Volume 47 | Issue 4 Article 14

June 1941

Taxation--Appeal from Circuit Court on Issues of Valuation

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the marriage,[1] it can allow *W* alimony *pendente lite* and attorney's fees. *Bell v. Bell.*[2]

The only case in West Virginia concerning alimony *pendente lite* in an annulment suit was *Meredith v. Shakespeare,*[3] in which the court on general equitable principles decided that since the marriage was void *ab initio* no alimony *pendente lite* could be allowed. The principal case is to be distinguished in that it was decided under the present statute[4] and not on general equitable principles. It is clear that such allowances are granted in divorce actions,[5] but the controversial point is whether *pendente lite* allowances will be granted in proceedings to annul a voidable marriage under this section. The court, in the principal case, has interpreted the intent of the legislature to be that the word "suit"[6] includes not only divorce actions but also annulment proceedings. From the general language of the statute, it would seem that the court was correct, in that this statute should apply to annulment as well as divorce where the marriage is voidable.

H. P. S.
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TAXATION — APPEAL FROM CIRCUIT COURT ON ISSUE OF VALUATION. — *P* owned two tracts of unimproved mountain land, each of which prior to 1939 had been assessed for taxation at six dollars per acre. That year the assessor raised the value of the larger tract to ten dollars per acre and of the smaller tract to fifteen dollars per acre, and each of these assessments was approved by the board of equalization and review. The circuit court sustained the valuation of the larger tract and reduced that of the smaller

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[1] W. VA. CODE (Michie, 1937) c. 48, art. 1, § 17.
[2] 8 S. E. (2d) 183 (W. Va. 1940).
[3] 97 W. Va. 514, 125 S. E. 374 (1924).
[4] "The court . . . may, at any time after commencement of the suit and reasonable notice to the man, make any order that may be proper to compel the man to pay any sum necessary for the maintenance of the woman, and to enable her to carry on or defend the suit in the trial court and on appeal should one be taken . . ." W. VA. CODE (Michie, 1937) c. 48, art. 2, § 13.
[5] *Ibid.*
[6] "The court . . . may, at any time after commencement of the *suit* . . .", *ibid.*; "The *suit* for annulling or affirming a marriage, or for divorce", *id.* at c. 48, art. 2, § 9; "No *suit* to annul or affirm a marriage shall be maintainable unless at the commencement of the *suit* one of the parties is a bona fide resident of this State . . .", *id.* at c. 48, art. 2, § 7. (Italics supplied.) Reasoning by analogy the manner in which "suit" is used in c. 48, art. 2, §§ 9 and 7, as including annulment as well as divorce, then when read in connection with c. 48, art. 2, § 13, the term "suit" would seem to include annulment as well as divorce.

tract to ten dollars per acre. *Held,* that an order of the circuit court entered on an appeal from a decision of the board of equalization and review will not be reversed when supported by substantial evidence unless plainly wrong. *Application of Sprinkle.*[1]

The Code provides that the assessor shall fix the "true and actual value"[2] of the realty in his county. In its explanation as to how this value is to be ascertained,[3] the legislature gives the assessor broad powers of discretion since the test laid down offers, at best, a zone with shadowed edges rather than a clearly defined black line to distinguish the different factual setups.

After the assessor fixes, in his opinion, the true and actual value of the land, the taxpayer who fancies himself to be aggrieved may appear before the county court while it is acting as a board of equalization and review and have the findings of the assessor reviewed.[4] Within thirty days after the adjournment of the county court, the taxpayer may apply for relief to the circuit court[5] if he feels that the board of equalization and review has failed to correct the allegedly faulty valuation.[6] When the assessed value of the property is fifty thousand dollars or more, the aggrieved taxpayer may appeal to the Supreme Court of Appeals for a final decision on the issue of valuation.[7]

An analysis of the cases[8] that have been decided by the supreme court since the enactment of the statute[9] allowing appeal seems to present the following results: first, the court is reluctant to disturb values fixed by the taxing authorities and as a basis

[1] 11 S. E. (2d) 757 (W. Va. 1940).

[2] W. VA. CODE (Michie, 1937) c. 11, art. 3, § 1.

[3] As defined by the legislators, the term "true and actual value" means "at the price for which such property would sell if voluntarily offered for sale, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale." W. VA. CODE (Michie, 1937) c. 11, art. 3, § 1.

[4] *Id.* at c. 11, art. 3, § 24.

[5] *Id.* at c. 11, art. 3, § 25.

[6] Although the code formerly provided for a board of equalization and review, in 1933 this board was dispensed with and the county court acts in its stead.

[7] W. VA. CODE (Michie, 1937) c. 11, art. 3, § 25.

