THE WEST VIRGINIA LAW OF FORFEITED AND DELINQUENT LANDS*

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The law presently governing the redemption and sale of lands forfeited, purchased by the state for nonpayment of taxes, escheated, or waste and unappropriated, is found in Chapter 11A, Article 4 of the West Virginia Code.\(^1\) In 1941 an administrative proceeding had been established by the legislature to effectuate the redemption and sale of forfeited and delinquent lands,\(^2\) but as this law was shortly thereafter declared unconstitutional,\(^3\) no sales of said land were effectuated under it. And, as this 1941 law provided for an administrative proceeding rather than a judicial proceeding, the comparison with the present or other acts is of little or no value. In 1933, the legislature had completed a revision of the law relating to forfeited and delinquent lands\(^4\) but because of the several and later moratorium acts\(^5\) there were few suits entered by the state for sales of property and there were only isolated instances of property being actually sold.

The last general sale of lands held by the state was in the immediate years prior to 1933. These proceedings for sale were conducted under the statutes in effect at that time, the last amendment thereto having been made in 1923. That law is the most recent statute that can be compared with the present existing law.\(^6\) However, any such comparison merely proves that in the intervening years the proceeding has been radically changed and, with few exceptions, there is little resemblance between the two acts.

A clear understanding of the meaning of the terms "forfeited land," "escheated land," "waste and unappropriated land," and "delinquent land" is necessary in any discussion of this law. The confusion which is found in former statutes and in legal decisions construing them is partially due to a failure of the legislature and of the court to define clearly

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* This paper was completed for publication before the decision in State v. Farmers' Coal Co., S. E. (2d) (W. Va. 1947) was announced. Although it is not believed that that decision substantially affects the matters discussed in this article, it is suggested that the opinion be read as the latest statement of the supreme court of appeals on the subject of delinquent lands. EDITOR.

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6 W. Va. Rev. Code (1931) c. 37, art. 3.
and to use accurately these terms. It is true that the use and meaning of said terms has somewhat changed since the formation of the state of West Virginia; but at the present time a clear meaning can be given to each of the said terms.

(1) **Forfeited lands** referred to in the present law means those lands which the owners have failed to enter for taxation on the land books of their counties and upon which no taxes have been paid for a period of five successive years. By operation of law this land is forfeited to the state of West Virginia, and no formalities are necessary to convey title to the state.\(^7\) No lands can be classified as forfeited except those forfeited for nonentry. Lands delinquent for nonpayment of taxes are not forfeited lands.

(2) **Escheated lands** are those which were owned by persons who died intestate and without heirs or next of kin. Such lands escheat to the state of West Virginia.\(^8\) The present code still provides for the office of escheater,\(^9\) whose duty it is to report all escheated land to the state auditor. However, as a practical matter there will seldom be any escheated land, it being more probable that said property would be returned delinquent and sold for nonpayment of taxes before the escheator had any knowledge of the fact that said land had escheated to the state of West Virginia. Therefore, while escheated lands are always a possibility, at the present time it is more than likely that such land will appear on the list of state lands as delinquent for nonpayment of taxes and sold to the state.

(3) The term **waste and unappropriated lands** has no meaning in the year 1947. Lands which were never patented are waste and unappropriated.\(^10\) At the time of the formation of the state of West Virginia, the provisions of our constitution\(^11\) were adopted from that of Virginia. There are few cases in West Virginia concerning waste and unappropriated lands and it seems safe to state that there are no waste and unappropriated lands in this state at the present time.

(4) **Delinquent lands** are all lands upon which the owners have failed to pay taxes when due and which have been advertised and re-

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\(^8\) W. Va. Code (Michie, 1943) c. 37, art. 2, §1.

\(^9\) Id. at §4. The assessor of the county is escheater.


turned delinquent by the sheriff of the appropriate county, and at a sale thereof purchased for the state by the sheriff. This classification covers approximately ninety per cent of all lands held by the state auditor for sale.

