June 1963

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Taxation and Land Titles Under Article XIII of the West Virginia Constitution*

HISTORICAL BACKGROUND

In 1872, the people of West Virginia adopted a new constitution containing unique provisions which unite the subject of land titles and taxation to some extent in one scheme set forth in article XIII.¹ These provisions make the answer to the question “Who owns that land?” depend largely on the answer to the question “who has paid the taxes on it?”

When the Constitution of 1872 was written, land titles in West Virginia were so confused that a serious problem confronted the people of the state. The West Virginia Supreme Court, speaking through Judge Hoffman in the case of Strader v. Goff² described the situation in 1873:

“From the beginning of the current century to the present time the conflicting titles and claims to the lands that constitute a large portion of the territory of this State, have prevented the settlement and improvement of the country, and paralized the energy and contravened the prosperity of our own people, to a degree inconceivable to those who have not especially observed the cause and its effect.”

To observe “the cause and its effect” it is necessary to look at the early history of Virginia.

At the time of the American Revolution, and for many years thereafter, the land lying west of the Allegheny mountains, in what was then Virginia but is now West Virginia, was largely unsettled forest land. This period in United States history was one of extensive land speculation originating in the settlement of what was then “the West.” The public land policy of the United States was founded on the idea of deriving immediate revenue by selling large grants of land and trusting the purchasers to colonize them. The plan proved untenable and was soon abandoned by Congress.³ But in

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² See 6 W. Va. 257, 265 (1873).
³ Read v. Dingess, 60 Fed. 21 (4th Cir. 1894).
1779, the General Assembly of Virginia adopted a similar plan when a statute was passed establishing a Land Office for the state and providing for the grant of waste and unappropriated lands.\(^4\) The purpose stated in the preamble was to settle the state's territory and gain tax revenue from landowners. Any person could, by paying about two and one-half pounds per acre into the treasury, receive a warrant authorizing him to locate a specified quantity of waste and unappropriated land wherever he might select. He was then required to enter the land, have surveys made, and return the surveys to a registrar within a fixed time. The Governor then issued a grant to the owner of the survey and the commonwealth's title vested in the grantee. "The result of this loose, cheap and unguarded system of disposing of . . . public lands was, that in less than twenty years nearly all of them were granted. . . ."\(^5\) But unfortunately most of the grants went to adventurers and speculators who often were nonresidents and never saw the lands, did not expect to improve them, and neglected to pay taxes on them.\(^6\) Thus the state's purpose was completely frustrated. The land sold was not occupied and improved as intended. The grantees, whose addresses were often unknown, did not pay taxes and the state was deprived of just revenues.\(^7\)

This vexing problem was compounded by the manner in which surveys were made. The surveys were often made without reference to other grants, or were constructed on paper by a surveyor who never entered the land. Thousands of acres were granted which were not identified by any marks or natural monuments. Often the same land was granted to two or more persons in succession.\(^8\)

Attempting to correct this situation and gain tax revenue, the Virginia General Assembly enacted a series of statutes\(^9\) which formed the basis of West Virginia's constitutional provisions.

These statutes begin with the Act of November 1781 which provided for the annual distraint and sale of lands for taxes by

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\(^4\) Hennings Laws of Virginia, ch. XIII, Act of May 1779 (1822).


\(^6\) McClure v. Maitland, supra note 5 at 564, 565.

\(^7\) McClure v. Maitland, supra note 5 at 565.

\(^8\) McClure v. Maitland, supra note 5 at 564; State v. West Branch Lumber Co. 64 W. Va. 678, 63 S.E. 372 (1908); Braxton v. Rich, supra note 5 at 183.

\(^9\) These statutes, from 1781 to 1831 are condensed in Harlow, Defective and Forfeited Lands (1877) pp. 2-9 and collected in full in 2 Virginia Revised Code 1819, pp. 508-561 and Supplement, pp. 341-345.
A series of acts supplemented and amended these provisions until the Act of December 27, 1790.

The Act of 1790 repealed all prior acts and provided that if the taxes remained unpaid on any land for a period of three years, all right to the land was lost, forfeited and vested in the Commonwealth. The title to forfeited land could be acquired by any person in the same manner he would acquire title to waste and unappropriated lands. A proviso protected the rights of infants, insane persons, and married women who were allowed three years after removal of disability to save their land from forfeiture. Subsequent acts established detailed procedures for publishing delinquent land lists, changed the period required for forfeiture from three years to two years and allowed former owners of forfeited lands to redeem them. Then, by the Act of February 5, 1810, the Virginia assembly provided that if any person failed to enter his lands for taxation on the appropriate land books for eighteen months, the lands were forfeited and title vested in the state. Again, infants, insane persons and married women were protected. Further acts provided for redemption of forfeited lands and extended the redemption period several times.

This scheme of forfeiting land for unpaid taxes or for non-entry on the land books continued until 1814. "The Act of the ninth of February 1814, very comprehensive and carefully drawn, is the great exemplar of all laws since, for the sale of delinquent lands by the sheriff."10 This act departed from the scheme of forfeitures. It provided for entry in the land books of land previously omitted. The land was then charged with back taxes and penalties and sold by the sheriff at public sale. If no person bought at the sale, then title became vested in the president and directors of the Literary Fund11 as if they were purchasers. While the land remained the property of the Literary Fund, no taxes were charged on it. The owner was given a right to redeem and infants, insane persons and married women were granted three years after removal of disability to redeem. The act concluded by repealing all prior forfeitures of land for failure to enter them on the land books and remitted all land forfeited for non-entry.

