both the state and federal constitutions.\(^{23}\) While a private landlord can consider any criteria that he wishes, criteria which protect the health, safety, and welfare of his other tenants are particularly relevant since the landlord has a definite interest in protecting his property and his tenants.\(^{24}\)

The court has not granted landlords a completely unrestricted hand in choosing tenants. There are constitutional and statutory limits which landlords cannot cross.\(^{25}\) The West Virginia Legislature has prescribed some such limits.\(^{26}\) Landlords are forbidden from refusing housing to persons based on race, religion, color, national origin, ancestry, sex, blindness, or handicap.\(^{27}\) The plaintiff, Mr. Collins, had contended that the court should expand this list to include prior criminal record.\(^{28}\) However, the court refused do so, finding that, if the Legislature had intended to include prior criminal record in this list, it would have done so.\(^{29}\) Where the legislature has made a comprehensive list of classifications that are offensive to public policy, the court will not add to them without a constitutional mandate.\(^{30}\) As the court pointed out in Cooper v. Gwinn,\(^{31}\) it is the function of the Legislature to interpret and implement public policy and not the judiciary.\(^{32}\)

The ramification of this decision seems to be fairly limited in scope. The court seems to allow a private landlord the right to use any criteria not statutorily banned in choosing their tenants so long as there is some plausible relationship between that criteria and the bonafide interest of the landlord. This decision places much adversity in the path of the truly rehabilitated ex-offenders who could be denied the housing of their choice because of their prior criminal records.\(^{33}\)

\(^{22}\) Id. at 793.

\(^{23}\) Id. (citing W. VA. CONST., art. III, § 10; (U.S. CONST. amend. V.).

\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Id. (citing W. VA. CODE § 5-11-9(g) (Supp. 1985)).

\(^{28}\) Id.

\(^{29}\) Id. at 794.

\(^{30}\) Id.


\(^{32}\) Collins, 333 S.E.2d at 798, (citing Cooper, 298 S.E.2d at 785-86).

\(^{33}\) Chief Justice Miller filed a dissenting opinion in which Justice McGraw joined. This dissent contended that this was not a case involving discrimination by a private landlord but was in fact "State action" due to the fact that the housing Mr. Collins was denied was federally subsidized housing. Id. at 794-96 (Miller, C.J. dissenting). The dissent further noted that while prior felons were note a "suspect" class, nor was housing a fundamental right thusly not invoking the strict scrutiny review standard, the denial of housing based on a prior criminal record did not even meet the rational basis test. Therefore,
III. PROPERTY VALUATION ASSESSMENTS


While the first step in taxing real property is the determination of the property’s “true and actual value,” the proper calculation has not been clearly stated in previous case law. This issue was addressed by the West Virginia Supreme Court of Appeals in *Kline v. McCloud*. Additionally, the court in *Kline* established the requisite degree of proof necessary to find that the tax levied upon property violates the equal and uniform taxing provision of the West Virginia Constitution.

*Kline* was an action by a group of citizens and taxpayers who sought to have the value of 35,000 acres of timberland in Randolph County reassessed to reflect the price that had recently been paid for it. Westvaco had purchased the land, paying in excess of $8,000,000 for it. The most recent appraisal of the property by the State Tax Commissioner had been $15 an acre in 1965. The county assessor had relied solely upon this appraisal in his assessment of the property. The county commission acting as the Board of Review accepted the assessor’s assessment as reflecting the true and actual value of the property in question. The circuit court concurred in this finding, and the case was appealed to the West Virginia Supreme Court. The court reversed the lower court, finding that the trial court acted under an erroneous conception of the law. The lower court had incorrectly construed West Virginia law as forbidding an appraisal of property at a value higher than that set by the State Tax Commission.