I. **Provisions of Chapter 11A, Article 4**

This article begins with a declaration of the intent and purpose of the legislature in passing this law. A statement is made that the article is designed to convey a derivative title to the purchaser and not an original title and that a title obtained will transfer only such interest as is vested in the state at the time of sale. The legislature reiterates the provisions of Section 6, Article 13 of the constitution, making it the duty of a landowner to enter his land for taxation on the land books of his county and to pay the taxes thereon, and providing for forfeiture for nonentry. All lands held by this state by reason of purchase for delinquent taxes, forfeiture, escheat or nonappropriation may be sold under this article. The state auditor is named as state commissioner of forfeited and delinquent lands and power given him to administer and carry out the provisions of the article and to hold and manage such lands.

Practicing attorneys in each county are to be designated by the auditor as deputy commissioners of forfeited and delinquent lands for the several counties, which deputies are to serve at the pleasure of the auditor. Deputy commissioners are the local agents of the auditor and are required to do what is ordered by the auditor and are subject to the control of the auditor. Said deputies are to be under such bond as the auditor may designate within the limits of two thousand to ten thousand dollars. The auditor is required to keep a permanent record of all forfeited, delinquent, escheated, waste and unappropriated lands. This record must set forth the quantity, local description, name of the former owner, the dates of nonentry and forfeiture or of the delinquency and sale to the state or escheat, as the case may be.

The auditor is directed to certify to the circuit court of each county a list of all lands in that county subject to sale under this article which have been under his control for as much as one year before certification. This list shall be arranged by districts and within the district alphabetically by the name of the former owner. The list must set forth

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13 Id. at §2.
14 Id. at §3.
15 Id. at §4.
16 Id. at §5.
17 Id. at §6.
18 Id. at §9.
all information as it appears in the auditor's record and must specify the amount of taxes and interest due on the date of certification and the publication and other charges due with interest and the total accordingly due, which shall be the amount required to redeem from the auditor on the date of certification less the auditor's redemption fee. It is provided that escheated and waste and unappropriated lands shall be separately listed. Each item certified to the circuit court shall bear a number and the several items in the list shall be numbered consecutively, and all orders, entries, applications or proceedings in said court with respect to any item shall refer to its number and to the year of certification. This list is made in quadruplicate, the original to be retained by the auditor, one copy to be sent to the clerk of the circuit court, one to the clerk of the county court, and the remaining copy to the deputy commissioner for the county. The list is a permanent record and the auditor, county clerk and circuit clerk are required to preserve it as such in their respective offices.

Within ten days after receiving the auditor's certified list for his county, a deputy commissioner shall prepare a notice which shall be twice published in two newspapers in his county.\(^\text{19}\) The form of the notice is prescribed by this section and is to notify all owners that all land listed has been certified to the deputy commissioner for sale and can be redeemed from him upon application and payment of taxes, interest, fees and charges. This notice must also be posted at the front door of the court house on the date of the first publication, and a fee to be paid by the auditor to the newspaper for said publication is here prescribed.

A. The Redemption of Lands

Prior to certification, the former owner of property has the right to redeem from the auditor at any time. After certification of the list, any person having a right of redemption may redeem from the deputy commissioner.\(^\text{20}\) This right to redeem continues until sale has been made and is confirmed by the court.\(^\text{21}\) Upon application for redemption, the deputy commissioner shall compute the amount necessary to redeem as therein provided and enter the amount due on an order to the sheriff of his county directing the sheriff to receive said amount and give a receipt therefor. The form of this order is prescribed by the auditor and is signed by the deputy commissioner. Under the authority given the auditor, he has provided a form of order which is issued in triplicate, the original of which is receipted by the sheriff of the county and returned to

\(^{19}\) Id. at §10.
\(^{20}\) Id. at §11.
the person redeeming, one copy being retained by the sheriff for his record and the other copy being returned to the deputy commissioner for his record and as a basis upon which he may issue a certificate of redemption. No partial redemption shall be allowed after certification.\footnote{22} This means that if several tracts or lots of land be assessed on the land books as one item and are certified by the auditor as one item that all of said tracts or lots must be redeemed. Any person having a right of redemption in any one of said tracts or lots must, in order to protect his interest, redeem all of said tracts or lots. When redemption is sought after institution of a suit for the sale of property and the pleadings in said suit disclose that two or more adverse parties claim ownership of such property, the deputy commissioner shall allow redemption only upon order of the court.