10 Harlow, supra note 9 at 7; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S.E. 214 (1892).
11 The Literary Fund generally conforms to West Virginia's School Fund. Sim v. Fisher, 125 W. Va. 512, 25 S.E.2d 216 (1943). It is a fund set aside for the promotion of education.
The results of all this legislation were still unsatisfactory. Very few people would buy land at tax sales and former owners failed to redeem land, although they were given every opportunity to do so. The state was, in effect, buying land and selling it to herself for the benefit of the Literary Fund and paying her own expenses. Furthermore, by repealing prior forfeitures and remitting land which in some cases had been granted by the state to others, another layer of grants was created involving land which had already been granted several times.\footnote{12 McClure v. Maitland, \textit{supra} note 5 at 566.}

In 1831, large amounts of taxes still remained unpaid. By the Act of April 1, 1831, the scheme of forfeiture and transfer was laid which has carried into our present laws. Briefly, the Act of April 1, 1831, provided that certain land already forfeited for nonpayment of taxes by virtue of the Act of 1814 was forever irredeemable, and all land returned delinquent after 1820 was forever irredeemable if taxes and penalties on it were not paid by 1833. Thereafter, any lands returned delinquent for three years were forfeited to the Literary Fund and became irredeemable. But, forfeited land would be transferred to, and vest in, any person actually occupying the land or a part of it who had paid all the taxes on it and had a just claim to the land. Likewise, forfeited land was transferred to a person in actual possession who had a just claim under a grant from the commonwealth.

The Act of February 27, 1835, provided for forfeiture of land lying west of the Allegheny mountains and not entered in the tax books. This forfeited land could transfer also to persons actually in possession of the land under a just claim who had paid the taxes on it.\footnote{13 Acts of Virginia Assembly, 1834-35, p.11.}

These two acts laid the basic foundation for West Virginia's whole system.\footnote{14 State v. West Branch Lumber Co., \textit{supra} note 8 at 683.} The steady and persistent policy behind the Virginia acts had been to punish those people who were derelict in paying taxes and favor, reward and protect those who paid taxes under some sort of claim to the land.\footnote{15 State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908).} This policy and the basic language of the acts was preserved through variations and modifications and carried into chapter 114 of the Code of Virginia 1860 which constituted the law on the subject when West Virginia
was formed. The substance of these statutes was incorporated into article XIII of the Constitution of 1872.

"That Article preserves, as did the Constitution of 1863, all rights acquired under the Virginia Statutes, and those statutes remain to this day as muniments of title to lands in this state. The forfeiture policy of the Virginia law was inserted in section 6 of Article XIII of the Constitution and the transfer principles were embodied in section 3 of that article."

The reason that West Virginia adopted the land law of Virginia can readily be perceived when it is understood that West Virginia faced exactly the same problems in 1872 that had plagued the parent state for nearly 100 years.

"At that time, a large portion of the state's territory was underdeveloped; land titles were unsettled; many times the same tract of land was covered by two or more grants from the Commonwealth of Virginia; there were overlapping claims, and the public policy of the state was to settle these conflicts of title in favor of those who were willing to occupy the lands and pay taxes, regardless of the date when the original grants from the Commonwealth were made."

The West Virginia Supreme Court described the condition of land titles in this state in 1871, just prior to the adoption of the constitution, thusly: "[T]he uncertainty and confusion of the land titles baffles the investigation and defies the ingenuity of the most assiduous and astute. . . ."

In summation, because of the results of the early attempts of Virginia to settle and cultivate her vast unpopulated forest lands west of the Alleghenys and at the same time gain some revenue, the subjects of land titles and taxation became rolled together in one ball of yarn which proved exceedingly difficult to unsnarl. Facing the same problem, West Virginia adopted the policies of Virginia on the subject and incorporated them into article XIII of the constitution. Governor John J. Jacobs, speaking to the House of Delegates immediately after the constitution had been ratified pointed out that the laws on the assessment of land and taxation were for

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16 State v. West Branch Lumber Co., supra note 8 at 684.
18 Twiggs v. Chevallie, 4 W. Va. 463 (1871).
one primary purpose—to provide revenue. But he warned that the questions of land title in this state are so interwoven with them that it would be no easy task to clear them of obscurity and at the same time protect the private rights that had vested from time to time under a series of Virginia acts.

ARTICLE XIII OF THE WEST VIRGINIA CONSTITUTION

Before beginning a study of article XIII of the Constitution of West Virginia it is necessary to establish definitions of certain words used in that article.

Escheated Lands: In American law escheat signifies a reversion of property to the state because of the lack of any person competent to inherit it. Escheated lands signify those lands which were owned by a person who died without a will and left no heirs or next of kin. These lands escheat to the state. It has been pointed out that as a practical matter there will seldom ever be any escheated land. Such lands would probably be returned delinquent and sold for taxes before it was determined they had been escheated to the state.

Waste and Unappropriated Land: Lands which were owned by the state at its formation and which have never been granted to anyone are waste and unappropriated. The term probably has no meaning today as there are probably no waste and unappropriated lands in the state.

Delinquent Lands: Delinquent lands are those upon which the owner failed to pay taxes and which have been listed as delinquent by the county sheriff and purchased by him for the state at public sale. The courts will sometimes speak of land becoming delinquent and forfeited to the state. Delinquent land is purchased by the state for the amount of taxes unpaid. The terms “delinquent” and “forfeited” are vastly different.