Westvaco, the owner of the timberland, contended that, based on the West Virginia Supreme Court’s decision in *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, the property must be assessed at the value established by the State Tax Commissioner. The supreme court disagreed. In *Tug Valley*, the court established that property could not be assessed at a value less than that value which the State Tax Commissioner set forth in his most recent appraisal. However,
here, the plaintiffs sought to have the property assessed at a value higher than that set by the Tax Commissioner. Therefore, *Tug Valley* did not apply.42

The West Virginia Code defines "true and actual value" as the price at which property would sell if placed on the open market.43 In determining "true and actual value," the county assessor is required to seek out all the relevant information that will enable him to make this determination.44 The West Virginia Supreme Court had previously held in *Killen v. Logan County Commission*,45 that assessors may consult credible and reliable sources of information other than the Tax Commissioner's appraisal in determining the "true and actual value" of property. The property owner's sworn valuation is one such source of information.46 Here, the court held that, in addition, the price paid in a recent arms length transaction is a source of credible and reliable information that an assessor may call upon in determining the "true and actual value" of property.47

Westvaco also contended that because all other property in Randolph County is assessed at the value set by the Tax Commissioner in his 1965 appraisal, an assessment of Westvaco's property at a value higher than that set by the State Tax Commissioner would be a violation of the equal and uniform taxing provision of the West Virginia Constitution.48 However, the court disagreed, holding that in order for there to be a violation of the equal and uniform taxing provision, there must be a showing by the complaining party that he was intentionally and systematically discriminated against.49 This position is in agreement with the Supreme Court50 and many other jurisdictions.51 While a survey of earlier decisions on this point will reveal no clear statement of the law, this can be explained by the particular facts of the cases and by certain changes in the tax law of West Virginia.52

By establishing the Tax Commissioner's appraisal as the minimum valuation that can be placed on property and directing assessors to consult other relevant information of the property's "true and actual value" such as the price paid in

42 Id.
43 Id. at 718 (citing W. Va. Code § 11-3-1 (1983)).
44 Id. (citing In re Shonk Land Co., 157 W. Va. 757, 761, 204 S.E.2d 68, 70 (1974)).
45 *Killen*, 295 S.E.2d 689.
46 *Kline*, 326 S.E.2d at 718 (citing *Killen*, 295 S.E.2d at 705-06).
47 Id. The position that the price paid for property in an arms length transaction is a substantial indicia of the "true and actual value" of property was established by the West Virginia Supreme Court of Appeals in *Crouch v. County Court of Wyoming County*, 116 W. Va. 476, 181 S.E. 819 (1935). A number of other jurisdictions echo this position. See Annot., 89 A.L.R.3d 1135-39 (1979).
49 Id. at 724 (citing Southern Ry. Co. v. Watts, 260 U.S. 519 (1923); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350 (1918)).
50 See *Souther Ry.*, 260 U.S. at 526.
52 *Kline*, 326 S.E.2d at 722.
an arms length transaction, the court has provided a needed step toward a truly equal and uniform tax system.

IV. COAL, OIL, AND GAS


In the area of coal, oil, and gas, the court was presented with questions pertaining to abandonment and forfeiture of leases. The abandonment question related to whether or not the payment of delay rentals relieves the lessee of the implied duty to reasonably and diligently market a mineral in a lease calling for "exploration and production." The forfeiture issue was a determination of the type of leases subject to forfeiture for nonpayment of rent under the West Virginia Code.

A. Abandonment

In *Berry Energy Consultants v. Bennett*, the lessors, the Bennetts, leased property to W. B. Berry and others for the purpose of oil and gas exploration and production. Under the lease, the Bennetts were to receive a royalty for the marketing of the gas or in lieu thereof they were to receive a "shut in royalty." In addition to the royalties, the Bennetts were to receive a $25 quarterly rent and gas from the leased property to heat and light one dwelling. Gas was discovered on the Bennett property and a well was completed in February of 1980, at which time the $25 rental payments began in accordance with the lease. In July of 1982, the Bennetts notified the lessees that they considered the leases to be abandoned because of their failure to market the gas from the well. The Bennetts also alleged that the lessees had failed to pay the shut in royalty provided for in the lease. During the period of February 1980 through July of 1982, the lessees tendered and the Bennetts accepted the $25 quarterly delay rental payments. The lower court held that the lease in question had not been abandoned but was a "valid and subsisting" agreement. The lessors appealed to the West Virginia Supreme Court of Appeals.