It has already been stated that a person having a right of redemption may redeem upon application to the deputy commissioner. It is elsewhere provided that "a person having a right of redemption" is (1) a former owner of any real estate forfeited for nonentry or delinquent and purchased by the state, or (2) any other person entitled to pay the taxes thereon.\footnote{23} A person entitled to pay taxes on land is any owner of real estate whose interest is not subject to separate assessment or any person having a lien on the land or on an undivided interest therein, or any other person having an interest in the land or in any undivided interest therein which he desires to protect, and also any person owning a part of a tract or lot, the whole of which was assessed in the name of another.\footnote{24}

The deputy commissioner is required to issue a certificate of redemption for the property redeemed when presented with evidence that the amount due has been collected by the sheriff.\footnote{25} All certificates of redemption shall be numbered consecutively for each year. The certificate of redemption is issued in triplicate, the original of which is sent to the auditor. One copy is delivered to the person redeeming, and the other copy delivered by the deputy commissioner to the clerk of the county court who shall treat it as a certificate of redemption issued by the auditor and shall also note the redemption on his copy of the certified list. If the redemption is effected after a suit for the sale of the land has been instituted in the circuit court, the fact of redemption shall be reported to the clerk of the circuit court who shall note said redemption on his copy of the certified list. Any person redeeming the interest of another from

\begin{footnotes}
\item[22] Id. at art. 4, \S 11.
\item[23] Id. at art. 3, \S 8.
\item[24] Id. at art. 1, \S89, 10.
\item[25] Id. at art. 4, \S12.
\end{footnotes}
the deputy commissioner shall be subrogated to the lien of the state upon such interest.\textsuperscript{26} His right to a lien shall be lost, however, unless within thirty days after payment to the sheriff he shall file his claim against the owner of said interest as a judgment lien in the office of the clerk of the county court. Said claim must state the number of the certificate of redemption issued by the deputy commissioner for said property. The lien of this claim may be enforced as other judgment liens are enforced.

A person redeeming from the deputy commissioner may request a revaluation or reclassification of the land for any year or years since the sale to the state.\textsuperscript{27} This request must be made to the assessor of the counties in which the property is situated.\textsuperscript{28} If it shall appear that the valuation complained of was too high or too low for any year, then the assessor is required to place a new valuation thereon. If the classification complained of fails to conform to that prescribed by law, the assessor shall make the proper reclassification. Any revision or reclassification by the assessor must be approved by the county court, and shall be certified by the county court to the deputy commissioner and used by him in computing the taxes due. Since 1939, the assessor has been required to classify and value real estate annually in the land books in the name of the former owner, even though said property has been sold to the state.\textsuperscript{29} If the assessors in the several counties have made annual valuations and classifications according to law, there would seem to be no reason for a request for revaluation and reclassification. However, many properties now in the hands of deputy commissioners have been delinquent since the year 1930 or 1931, and in this respect it should be noted that the assessor, at the request of the person wishing to redeem, is \textit{required} to review the property and make a revaluation or reclassification, if for any reason it appears necessary.\textsuperscript{30}

After a sale has been made of any forfeited or delinquent land, but before the court has confirmed the sale, any person having a right of redemption may redeem such land by paying to the purchaser the amount of purchase money with interest at twelve per cent \textit{per annum} from the date of sale and securing an itemized receipt for said payment.\textsuperscript{31} Said person shall present the receipt to the deputy commissioner who shall then calculate the additional amount required for redemption. If the land was sold for as much or more than the total amount of taxes, interest, charges and costs due thereon, the deputy commissioner shall

\textsuperscript{26} \textit{Id.} at art. 4, §13.
\textsuperscript{27} \textit{Id.} at art. 4, §14.
\textsuperscript{28} \textit{Id.} at art. 3, §11.
\textsuperscript{29} \textit{Id.} at art. 4, §13.
\textsuperscript{30} \textit{Id.} at art. 3, §11.
\textsuperscript{31} \textit{Id.} at art. 4, §37.
charge for redemption only the fee for the redemption certificate and one dollar for execution of the same. Where the land sold for less than the amount due, the additional amount required for redemption shall be the difference between the purchase price at the sale and the amount due with interest at twelve per cent per annum from the day of sale plus the fee for certificate of redemption and for execution of the same. Where the amount necessary for redemption has been determined, he shall issue an order to the sheriff and proceed in all respects as if the property had been redeemed before a suit for sale had been instituted. Upon confirmation of a sale by the court the right to redeem is terminated.\textsuperscript{32}

B. Suit for the Sale of Land and Sale Under the Article

After receiving the certified list, the deputy commissioners are required to examine the title of each tract or lot included therein in order to determine the persons entitled to notice of the institution of suit for the sale of land and acquire information necessary for preparing the bill in said suit.\textsuperscript{33} In making the title examination, he shall list the following persons who shall be entitled to notice of any suit instituted:

1. The person who owned the real estate at the time it was forfeited or returned delinquent and sold, his heirs or devisees and his personal representatives, if such there be.