Forfeited Lands: Lands become forfeited when the owners fail to enter them for taxation on the land books of the proper counties and no taxes are paid on them for five consecutive years. This land is forfeited to the state by operation of law and no for-

22 Ibid.
23 Ibid.
malalties are necessary to convey title to the state. Lands are forfeited only for non-entry, not for non-payment of taxes.  

Article XIII of the West Virginia Constitution contains six sections which are presented here, not in numerical order, but in what is hopefully a logical progression.

**Section 1**

This section protects all private rights and interests in lands derived prior to the formation of West Virginia. Such rights are to be determined by the laws in force in Virginia prior to the formation of this state and by the laws in force in West Virginia prior to the adoption of the Constitution of 1872. It has been held that these provisions were designed to protect those people, known as "entrymen," who had entered and surveyed land under a warrant from Virginia but who had not yet been granted the surveyed land.  

Because section one refers specifically to private interests in land, it has been held that it does not limit the state's power to levy taxes on land.  

**Section 2**

Section two abolishes entry on land by warrant. Entry by warrant, discussed briefly above, is the procedure formerly used in Virginia to sell waste and unappropriated land. It has been held that this section, read with Section One, does not prevent the issuance of a grant to an entryman who, prior to the formation of this state, made surveys and entries of land in the state under Virginia law.  

**Section 6**

This section causes land to be forfeited for non-entry in the tax books. Section six declares it to be the duty of every owner of land, including the owner of an undivided interest in land, to have the land or interest in land entered on the land books of the county where the land, or part of it, is situated. Thus the owner

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26 State v. Miller, 84 W. Va. 175, 99 S.E. 447 (1919).
28 State v. Mil ler, 84 W. Va. 175, 99 S.E. 447 (1919).
will cause himself to be charged with taxes. Failure to enter the land on the tax books for five successive years causes it to be forfeited. Title vests in the state, unless it is subject to the transfer provisions of section three, to be discussed later.

Note that land may be entered in the tax books of a county where part of it lies. If land lies in two counties, entry in the tax books of either county, and payment of taxes, will save it from forfeiture. Taxation in the name of a former owner will prevent forfeiture for non-entry in the name of the actual owner. For example, where the former owner is deceased and land continues to be taxed in his name and not in the name of the heirs, no forfeiture occurs. Also, payment of taxes by either one of two adverse claimants to land, who both claim title from the same original owner, will prevent the occurrence of a forfeiture. But where land is purchased by the state for non-payment of taxes and held on the land books for five years in the name of the former owner without being charged with taxes in accordance with law, it becomes forfeited to the state for non-entry. To prevent forfeiture, there must be a charge of taxes on the land. To be an "owner" of land under this section it is not necessary to have a perfect legal title. Any person who claims the title in good faith and pays taxes on the land will not be disturbed by forfeiture.

Section six offers protection from forfeiture to people laboring under certain disabilities. If at the time of forfeiture the forfeited land is owned by an infant, married woman, or insane person, the land may be redeemed by that person within three years after the disability is removed. But the right of redemption is terminated if the land is not redeemed within twenty years of the forfeiture.

The grant of this right of redemption to married women creates a peculiar conflict in West Virginia constitutional and statutory

36 Stiles v. Layman, supra note 33; State v. Tavenner, 49 W. Va. 696, 39 S.E. 649 (1901).
law. The Revised Code of 1931, chapter 48, article 3, section 13 provides that married women's property shall not be subjected to any restraints or restrictions that may not lawfully be placed upon the property of unmarried persons. Thus a married woman in West Virginia is under no disability because of coverture as to land owned by her. In 1933, section 6 of article XIII of the constitution was amended in part, but the portion dealing with redemption of forfeited land by married women was left intact. Although the Legislature attempted to remove all disability from married women in 1931, the public reaffirmed in 1933 that married women require preferential treatment, granted to infants and the insane presumably unable to manage their own affairs, at least so far as land taxation is concerned. No case discussing this conflict was found. A 1948 decision38 held an earlier version of chapter 11a, article 4, section 34 of the code unconstitutional parte on grounds that it did not grant a right of redemption to married women. Lands forfeited to the state for non-entry which belong to infants, insane persons or married women cannot be sold for the benefit of the school fund or transferred by operation of section 3 before they become irredeemable.39

When lands are forfeited to the state, the forfeiture is automatic and absolute and becomes effective upon the happening of the event which operates to work the forfeiture.40 The West Virginia Constitution and statutes, like the statutes of Virginia of 1837 effect by their own force an absolute forfeiture of land, vesting title in the state without any legal proceedings.41

The clause forfeiting land for non-entry on the land books does not violate the clause of the fourteenth amendment to the Constitution of the United States restraining states from depriving any person of property without due process of law,42 but forfeiture of lands is a harsh and dreadful remedy and the courts lean away from it, applying it only in clearly warranted cases.43 A forfeiture will not be presumed from facts or lack of them.44 There is a pre-

39 Ibid.
42 King v. Mullins, 171 U.S. 404 (1898); State v. Sponaugle, 45 W. Va. 415, 32 S.E. 283 (1889); State v. Cheney, supra note 31; State v. Swann, 46 W. Va. 128, 33 S.E. 89 (1890).
44 Randolph v. Adams, 2 W. Va. 519 (1868).
sumption of entry of lands for taxation, and payment of taxes, in favor of the owner which stands until overthrown by proof to the contrary.\(^{45}\)