In order to determine whether a lessee has abandoned his lease, the court looked at the lessee's intent. The West Virginia Legislature has supplemented this finding

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53 Id. at 724.
55 Id. at 824.
56 Id. at 825.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id. at 826 (citing Smith v. Root, 66 W. Va. 633, 639, 66 S.E. 1005, 1007 (1910); 38 Am. Jur. 2d Gas and Oil § 208-09 (1968)).
of intent through a section of the West Virginia Code, which provides a rebuttable presumption of intent where a lessee fails to produce or market oil or gas from a leased premise for more than twenty-four months. This section of the West Virginia Code further provides that this presumption will be overcome where: (1) there is a rental payment made to keep the lease in effect; (2) the lessor interferes with production; (3) the lessee is unable to market the product; or (4) the lease is for storage purposes.

In Berry Energy, the court found that the presumption of an intention to abandon was precluded by the acceptance of the $25 delay rental payments by Bennett. Both the West Virginia Code and the prior case law support the position that accepting rental payments which are to keep the lease in effect precludes a finding of abandonment of the lease.

In spite of making the delay rental payments, the lessee still owed Bennett the implied duty to diligently market the gas. This is due to the fact that the lease was for the “exploring and operating for” and “producing and marketing” gas and oil. It is well established in West Virginia that a lease for “producing and marketing” gas and oil creates an implied duty on the part of the lessee to diligently market the oil and gas. Payment of the delay rental does not relieve the lessee of the duty to reasonably and diligently market the oil and gas extracted from the leased premises.

The case was then remanded to the circuit court for a determination of whether during the period in question, February 1980 through July 1982, the lessees exercised reasonable diligence in marketing the gas.

B. Forfeiture

The forfeiture question was raised in Warner v. Haught, Inc. The appellants in Warner had leased several tracts of land for oil and gas exploration and development to D & H Oil Company. The lessee was to pay an annual delay rental to

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63 Berry Energy Consultants, 331 S.E.2d at 826 (citing W. Va. Code § 36-4-9a).
64 Id.
65 Berry Energy Consultants, 331 S.E.2d at 827.
67 Berry Energy Consultants, 331 S.E.2d at 827 (citing McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 64 S.E. 1027 (1909)).
68 Id.
69 Id. at 828.
70 Id.
71 Id. (citing Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 S.E. 836 (1909); Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 591, 42 S.E. 655, 658 (1902)).
72 Id. at 829.
73 Id.
the lessor, in advance, until a well yielding royalties was established on the lessor's property. Each lease contained a surrender clause which allowed the lessee, his successors, and assigns to cancel the lease at any time by paying the lessor one dollar. D & H Oil assigned these leases to the appellee, Haught.77 Haught, the lessee, failed to make the delay rental payments when they were due. When the rent was approximately one month overdue, the lessors notified Haught that they considered the leases to be forfeited. Haught then mailed back dated delay rental payments to the lessors, all of whom refused to accept the payments.76

The lessors initiated an action seeking a judgment declaring the leases forfeited for the failure to make timely payment of rent.77 Haught answered the charge by stating that the lessors had not complied with the notice provisions of the West Virginia Code,78 which prohibits forfeiture of an oil or gas lease unless the lessee is provided with notice of a demand for payment and given sixty days to make those payments demanded.79 The lower court granted the lessee's motion for summary judgment and the lessors appealed to the West Virginia Supreme Court of Appeals.80

It was clear that the lessors failed to meet the notice provisions of the West Virginia Code section 36-4-90. This was not contested, but instead the lessors based their appeal on the contention that the lease in question was of the "unless" type, and therefore not within the purview of the statute since the statute applied to "or" type leases only.81

An "or" type lease requires the lessee to drill or pay rent. This type of lease does not terminate automatically but typically contains some type of termination clause. The "unless" type lease requires no termination clause, but instead terminates by its very own terms. The typical "unless" type lease would read: "If no well is drilled the lease terminates 'unless' rental payments are made."82

The lessor, Warner, was incorrect in his contention that the written lease was of the "unless" genus.83 The "unless" type lease imposes no obligation whatsoever on the lessee. He need do nothing, and, in fact, his doing nothing works as a termination of the lease.84 The "or" lease, on the other hand, imposes a duty upon the lessee to do one of two things: he can either drill, or he must pay.85 The failure