2. Every subsequent grantee of the land, his heirs or devisees and personal representative, if such there be, if the conveyance of title to him is of record in the office of the clerk of the county court.

3. Every lienholder disclosed by the records in said clerk's office; and

4. Every other person having such an interest in the property as would entitle him to redeem if such interest appears of record.

After completing the examination of titles, the deputy commissioner shall institute a suit or suits in the circuit court in his county for the sale of all lands included in the list, except such lands as have been redeemed after certification and before suit was commenced.\textsuperscript{34} No suit shall include more than twenty-five items on the certified list but may include less than twenty-five. Where undivided interests in a single tract or lot are involved, which tract or lot is forfeited or delinquent, one suit may be brought for the sale of such interests regardless of the number of said interests. Waste and unappropriated lands or escheated lands shall not be included in any suit brought for the sale of forfeited or delinquent lands. All persons listed by the deputy commissioner in making his title examination as persons being entitled to notice in the institution of the suit

\textsuperscript{32} Id. at art. 4, §43.
\textsuperscript{33} Id. at art. 4, §15.
\textsuperscript{34} Id. at art. 4, §16.
shall be named as parties defendant therein.\textsuperscript{36} Unknown heirs of a former owner shall also be made defendants and all other persons who have or claim an interest in any of the land included in the suit. It is expressly provided, however, that a failure by the deputy commissioner to make any person a defendant shall not affect the validity of the proceeding in respect to any person who was made a defendant.\textsuperscript{38} Where the deputy commissioner has found that land should not be sold, he need name as defendant, only the former owner in whose name the property was forfeited or returned delinquent and sold and the present owner or owners if the land has since been transferred.\textsuperscript{37} It is further provided that any person claiming an interest in land included in a suit instituted by the deputy commissioner may intervene at any stage of the proceeding by petition stating the interest he claims and shall thereupon become a party defendant with the same rights as if he had originally been named such defendant.

All persons who were found to reside in the state must be personally served with process and all other defendants must be served by publication as in other chancery suits.

The bill filed in a suit for the sale of lands shall aver that each tract or lot included in the suit is subject to sale for the benefit of the school fund. It shall contain a list of the lands included in the suit and set forth the total amount of taxes, interest, fees and costs for each piece of land, and shall indicate whether the land is forfeited, delinquent, escheated, or waste and unappropriated, shall refer to its certification number, shall give the location and general description and the name of the former owner, and, in the case of forfeited or delinquent land, the year of forfeiture or sale to the state.\textsuperscript{38} The bill shall also describe the former owner’s source of title by proper reference to the instrument conveying title to him, giving its date and the book and page number where the same is recorded in the county clerk’s office. Where the deputy commissioner has included in the suit land which is not subject to sale, the bill shall state that fact and the reasons for the deputy commissioner’s conclusion and shall pray that the court enter an order dismissing the suit in respect to such land. In all other respects the prayer shall be that the court enter a decree ordering the sale of each tract or lot included therein. All suits brought by deputy commissioners shall be commenced, proceeded in, heard and determined as other chancery suits.\textsuperscript{39} A defendant in any suit shall be bound by the order or decrees entered therein only in so far as

\begin{itemize}
  \item \textsuperscript{36} \textit{Id.} at art. 4, §17.
  \item \textsuperscript{37} \textit{Ibid.}
  \item \textsuperscript{37} \textit{Ibid.}
  \item \textsuperscript{38} \textit{Id.} at art. 4, §19.
  \item \textsuperscript{39} \textit{Id.} at art. 4, §20.
\end{itemize}
they concern the particular land with respect to which he was made a defendant.

A default decree may be entered in any suit for the sale of land against any defendant properly served with process, either personally or by publication, in the same instances as other chancery proceedings. The list certified to the circuit court by the auditor shall be an exhibit and a part of every bill and *prima facie* evidence of everything therein stated.