**Section 3**

Section 3 declares in substance that title to lands forfeited to the state under the provisions of section 6, or purchased by the state for delinquent taxes, shall be transferred automatically to one of three specified classes of persons.\(^{46}\) The disposition made of forfeited lands in this section shows that the purpose of forfeiture under Section 6 is not just to make a profit for the state by imposing a tax on land for every title under which it is claimed, because as fast as titles are forfeited they then are handed as a free gift to any one in a position to take them.\(^{47}\)

"It would be a rare case indeed where a transfer of title under the Constitution would not leave in its trail unpaid taxes, which the former owner should have paid. The policy of the State has been to lose these taxes in order to get land titles settled, and the land in the hands of persons who will develop the same and pay taxes thereon."\(^{48}\)

This section grew out of the policy of Virginia and of West Virginia to encourage the occupancy of lands and the entering of occupied lands on the books for taxation.\(^{49}\)

The language of this section is sweeping and comprehensive. It applies to all titles to lands in this state which have been forfeited, or which have been purchased by the state at sales made for the nonpayment of taxes and become irredeemable.\(^{50}\) It does not deal with part of the title or undivided interests.\(^{51}\) Title to any

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\(^{46}\) Waggoner v. Wolf, 28 W. Va. 820, 1 S.E. 25 (1886).

\(^{47}\) State v. West Branch Lumber Co., 64 W. Va. 673, dissent 66 W. Va. 1, 63 S.E. 372 (1908).


\(^{50}\) State v. Davis, 140 W. Va. 153, 83 S.E.2d 114 (1954).


Note that cases adhering to this proposition are all decided on fact situations which arose before the amendment of section 6, article XIII of the constitution in 1933. Section 6 now contemplates the entry of undivided interests in land on the tax books.
lands waste and unappropriated or escheated to the state are also affected by this section.

Title to these lands which is vested and remaining in the state transfers to and becomes vested in one of three classes of persons.\textsuperscript{52}

The first class includes any person (except that person whose default caused the land to be forfeited or declared delinquent, his heirs and devisees) who has had actual continuous possession of the land for ten years under the claim or color of title and has paid taxes on it for any five of the ten years. If there is no such person then the title may transfer to a person meeting the qualifications described in the second category.

The second class embraces any person (except that person who defaulted, his heirs and devisees) who has title regularly derived from the State of West Virginia or the Commonwealth of Virginia, which title would be valid except for the interposition of the forfeited title, and if he has paid all state taxes on the land for five successive years after 1865. By this clause it was intended to provide for those who held junior grants to lands which had accidentally been granted several times to different grantees by the old state, Virginia, or the new state, West Virginia.\textsuperscript{53} The state herself had infused uncertainty into land titles by making multiple grants and she was under an obligation to junior grantees to perfect their titles if the opportunity arose.\textsuperscript{54}

The title which a claimant must possess to qualify as a transferee under this classification is described in the constitution as "... not forfeited, which but for the title forfeited, would be valid..." The phrase "which but for the title forfeited" refers to the title which has been forfeited by the former owner to the state. If, disregarding this forfeited title now in the state, the junior grantee's title would be good, then the state's title transfers to and vests in him to perfect his title.\textsuperscript{55} One of the conditions imposed upon a claimant of the second class is that the title under which he claims not be forfeited.\textsuperscript{56}


\textsuperscript{53} Braxton v. Rich, supra note 52 at 189.

\textsuperscript{54} State v. West Branch Lumber Co., supra note 47.

\textsuperscript{55} State v. Collins, 48 W. Va. 64, 35 S.E. 840 (1900).

\textsuperscript{56} State v. Estep, 115 W. Va. 55, 175 S.E. 350 (1934).
If no person falls into either of these two classes, then the land may be transferred to a person of the third class. The third class includes any person (except the person who defaulted, his heirs and devisees) who has had actual continuous possession under color of title for any five successive years after 1865 and has paid all state taxes charged or chargeable for the period. It has been held that the periods of possession and payment of taxes should coincide.\textsuperscript{57}

The person responsible for the default which resulted in land title vesting in the state, and his heirs and devisees are specifically excluded from each class which may benefit from the transfer provisions of section 3. But the language does not reach beyond heirs and devisees. The transferee's title need not be hostile to the former owner's title and an assignee or grantee of the former owner is not excluded from the benefit of the section.\textsuperscript{58} It will not avail the former owner to continue in possession and pay taxes, after forfeiture, in hopes of regaining the lost title by transfer. Having caused the forfeiture, he cannot regain the title by transfer.\textsuperscript{59}

To qualify as a transferee under classes one and three, a person must have possession of the land.\textsuperscript{60} Possession is not required of a transferee under class two.\textsuperscript{61}

Possession must be actual and continuous, but need not be adverse possession.\textsuperscript{62} The continuity of possession required is the same as that required for adverse possession. That is, the possession must not have been abandoned by the claimant and it must be uninterrupted, not effectually broken by the possession of any other person.\textsuperscript{63}

The possession must be under claim or color of title. Color of title, in law, is no title at all. It is a void instrument which has

\textsuperscript{57} Mahaffey v. Batson, \textit{supra} note 48.

\textsuperscript{58} Mahaffey v. Batson, \textit{supra} note 48; State v. Board, 111 W. Va. 582, 163 S.E. 57 (1932); Litz v. Lowry, 69 W. Va. 181, 71 S.E. 263 (1911); State v. Collins, \textit{supra} note 55.