71 Id. at 90-91.
76 Id. at 91.
77 Id.
78 W. VA. CODE § 36-4-9a (1985).
79 Warner, 329 S.E.2d at 91-92 (citing W. VA. CODE § 36-4-9a).
80 Id. at 91.
81 Id. at 92.
82 Id. (citing 3 H. WILLIAMS, OIL AND GAS LAW §§ 605-06 (1984); R. DONLEY, THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA §§ 80, 83 (1951)).
83 Id. at 94.
84 Id. at 92-93 (citing H. WILLIAMS, supra note 82, at § 606).
85 Id.
of a lessee to do anything in an "or" type lease does not act as a termination of the lease, but only provides the lessor with a cause of action. In Warner, the lease was of the "or" type because it created a duty on the part of the lessee to do something: either drill a productive well, pay rentals, or surrender the lease under the surrender provision. The mere existence of a surrender clause gave rise to speculation that the lease is of the "or" type. Since an "unless" type lease terminates by its own terms, it does not need a termination clause.

The lessors contended that the lessees made oral representations to them that the lease would be automatically forfeited if they failed to pay the rentals. If these allegations were true and admissible into evidence, then the leases in question would in fact be of the "unless" type. Therefore the court had to determine if West Virginia Code section 36-4-9a applied also to "unless" type leases.

For this determination the court found it necessary only to look at the purpose of the statute. Despite the reference to any lease, the statute manifested an intent that it was designed to deal with rental collection problems in "or" type leases only. Under the statute, "the continuation in force of any such lease after the demand for and failure to pay such delay rentals . . . is deemed by the legislature to be opposed to public policy and against the general welfare." This statement of purpose by the Legislature could only apply to the "or" type lease. The "unless" type lease never continues after nonpayment of rent, but always terminates when the rent is not paid. This is the very essence of the "unless" lease. The "or" type lease, on the other hand, always continues in the absence of a forfeiture clause. Prior to the enactment of the statute, an "or" type lease could only be terminated by a lawsuit. This is what the court found to be offensive to public policy. If the alleged oral representations were made by the lessee to the lessor, the lease would be of the "unless" type and therefore unaffected by the notice and demand provisions of the statute.

The lessors then alleged that even if this was an "or" type lease equity would require its forfeiture. It is well established in West Virginia law that the nonpayment of rent in an "or" type lease does not make the lease forfeitable.

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86 Id. at 93-94 (citing R. Donley, supra note 82, at § 73).
87 Warner, 329 S.E.2d at 94.
88 Id. at 93.
89 Id. at 94.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id. at 94-95.
95 Id. at 94.
96 Id. at 95.
97 Id. at 96 (citing Reserve Gas Co. v. Carbon Black Mfg. Co., 72 W. Va. 757, 79 S.E. 1002 (1913); McCutcheon v. Enon Oil & Gas Co., 102 W. Va. 345, 353, 135 S.E. 238, 241 (1926)).
for finding that a forfeiture should be had is when it will promote justice and equity and protects the owner against indifference, laches, and injurious conduct of the lessee. Such was not the case in Warner.

The court went on to note that the continued failure of a lessee to pay rents on time, thus forcing the lessor to continually seek relief under the statute, can be grounds for an equitable forfeiture if the criteria of indifference, laches, and injurious conduct on the part of the lessee is found. The case was remanded to the circuit court because there were genuine issues of fact to be tried including the alleged oral statements that the lessee made to the lessor concerning automatic termination for failure to pay rentals.

The court’s decisions in Berry Energy Consultants and Warner are aimed at maximizing the production of the fossil fuels found in the subsurface of West Virginia. These decisions protect both the land owner and the petrochemical producers. The producers are protected by only allowing forfeitures of leases in certain well defined instances. The landowners are protected by providing a remedy for the continued failure of a lessee to make timely rental payments and a remedy for the “tieing up” of productive oil and gas wells by the lessee who is anticipating a rise in the market price. These decisions should stimulate oil and gas production which is beneficial to everyone.

V. Joint Tenancy


Harris v. Crowder involved the determination of the rights of a creditor to force a partition and sale of property held by a husband and wife as joint tenants when only one spouse is a debtor. This issue placed the court between the proverbial rock and a hard place; on the one hand the logic and weight of property law seems to dictate that the creditor could force the partition and sale of property held in joint tenancy, while equity would deplore such a result.