The clerk of the circuit court shall keep a separate chancery order book for all orders or decrees in proceedings for the sale of lands under this article. This book is to be indexed by certification number and the name of the former owner of each tract.

It is provided that any person substantially interested in a property, or the deputy commissioner, may apply to the circuit court at any time before sale for an order reducing the tax due upon the ground that the amount rightfully due is less than the amount charged against it on the certified list. This section seems to indicate that a person who has applied for a revaluation or reclassification of a property under Section 14 and has not been satisfied with the revaluation or reclassification placed thereon by the assessor might apply directly to the court for a reduction of the tax on the basis that the valuation or classification was improper, and if the assessor has refused to entertain the application for a revaluation or reclassification, such person might make said refusal the basis for an application to the circuit court under this section.

An application to dismiss the suit may be made by any person substantially interested, or the deputy commissioner, at any time before sale, where his application is based upon one or more of the following grounds: (1) that all taxes due thereon were paid before sale to the state; (2) that the land was redeemed after sale to the state; (3) that the land has not escheated; (4) that the land has not been forfeited for non-entry; (5) that the land was sold to him at a former circuit court sale for the benefit of the school fund and has not since been sold to the state for nonpayment of taxes or forfeited for nonentry; and (6) that he has acquired title to the land by transfer under the provisions of Section 3, Article XIII of the constitution.

When the deputy commissioner makes application under the two preceding sections, if the court is satisfied with the reasons stated it shall

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40 Id. at art. 4, §23.
41 Id. at art. 4, §21.
42 Id. at art. 4, §22.
43 Id. at art. 4, §24.
44 Id. at art. 4, §25.
It is further provided that, where such application is made by a person substantially interested, the court may make a decree of reference directing a commissioner in chancery to ascertain the facts and report to the court and further provides for the execution of the decree of reference and the orders which shall be entered by the court based upon the report of the commissioner in chancery.46

Where the court shall find that the tract or lot is subject to sale, it may enter a decree ordering that such tract or lot be sold by the deputy commissioner at public auction to the highest bidder and shall fix the time and place of the sale.47 Thereafter, and at least fifteen days before the day on which the court ordered the land to be sold, the deputy commissioner is required48 to publish once a week for two successive weeks a list of lands to be sold. The form of the notice is provided and the list is required to state for each tract or lot the quantity, local description, name of the former owner, and the total amount of taxes, interest and costs due thereon.49

On the day fixed by the order of court, the deputy commissioner shall sell in accordance with said order each item remaining unredeemed.50 The sale may be continued from day to day until all land has been offered for sale. If no bid is made on certain land, the deputy commissioner shall report this fact to the court and the court may order such land to be sold at a subsequent sale. Proceeds of the sale shall be collected by the sheriff, or one of his deputies, who shall issue a receipt for the purchase price on a form prescribed by the Auditor. Within ten days after the sale, the deputy commissioner shall file with the clerk of the circuit court a report showing his proceedings with respect to lands ordered sold on that day. This report shall state whether each item was sold or redeemed before sale and if so, the name of the purchaser and the amount of his bid. Where it appears that the land sold was non-existent or had been the subject of duplicate or improper assessment or had been transferred to other persons under Article XIII of the constitution, the purchaser may request a refund of the purchase money and the deputy commissioner shall apply to the circuit court for an order directing the sheriff to return said purchase money.

45 Id. at art. 4, §826.
46 Id. at art. 4, §§26, 27, 28.
47 Id. at art. 4, §29.
48 Id. at art. 4, §30.
49 Ibid.
50 Id. at art 4, §31.
After the sale has been had, the deputy commissioner must apply to the court for an order confirming the sale of each tract or lot sold.\textsuperscript{51} Where the court is satisfied that the purchase price obtained was as high as might reasonably be expected, it shall enter an order confirming the sale and directing the deputy commissioner to execute and deliver to the purchaser, his heirs or assigns, a deed for the same. On the other hand, if the court believes that the amount bid was too low, it shall refuse to confirm the sale and shall enter an order directing the deputy commissioner to sell the land again at his next sale and directing the sheriff to return the purchase money to the purchaser. Upon confirmation of the sale, all rights of redemption in respect to the land shall be terminated. Persons whose rights are not terminated by an order of confirmation are infants or insane persons,\textsuperscript{52} or those persons serving in the armed forces.\textsuperscript{53} The form of deed which the deputy commissioner shall make and deliver to the purchaser in accordance with the decree of court is set out and provided in the article.\textsuperscript{54}