\textsuperscript{59} State v. Haymond, 84 W. Va. 292, 100 S.E. 81 (1919).

\textsuperscript{60} State v. Estep, \textit{supra} note 56.

\textsuperscript{61} Jarrett v. Stevens, 36 W. Va. 445, 15 S.E. 443 (1892).


\textsuperscript{63} State v. Davis, \textit{supra} note 50; Core v. Faupel, 24 W. Va. 238 (1884).
the appearance of legal or equitable title.\textsuperscript{64} A void tax deed,\textsuperscript{65} a
void deed executed under a court decree entered in a case where
the court had no jurisdiction,\textsuperscript{66} or even a deed made by a complete
stranger to the title,\textsuperscript{67} may serve as color of title to an occupant
of land. Color of title is necessary to determine the extent of the
claim. Where there is no paper giving color of title, but there is
only a claim to title, the possession will be limited to actual im-
provement, inclosure or clearing.\textsuperscript{68} It has been held that if a person
enters land and occupies a part of it for ten years under color of
title, his possession will include forfeited land within the bound-
aries although it is not actually occupied.\textsuperscript{69} The same is true of
contiguous tracts of land claimed under color of title which in-
cludes all of them. Actual and continuous possession of any part
of one tract will be deemed possession of all the tracts.\textsuperscript{70}

Land delinquent for nonpayment of taxes and purchased by
the state must become irredeemable before it is transferable. It
becomes irredeemable within the meaning of this section at the
expiration of the statutory period allowed for redemption.\textsuperscript{71} At
present the redemption period is eighteen months.\textsuperscript{72}

Land owned by infants, insane persons and married women
which is forfeited to the state for non-entry in the land books is
not transferable until the expiration of the redemption period
allowed in section 6 of this article has passed.\textsuperscript{73} Persons not under
a special disability who have forfeited their lands are also allowed
a redemption period by code.\textsuperscript{74} The West Virginia Supreme Court
said, in 1947, that a right of redemption as to forfeited lands is
impliedly assured by provisions of section 39 of article VI of the
constitution which declares that the Legislature shall provide by

\textsuperscript{64} State v. Davis, \textit{supra} note 50.
\textsuperscript{65} Stiles v. Layman, 127 W. Va. 507, 33 S.E.2d 601 (1945); Smith v.
\textsuperscript{66} Bank of Quinwood v. Becker, \textit{supra} note 62.
\textsuperscript{67} State v. Summers, 77 W. Va. 675, 89 S.E. 1 (1916).
\textsuperscript{68} Bennett v. Neff, 130 W. Va. 121, 42 S.E. 2d 793 (1947); Lyons v.
Fairmont Real Estate Co., 71 W. Va. 754, 77 S.E. 525 (1912); Parkersburg Indus-
trial Co. v. Schultz, 43 W. Va. 470, 27 S.E. 255 (1897); Adams v. Alkire, 20
W. Va. 480 (1882).
\textsuperscript{69} United Fuel Gas Co. v. Hays Oil Co., 111 W. Va. 598, 163 S.E. 443
(1932); State v. Morgan, 75 W. Va. 92, 83 S.E. 288 (1914).
\textsuperscript{70} State v. Haymond, \textit{supra} note 59.
\textsuperscript{71} State v. Farmers Coal Co., 130 W. Va. 1, 43 S.E.2d 625 (1947); State
v. Board, \textit{supra} note 58.
\textsuperscript{72} W. Va. Code, ch. 11A, art. 3, § 8 (Michie 1961).
\textsuperscript{73} State v. Blevins, \textit{supra} note 69.
\textsuperscript{74} W. Va. Code, ch. 11A, art 3, § 8 (Michie 1961).
general laws for releasing title to forfeited lands, but not by local or special laws. But it has also been held, as late as 1951, that the statutory privilege granted by the state to redeem forfeited or delinquent lands is not a duty of the state, but a mere act of grace by the Legislature. An additional opportunity to redeem is granted to former owners of forfeited land and delinquent land at the time the lands are sold by the state for the benefit of the school fund. Redemption statutes must be construed liberally in favor of the person entitled to redeem.

To enable a person to take the benefit of a transfer of forfeited land title under this section of the constitution it is not necessary that he be in a position to qualify for the transfer, by payment of taxes and possession, at the instant that title vests in the state. His title may come into fruition even after the state has instituted a suit to sell the land for the benefit of the school fund. But a person acquires no vested rights simply by entering land under claim or color of title and paying current taxes. No right vests until he has been in actual continuous possession of land for five years and paid all taxes for the period during which the state has held title to the lands. But when title to land vested in the state by forfeiture or purchase for nonpayment of taxes has been transferred to a person by this article, all title then in the state passes by the transfer to the person and the state cannot sell the land for any forfeiture then existing, and the former owner cannot redeem the land.

"By actual and continuous possession and payment of taxes, one who has not caused the forfeiture may obtain the title from the State, not against her will, but agreeably to her will. He is invited and encouraged to comply with the conditions vesting the forfeited title in him."