In Harris, Mr. and Mrs. Crowder had purchased a family home and had given the sellers a first deed of trust to secure the purchase money note. The Crowders held the property as joint tenants with rights of survivorship. Initially, both Mr. and Mrs. Crowder lived together in the home but when this action was commenced they were separated, with only Mrs. Crowder occupying the home.

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98 Id. (citing Doddridge County Oil & Gas Co. v. Smith, 154 F. 970, 978 (N.D. W. Va. 1907).
99 Id.
100 Id.
101 Id. at 97-98.
103 Harris, 322 S.E.2d 854.
104 Id. at 855-56.
Mr. Harris brought an action against Mr. Crowder to enforce a judgment he had obtained against him. Mrs. Crowder made a motion to exclude from execution the property which she and her estranged husband held as joint tenants. This motion was denied by the circuit court who then appointed a commissioner to sell the jointly held property.\(^{105}\) A certified question was presented to the West Virginia Supreme Court of Appeals asking for a determination of whether or not a creditor can force partition and sale of property belonging to a husband and wife as joint tenants where only one spouse is a debtor.\(^{106}\)

In an effort to protect both the interest of the non-debtor joint tenant and the creditor, the court held that although there is no certain answer, a creditor can force partition and sale of property held by joint tenants where only one tenant is the debtor if the non-debtor tenant will not be prejudiced by the partition and/or sale.\(^{107}\) The court recognized that there are a variety of factors that must be taken into consideration in determining whether the non-debtor tenant will be prejudiced by the partition and sale but only articulated two: the size and the nature of the joint holdings.\(^{108}\)

In deciding the issue, the court looked to earlier law. As early as 1540 the English courts recognized the possibility of prejudice to one tenant when partition of a joint tenancy is forced to satisfy the debts of only one joint tenant.\(^{109}\) This position is recognized today in the statutes of West Virginia.\(^{110}\) A strong public sentiment pervades throughout the United States against allowing creditors to destroy the rights of a non-debtor tenant, through the enforcement of judgments solely against the other joint tenant, against the property held in joint tenancy. This sentiment is evidenced by the present day existence of the common law tenancy by the entireties in twenty-two jurisdictions.\(^{111}\) West Virginia does not currently recognize tenancy by the entireties. The court has recognized that the common law tenancy by the entireties has been abolished by statute.\(^{112}\) However, the common law tenancy by the entireties has survived in other jurisdictions solely to protect the family home from attacks by creditors.\(^{113}\)

The court found the reasoning of the New Jersey Supreme Court very per-

\(^{105}\) Id. at 856.

\(^{106}\) Id.

\(^{107}\) Id. at 861 (citing W. Va. Code § 37-4-3).

\(^{108}\) Id. at 862.

\(^{109}\) Id. at 857 (citing 32 Hen. 8, ch. 32 (1540)).

\(^{110}\) W. Va. Code § 37-4-3 provides:

[1]In any case in which partition cannot be conveniently made, if the interests of one or more of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, and the interest of the other person or persons so entitled will not be prejudiced thereby, the court . . . may order such sale. (emphasis added).

\(^{111}\) Harris, 322 S.E.2d at 858.

\(^{112}\) Wartenburg v. Wartenburg, 143 W. Va. 141, 100 S.E.2d 562 (1957).

\(^{113}\) Harris 322 S.E.2d at 858.
suasive. The New Jersey court held that equity would not allow the partition and sale of a modest family home held by a husband and wife as tenants by the entireties, to satisfy the debts owed by only one tenant. Even though West Virginia does not recognize tenancies by the entireties, the West Virginia Code provides a means whereby the judiciary may consider equitable principles in determining whether a creditor should be allowed to force a partition and sale of property held in a joint tenancy.

It is true that a joint tenant can unilaterally destroy a joint tenancy, transforming it into a tenancy in common and destroying the rights of survivorship by conveying his interest to a third party. Property law would seem to allow the creditor to step into the debtor's shoes and accomplish the same thing, namely the partitioning of a joint tenancy. However, in *Harris* equitable considerations will not allow this where the non-debtor joint tenant would be prejudiced by the partition and sale.

*Earl Kent Hellems*