Any purchaser obtaining a deed from the deputy commissioner shall thereby acquire 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 the state or by any person who was entitled to redeem.\textsuperscript{55} Exceptions are made for those persons whose rights in the land are saved by express provision.\textsuperscript{56} The title acquired shall relate back to the date of sale. The legislature declares that no irregularity in the procedure up to the confirmation of sale shall invalidate the title unless the irregularity or mistake is expressly made a ground for instituting a suit to set aside the deed.\textsuperscript{57}

\textit{C. Who May Purchase at the Sale}

A former owner of any land being sold, his heirs or assigns, is forbidden to purchase such real estate at the sale or to be indirectly interested in the purchase of the same.\textsuperscript{58} No deputy commissioner, sheriff, clerk of the county or circuit courts, assessor or deputy of any of them, shall directly or indirectly be the purchaser or be interested in the purchase of any such real estate. Sales to any of these persons shall be voidable at the instance of any person having a right to redeem unless such real estate has reached the hands of a bona fide purchaser.

\textsuperscript{51} Id. at art. 4, \S 43.
\textsuperscript{52} Id. at art. 4, \S 51.
\textsuperscript{53} Id. at art. 4, \S 52.
\textsuperscript{54} Id. at art. 4, \S 44.
\textsuperscript{55} Id. at art. 4, \S 45.
\textsuperscript{56} Id. at art. 4, \S\S 34, 47, 48, 49, 51, 52.
\textsuperscript{57} Id. at art. 4, \S 46.
\textsuperscript{58} Id. at art. 4, \S 34.
Any co-owner, except a coparcener, in the absence of satisfactory proof of a fiduciary relationship, shall be entitled to purchase at the sale for his own account the interest of any or all of his co-owners in any real estate.\(^69\) It is further provided that there shall be a \textit{prima facie} presumption against the existence of a constructive trust. This section is identical with the first paragraph of Section 16, Article 3, Chapter 11A, providing for sales by the sheriff. However, Section 9 of Article 4, Chapter 11, contains the following statement:

"All acts and parts of acts relating to the taxation, delinquency, sale, procuring of tax deeds by individual purchasers, advertisement, forfeiture and redemption of lands or real estate shall also apply with the same force to said estates and land, and any co-tenant, co-parcener, or joint tenant in the absence of satisfactory proof of a fiduciary relationship, shall be entitled to acquire by tax purchase for his own account \textit{the interest of any or all of his co-owners} in any tract, lot, estate or parcel of land, without being required to hold the same under any constructive trust; and the burden of proof shall rest on any person alleging such a constructive trust, and such a constructive trust shall \textit{prima facie} be non-existent."\(^66\)

As the distinction between co-owner and coparcener is now largely technical and as there seems to be no particular reason for forbidding a coparcener to purchase where a co-owner may purchase, it is difficult to determine which of the three provisions of law mentioned are controlling in the situation of a coparcener. The two identical sections\(^61\) are the latest expressions of the legislature on the matter.

In accordance with the constitution, any surplus realized over and above the amount due on any land shall be paid to the general receiver of the circuit court and the former owner, his heirs or assigns, shall be entitled to such surplus if they apply to the circuit court within two years after the sale.\(^62\) Where a surplus arises from the sale of escheated land, the court may apply said surplus to the satisfaction of the claims of the creditors of the decedent who had a lien on the land at the time of his death and have properly proved their claims against his estate and have been unable to obtain payment out of the personalty.\(^63\) Lien creditors are to be preferred over general creditors.

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\(^{69}\) \textit{Id.} at art. 4, §33.

\(^{66}\) Italics supplied. This statement is the last sentence of the first paragraph of the section.

\(^{61}\) W. Va. Code (Michie, 1943) c. 11A, art. 4, §33; \textit{id.} at art. 3, §16.

\(^{62}\) W. Va. Code (Michie, 1943) c. 11A, art. 4, §33.