75 State v. Farmers Coal Co., supra note 71.
80 State v. Board, supra note 58.
83 State v. Haymond, supra note 59 at 299.
Section 4

Section 4 of article XIII provides for the disposition of land which the state has acquired by purchase for nonpayment of taxes or by forfeiture. This section, like section 3, deals with all land in the state which is waste and unappropriated, escheated to Virginia or this state, forfeited to the state, or purchased by either state and become irredeemable, not released, redeemed, transferred or otherwise disposed of, the title to which remains in the state. Such land may be sold to the highest bidder in a proceeding in the circuit court of the county in which the lands, or part of them, are situated. The money accruing to the state from the sale goes to the School Fund.64

Because the right of entry by warrant is prohibited by section 2 of this article, the state has no way to dispose of lands classified in this section except by sale in the circuit courts.65 Beds of navigable streams in this state are not classified as waste and unappropriated lands within the meaning of this section.66

The proceeding required must be a judicial proceeding instituted in the circuit courts, requiring process or notice in advance of hearing. An administrative proceeding is unconstitutional.67 Before a decree can be entered ordering the sale of land for the benefit of the School Fund, there must be a judicial finding that the land is subject to sale,68 and title must be in the state free and clear of all right of redemption in the former owner.69

As we have seen, land purchased by the state as delinquent for nonpayment of taxes does not become irredeemable and subject to sale until after the eighteen month statutory redemption period has expired.70 Delinquent lands owned by infants and insane persons remain redeemable for a period of one year after the disability is removed, the total period not to exceed twenty years.71

64 West Virginia Constitution, art. XII, § 4; W. Va. Code, ch. 11A, art. 4, § 3 (Michie 1961); State v. Farmers Coal Co., 130 W. Va. 1, 43 S.E.2d 625 (1947).
68 Sims v. Fisher, supra note 87.
69 State v. Gray, supra note 87; State v. Blevins, supra note 85; State v. Farmers Coal Co., supra note 84.
forfeited to the state for non-entry which were owned by infants, insane persons, or married women remain redeemable for a three year period after the removal of disability, the total period not to exceed twenty years, by virtue of section 6 of article XIII of the constitution. During this period forfeited land is not irredeemable, not subject to transfer under section 3, or sale by the state under this section. An additional opportunity to redeem is granted to former owners of forfeited and delinquent land at the time of sale in the circuit court. This privilege of redemption at the time of suit is a mere act of grace by the state and not a vested right of the former owner. Being an act of grace, it may be withdrawn by the Legislature at any time and does not affect the state's absolute title to the land.

Section 5

By the provisions of section 5, the former owner of any land sold under the authority of section 4 is entitled to receive any excess of the sum for which the land is sold above the taxes and interest chargeable on it. He must file a claim for the sum in the circuit court which decreed the sale within two years after the sale.

The two years granted refers to the period beginning at the time when the decree of sale is confirmed, not the time when the suit was instituted, and the right is extended to heirs and assigns of the former owner.

Former owners have a constitutional right to the distribution of surplus, not just a privilege like the privilege of redemption granted as a matter of grace. But this right to the excess proceeds of the sale is wholly gratuitous and does not give the former owner an interest in the land or confer any right to be a party to proceedings for the sale of it. The right is personal property which he may sell, and which is liable to a lien, and his creditors may maintain a suit to prevent the fraudulent transfer of it. It is a vested

92 State v. Blevins, supra note 85.
94 State v. Farmers Coal Co., supra note 84.
97 State v. Farmers Coal Co., supra note 84; State v. Gray, supra note 87; McClure v. Maitland, 24 W. Va. 561 (1884).
right, but contingent in possession and enjoyment on the event of a sale and the occurrence of excess proceeds from the sale. 99

**RELATED LEGISLATION**

**CHAPTER 11A, WEST VIRGINIA CODE**

All statutes relating to land titles and taxation and affecting the subject matter of the provisions of article XIII of the constitution must harmonize and conform to the constitutional plan and be construed in the light of it. 100 While the constitutional provision relating to transfer of title vested in the state has not changed since it was passed, the statutory provisions relating to it have undergone considerable change, 101 as have the statutes relating to other sections of article XIII.

Enabling legislation related to article XIII of the constitution is found in chapter 11A of the West Virginia Code entitled, Collection and Enforcement of Property Taxes. Specifically, article 3 and article 4 dealing with the sale of land for taxes and sale of lands for the school fund are most closely related to the subject matter.

The legislative purpose of these articles is declared to be threefold: (1) to provide for speedy and expeditious enforcement of the tax claims of the state and its subdivisions; (2) to provide for the transfer of delinquent lands to those more willing or better able to bear the duties of citizenship; and (3) to establish a quick and efficient procedure to dispose of claims of former delinquent owners and secure title in the new owner. 102 To this end, provisions are made for publication of lists of delinquent real estate by the sheriff. 103 The list, and a notice of impending sale, must be published in two newspapers of opposite politics in the county once a week for four successive weeks prior to the sale. A notice and copy of the list must be posted at the front door of the courthouse at least four weeks before the sale. If no newspapers are available, then the list and notice must be posted at the courthouse door and a copy of the notice must be posted at some public place in each magisterial district of the county.