\(^{63}\) \textit{Id.} at §33.
D. How Sale May Be Set Aside

Where any person is entitled to apply for an order dismissing a suit for the sale of land⁴⁴ and did not learn of the suit in time to protect himself by making such application, he may institute a proceeding to set aside the sale at any time after the sale and before confirmation thereof.⁴⁵ Written notice must be given to the purchaser, his heirs or assigns, which notice shall state the facts which are the grounds for setting the sale aside and shall require said purchaser, his heirs or assigns, to appear before the circuit court on a day named in the notice and protect whatever rights were acquired at the sale. The section evidently contemplates service of said notice as process is served and requires that said notice shall be served at least ten days before the return day thereof. Further, any person who could apply for an order dismissing the suit for the sale of any land, and who is not named in Section 15 as one of the persons entitled to notice of the institution of the suit, and who did not have actual notice of the proposed sale in time to protect himself by applying for an order to dismiss the suit upon the grounds stated in Section 25 or to institute a proceeding after sale and before confirmation thereof to set the same aside as provided by Section 42, may within one year after confirmation of the sale institute a suit in equity to set aside the sale or the deed.⁴⁶

Where the deputy commissioner delivers a deed to a purchaser of property which had been redeemed, the former owner of such property, his heirs or assigns, or the person who redeemed the property, may within one year after confirmation of the sale institute a suit in equity to set aside the deed.⁴⁷

If a person was entitled to be notified of the institution of the suit and is not given notice of the institution of the suit, and does not have actual knowledge thereof in time to protect his interests by redeeming the property and by instituting a proceeding after sale and before confirmation thereof to set aside the said sale, he may within one year after confirmation institute a suit in equity to set aside the sale or the deed.⁴⁸ In this event, however, no sale or deed shall be set aside until payment has been made or tendered to the purchaser and to the deputy commissioner, if necessary, of the amount which would have been required for redemption at the time of sale, together with any

⁴⁴ The grounds for application to dismiss are set out in id. §25.
⁴⁵ W. Va. Code (Michie, 1943) c. 11A, art. 4, §42.
⁴⁶ Id. at §47.
⁴⁷ Id. at §48.
⁴⁸ Id. at §49.
taxes which have been paid or are chargeable on the property since the sale and with interest at the rate of twelve per cent per annum.

Any suit to set aside the sale or the deed must be brought on behalf of the owner, former owner, or his heirs or assigns.69

E. Release of Taxes and Interest

Section 57 provides that if all taxes due on any land for the assessment year 1936 or for all years subsequent thereto have been paid all title theretofore acquired by the state shall be released. This section states that it is the purpose and intention of the legislature to release all taxes, interest and charges due on any real estate for the assessment year 1935 and for all years prior thereto and declares that all such taxes, interest and charges are fully paid. In making certification to the circuit court of the list of lands held by the state, the auditor is directed to use the assessment year 1936 as the initial year for which taxes are to be charged. He shall not charge interest, fees, penalties or costs for any years prior to 1936 but shall charge all interest, fees, penalties and costs subsequent to the year 1935. The constitutionality of this section releasing delinquent taxes and the right of the legislature to declare delinquent taxes paid and released has no place in this discussion. It may be pointed out that on another occasion prior to this the legislature has released unpaid taxes and that no case questioning the right of the legislature to do so has been raised in this jurisdiction.70

II. Title Acquired by Purchaser Obtaining Deed from Deputy Commissioner after Confirmation and under Order of Court

In Section 45, Article 4, Chapter 11A, the legislature declares:

"Whenever . . . a purchaser, his heirs or assigns, shall have obtained a deed for any real estate from the deputy commissioner, he or they shall thereby acquire 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 the state or by any person who was entitled to redeem . . . ."

This is followed by another declaration:

"No irregularity, error or mistake in respect to any step in the procedure leading up to and including confirmation of the sale or delivery of the deed shall invalidate the title acquired unless such irregularity, error or mistake is, by the provisions . . . of this article, expressly made ground for instituting a suit to set aside the sale or the deed. This and the preceding section are enacted in furtherance

69 Id. at §50.
of the purpose and policy set forth in section one, article three of
this chapter.\textsuperscript{71}

These two sections were new with the law passed in 1941.\textsuperscript{72} Neither
of them has been construed by the supreme court of appeals.