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100 State v. Farmers Coal Co., *supra* note 84; Webb v. Ritter, 60 W. Va. 193, 54 S.E. 484 (1906).
An opportunity to redeem the land by paying the taxes, interest and costs before sale is granted.\textsuperscript{104} If the land is not redeemed, then it may be sold by the sheriff at public auction for the total amount of taxes, interest and charges due.\textsuperscript{105} If there are no purchasers at the auction, then the sheriff is authorized to purchase it on behalf of the state for the amount due.\textsuperscript{106} Title to the real estate is then vested in the state without the necessity of a deed.\textsuperscript{107}

Redemption of Delinquent and Forfeited Lands

The former owner is still allowed a period of redemption from the state auditor, which extends for eighteen months after the purchase by the state. At the expiration of that period the property becomes irredeemable and subject to transfer or sale under sections 3 and 4 of article XIII of the constitution.\textsuperscript{106}

The former owner of any real estate forfeited to the state for non-entry by the provisions of article 2, section 3 of this chapter and section 6 of article XIII of the constitution, or any person entitled to pay the taxes on the forfeited land, may redeem it at any time before the auditor certifies it to be sold for the benefit of the school fund.\textsuperscript{109}

As we have seen, a recent case held that some period of redemption must be allowed the former owners of delinquent land and forfeited land under a proper interpretation of the constitution.\textsuperscript{110} But a majority of the cases hold that the right of redemption granted to a former owner of forfeited land and the right granted to a former owner of delinquent land is the same, a mere grace of the Legislature which may be withdrawn at any time.\textsuperscript{111}

All lands that have been purchased by the state for nonpayment of taxes and become irredeemable, and all forfeited land, as well as waste and unappropriated and escheated lands, are

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\textsuperscript{104} W. VA. CODE, ch. 11A, art. 3, § 3 (Michie 1961).
\textsuperscript{105} W. VA. CODE, ch. 11A, art. 3, § 4 (Michie 1961).
\textsuperscript{106} W. VA. CODE, ch. 11A, art. 3, § 6 (Michie 1961).
\textsuperscript{107} W. VA. CODE, ch. 11A, art. 3, § 7 (Michie 1961); Armstrong Products Co. v. Martin, 119 W. Va. 50, 193 S.E. 125 (1937); Ellis v. Hager, 87 W. Va. 313, 104 S.E. 607 (1920); Neal v. Wilson, 79 W. Va. 482, 92 S.E. 136 (1917).
\textsuperscript{108} W. VA. CODE, ch. 11A, art. 3, § 8 (Michie 1961).
\textsuperscript{109} Ibid.
\textsuperscript{110} State v. Farmers Coal Co., supra note 84.
\end{flushleft}
subject to judicial sale for the benefit of the school fund.\textsuperscript{112} Delinquent lands which are not irredeemable cannot be made the basis of a suit under article XIII, section 4 of the constitution.\textsuperscript{113} Irredeemability can only be determined by legislative enactment allowing a definite, fixed period for redemption at the expiration of which the land becomes irredeemable.\textsuperscript{114} When the land has become irredeemable, or is forfeited, or escheated to the state, the state has absolute title and the former owner has no right or interest except such further privilege of redemption as may be granted by the state, and no person is entitled to redeem.\textsuperscript{115}

Forfeited lands formerly owned by infants, insane persons or married women are redeemable within three years after the disability is removed, the right not extending beyond twenty years,\textsuperscript{116} and therefore are not subject to sale or transfer until this period has elapsed.\textsuperscript{117} Infants and insane persons, former owners of delinquent land, are also granted a right of redemption extending one year after the disability is removed, not to exceed twenty years.\textsuperscript{118}

\textit{Judicial Sale of Delinquent and Forfeited Lands}

The state auditor is, \textit{ex officio}, the state commissioner of forfeited and delinquent lands.\textsuperscript{119} He must appoint a deputy commissioner of forfeited and delinquent lands in each county.\textsuperscript{120} As soon as possible after receipt of a certified list of forfeited and delinquent lands from the auditor, the deputy commissioner should institute a suit in the name of the state in the circuit court of his county for the sale of the listed lands.\textsuperscript{121}

This proceeding instituted in the circuit court for the sale of land must be judicial in nature requiring process or notice in advance of hearing. An administrative proceeding, for this purpose,

\begin{footnotes}
\item[112] W. Va. Code, ch. 11A, art. 4, § 3 (Michie 1961).
\item[113] State v. Simmons, supra note 98; State v. Blevins, supra note 85; State v. Gray, supra note 87; State v. Farmers Coal Co., supra note 84; Sims v. Fisher, supra note 87; W. Va. Code, ch. 11A, art. 4, § 12 (Michie 1961).
\item[114] State v. Farmers Coal Co., supra note 84.
\item[117] State v. Blevins, supra note 85.
\item[121] W. Va. Code, ch. 11A, art. 4, § 10 (Michie 1961).
\end{footnotes}
insofar as it attempts to require courts to perform administrative and non-judicial functions is unconstitutional.\textsuperscript{122} Two apparent reasons why the Legislature, after previous unsuccessful attempts, enacted in 1947 the present statute as chapter 11A, article 4 of the Code, which provides for a judicial proceeding \textit{inter partes} and substantially one \textit{in rem}, are to remove skepticism surrounding tax deeds and to insure purchasers of good title to lands sold for the benefit of the school fund. The purpose of the suit is to afford judicial determination of all the questions of the rights of parties and then render a decision as final as in any other case of \textit{res adjudicata}.\textsuperscript{123}

It is argued that the suit for sale of land is not a suit at all because there are no adversary parties. The state holds absolute title to the land, no other person has any right, title, or interest and it is illogical to require the state to bring suit against former owners to sell its own land.\textsuperscript{124} Nevertheless the law in West Virginia today, as we have seen, requires a judicial proceeding for the sale of delinquent and forfeited land.

In the suit instituted in the circuit court, the former owner of the land, any known party having an interest in the land, and all unknown parties are made defendants. Service of process is by publication once a week for three successive weeks in newspapers published in the county. Personal service is not necessary and the legislature has expressly provided that failure to serve personally any party to the suit, or failure to name any party by publication will not affect the validity of the proceedings.\textsuperscript{125} This section has been held to be directory, not mandatory,\textsuperscript{126} thus failure to serve any party as defendant does not invalidate the suit.

Any person may apply to the circuit court at any time before the sale takes place and request that the suit be dismissed for any of the following reasons:\textsuperscript{127}

1. All taxes due were paid before the land was sold to the state.

2. The land has been redeemed.

\textsuperscript{122} Sims v. Fisher, 125 W. Va. 512, 25 S.E.2d 216 (1943).
\textsuperscript{123} Robinson Improvement Co. v. Tasa Coal Co., 143 W. Va. 293, 101 S.E.2d 67 (1957).
\textsuperscript{125} W. VA. CODE, ch. 11A, art. 4, § 12 (Michie 1961).
\textsuperscript{127} W. VA. CODE, ch. 11A, art.4, § 19 (Michie 1961).
3. The land has not escheated.

4. The land has not been forfeited.

5. The land was sold to the applicant at a prior sale for the benefit of the school fund.

6. The applicant has obtained title to the land by reason of transfer under the provisions of section 3, article XIII of the constitution.

This section does not prevent the court from making a full inquiry on its own discretion to determine if the lands are subject to sale. In addition, any person who would have been entitled to apply for an order dismissing the suit, but who did not learn of the suit in time to do so, may apply to the court for an order setting aside the sale at any time before the sale is confirmed.

The privilege of redeeming the land ends when the sale is confirmed by the circuit court, except that infants, insane persons and married women may redeem from the purchaser.

**Title Acquired, The Tax Deed**

The court shall direct the deputy commissioner to make and deliver to the purchaser a deed to the land, the provisions of which are detailed in the statute. The purchaser, his heirs and assigns, acquires all right, title and interest in the real estate which was vested in the state or in any person entitled to redeem. No irregularity or error in any step in the procedure leading up to and including delivery of the deed will invalidate the title acquired by the purchaser. The deed is made conclusive evidence of title and emphasizes the intention of the Legislature to make the suits by the deputy commissioners comprehensive of all questions and rights of parties and it is necessary for defendants to assert their claims directly in such suits. If a collateral proceeding is brought attacking the decrees in such a suit, the plaintiff therein is not entitled to a decree annulling or voiding the deed.

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129 W. VA. CODE, ch. 11A, art. 4, § 30 (Michie 1961).
130 W. VA. CODE, ch. 11A, art. 4, § 31 (Michie 1961); Beckley v. Hatcher, supra note 115.
131 W. VA. CODE, ch. 11A, art. 4, § 34 (Michie 1961).
132 W. VA. CODE, ch. 11A, art. 4, § 32 (Michie 1961).
133 W. VA. CODE, ch. 11A, art. 4, § 33 (Michie 1961).
134 Robinson Improvement Co. v. Tasa Coal Co., supra note 123.
The state sells the purchaser in a school land suit a derivative title, and not an original title.\textsuperscript{135}

\section*{The West Virginia Constitution and Other State Constitutions}

The provisions of the Constitution of West Virginia relating to land titles and taxation are apparently unique. No other state constitution was found with similar provisions.

The Constitution of North Dakota, article IX, section 158 provides for a kind of forfeiture. Lands acquired by the state for the common school fund and contracted to be sold by the state are subject to taxation from the date of the contract. If the assessed taxes are not paid by the purchaser within a specified period of time, the contract may be declared null and void by the board of university and school lands.

Louisiana flatly declares there shall be no forfeiture of property for the nonpayment of taxes in article X, section 11 of her Constitution. But after taxes have become overdue, the collector is empowered to sell, without suit and after giving proper notice, such property as the debtor may point out, or the minimum amount necessary to cover taxes and costs. The property remains redeemable for three years after the sale.

At least two states, Texas and Mississippi, specifically mention the sale of delinquent lands in their constitutions but handle the problem in a general way by declaring that the legislature shall provide laws for the sale of delinquent lands. Each state allows a two year period for redemption.\textsuperscript{136}

Ten states were found to protect property owners in their possession by exempting a homestead from forced sale by any court. The homestead is usually described as a specified amount of real and personal property. In each case, however, the homestead is declared not to be exempt from sale for taxes.\textsuperscript{137} One of

\textsuperscript{135} Beckley v. Hatcher, supra note 115.
\textsuperscript{136} Mississippi Constitution, art. IV, § 79; Texas Constitution, art. VIII, § 13.
\textsuperscript{137} Florida Constitution, art. X, § 1; Kansas Constitution, art. XV, § 9; Nevada Constitution, art. IV, § 30; North Carolina Constitution, art. X, § 2; Oklahoma Constitution, art. XII, § 2; South Carolina Constitution, art. III, § 28; Tennessee Constitution, art. XI, § 11; Texas Constitution, art. VIII, § 13; Virginia Constitution, art. XIV, § 190; Wyoming Constitution, art. XIX, § 19.
these, Florida, exempts the homestead from taxation up to the assessed value of 5,000 dollars.\textsuperscript{136}

Kentucky, whose early history is traced to Virginia, was also faced with the same problems of conflicting land titles that faced West Virginia when the constitution of 1872 was adopted. Kentucky met the problem by denying land claimants the right to maintain an action for possession of land if it is necessary to rely on a grant or patent from Virginia, or from Kentucky, if issued before 1820.\textsuperscript{139}

\textsuperscript{136} Florida Constitution, art. X, §7.
\textsuperscript{139} Kentucky Constitution, § 251.