Former acts were not so broad or inclusive in their terminology. In
the 1937 Code, it was stated that the deed made shall convey "all the
right, title and interest of the State of West Virginia, in and to the real
estate thereby conveyed . . . which remained in the State at the time of
the decree for the sale thereof."\textsuperscript{73} And it was further provided that
"Whatever right, title, interest and estate the State of West Virginia had
to any lands at the date of the sale or conveyance thereof . . . shall be
deemed and held to have passed to and vested in the grantee thereof . . .
notwithstanding any irregularity or error in such proceeding or in-
formality in such sale or conveyance or purported conveyance, or want
of jurisdiction in the court to decree such sale. And all such sales and
conveyances and purported conveyances are hereby confirmed and
made good and valid."\textsuperscript{74}

It can be seen that these prior sections are curative and purport to
cure defects in passing the title of the state under a deed. They make no
mention of curing defects with respect to or passing the right, title and
interest vested in the former owner. It has been held that these provisions
are retroactive only and do not cure defects occurring after passage of
the act.\textsuperscript{75} Such a deed may create a new title from the state\textsuperscript{76} but the
former owner can only be deprived of his title where all of the essential
requirements of the law are complied with.\textsuperscript{77} Recently it has been held
that these curative provisions relating to irregularities do not affect prior
vested rights of an owner in whose name the property was at the time of
its sale to the state.\textsuperscript{78} However, in the absence of irregularities in the pro-
ceeding the state or other purchaser of delinquent land does in fact be-
vome vested with the title held by the former owner.\textsuperscript{79}

\textsuperscript{71} W. VA. Code (Michie, 1943) c. 11A, art. 4, §46.
\textsuperscript{72} W. Va. Acts 1941, c. 117.
\textsuperscript{73} W. Va. Code (Michie, 1937) c. 37, art. 3, §27.
\textsuperscript{74} Id. at §34.
\textsuperscript{75} State v. Mathews, 68 W. Va. 89, 69 S. E. 644 (1910); Neal v. Wilson, 79
  W. Va. 482, 92 S. E. 136 (1917); Ellis v. Hager, 87 Va. 313, 104 S. E. 607
  (1920).
\textsuperscript{76} State v. Mathews, 68 W. Va. 89, 69 S. E. 644 (1910); State v. Jackson,
  56 W. Va. 558, 49 S. E. 465 (1904).
\textsuperscript{77} McQueen v. Ahbe, 99 W. Va. 650, 130 S. E. 261 (1925).
\textsuperscript{78} White v. Wickham, 112 W. Va. 576, 165 S. E. 805 (1932).
\textsuperscript{79} State v. Black Band Consol. Coal Co., 113 W. Va. 876, 169 S. E. 614
  (1933); Hector Coal Land Co. v. Jones, 79 W. Va. 618, 92 S. E. 102 (1917);
  Neal v. Wilson, 79 W. Va. 462, 92 S. E. 136 (1917); McGhee v. Sampselle, 47
  W. Va. 352, 34 S. E. 815 (1899).
It would seem, therefore, that where the requirements of the law are strictly complied with by the deputy commissioner in bringing a suit to sell lands, that a purchaser receiving a deed after confirmation would acquire a good title to the land both as against the state and the former owner.

III. Undivided Interests and Life Estates

Prior to the adoption of the land book assessment amendment of 1933 assessments of undivided interests in land were illegal, and a sale of such an interest so assessed was void. At the present time, the constitution places upon the owner of an undivided interest in land the duty of having it separately assessed, and enabling legislation permits the assessor to make such an assessment. In line with these changes, the law now provides that in any tax sale only the undivided interest proceeded against shall pass to the purchaser, and the title and rights of the owners of other undivided interests in the property shall not be affected by such sale.

Life estates in property with the accompanying interests of remaindermen present a different problem. The person who has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation. The owner of the life estate has the duty of paying the taxes thereon which payment inures to the benefit of the remaindermen. Remaindermen are not assessed for taxes until the life estate ends. The failure of the life tenant to pay taxes, however, renders the entire estate subject to sale. When such land is sold to the state for delinquent taxes in the name of the owner of a freehold estate therein less than the fee, the state thereby acquires the estate of the remaindermen as well as the estate of the person assessed.

81 See (1935) 41 W. Va. L. Q. 167 for discussion of this problem.
82 W. Va. Code (Michie, 1943) c. 11, art. 4, §9.
83 Ibid. (second paragraph).