[8] Of the four cases which were appealed to the supreme court on the issue of valuation only one, Crouch v. County Court of Wyoming County, 116 W. Va. 476, 181 S. E. 819 (1935), held that there was sufficient evidence to reverse the findings of the lower court. In the other three cases, Liberty Coal Co. v. Bassett, 108 W. Va. 293, 150 S. E. 745 (1929); Central Realty Co. v. Board of Review, 110 W. Va. 437, 158 S. E. 537 (1931); and West Penn Power Co. v. Board of Review, 112 W. Va. 442, 164 S. E. 862 (1932), the court refused to change the findings of the lower court.

[9] W. Va. Acts 1929, c. 55, lines 50-53.

for refusal to interfere utilizes either the presumption that a public official performs his duty correctly[10] or the reason that the true and actual facts of the case are more in the "peculiar knowledge" of the taxing authorities than the court. Second, in a proceeding to reduce an assessment, the taxpayer must establish affirmatively by clear and convincing proof that the judgment of the assessor was erroneous.[11] Third, the assessment will not be disturbed unless it is so at variance with undisputed facts as to be in the eyes of the law a fraud on the taxpayer's rights; the mistake must apparently be more than merely patent—it must be "glaring."[12] Fourth, all ambiguities will be so construed that the findings of the taxing authorities will be upheld. Fifth, ". . . it is not of consequence that another court could fairly arrive at a different conclusion . . . or that the weight of evidence is against the finding. It is our duty to uphold the lower tribunal if there is sufficient evidence for the foundation of its judgment, unless it is plainly wrong."[13] Sixth, although not "spelled out" in the cases, the urgent need of revenue for governmental operation and the fact that reversals might lead to an increase in frivolous litigation may play an unassuming but none the less important role in the reluctancy to interfere with the valuation as set by the taxing authorities.

Though some persons "doubt the right of the legislature to clothe the courts with the authority and duty of reviewing assessments,"[14] they must agree that the present case emphasizes the principle, as laid down in prior cases, that there will be judicial review.[15] Perhaps they may find consolation from the firmly

[10] The presumption may be rebutted by proof to the contrary. Liberty Coal Co. v. Bassett, 108 W. Va. 293, 297, 150 S. E. 745 (1929).

[11] Central Realty Co. v. Board of Review, 110 W. Va. 437, 439, 158 S. E. 537 (1931).

[12] In the only one of the appealed cases wherein the findings of the lower court were reversed because of erroneous valuation, the mistake was very apparent. In the Crouch case the land was purchased in 1933 for $75,000.00. For the years 1933 and 1934 the land was assessed at nearly $50,000.000 in excess of that amount. (The court points out that valuation over the purchase price is not conclusive on the issue of improper valuation.) The assessment complained of was for the year 1934. No allowance had been made for the removal of nearly $15,000.00 worth of timber in 1933. The mistake in valuation in the beginning plus the refusal to deduct any amount for the removal of some of the value of the land seem to make it obvious that a readjustment of the value was necessary.

[13] Liberty Coal Co. v. Bassett, 108 W. Va. 293, 295, 150 S. E. 745 (1929).

[14] This quotation is from the opinion by Judge Maxwell in West Penn Power Co. v. Board of Review, 112 W. Va. 442, 446, 164 S. E. 862 (1932).

[15] Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers* (1938) 44 W. VA. L. Q. 270. Mr. Davis

established doctrine that it takes a clear case before the courts will upset the findings of the taxing authorities, in reality the administrative body's findings are being given virtual finality.

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TAXATION — INCOME TAX — DEDUCTIONS. — In making his state income tax return for 1937, *T*, a member of two mining partnerships, deducted from his gross income his proportionate share of the amounts paid that year by the partnerships to the Federal Government on account of (1) old age benefits and unemployment compensation under the Social Security Act, and (2) the Bituminous Coal Act of 1937; and to the state of West Virginia on account of (1) unemployment insurance, and (2) gross sales tax. Among the deductions allowed by the income tax statute of 1937[1] were: "1. Ordinary and necessary expenses . . . if paid for or incurred during the tax year in . . . carrying on a trade or business"; and "3. Income taxes payable to the United States upon income earned in West Virginia; property taxes upon real and personal property situated in this state . . ." *Held*, that the taxpayer was not entitled to deductions respecting any of these four items. *Christopher v. James.*[2]

Due to the fact that the statute expressly made income and property taxes deductible, the court applied the rule of *expressio unius exclusio alterius* to preclude the deduction of any other kind of tax. In order to allow any of the four exactions as permissible deductions it would therefore have been necessary to find that they were not taxes within the meaning of the statute, but deductible as

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critically examines the cases concerning the right of judicial review upon the question of valuation. As disclosed in the article, the cases have been vacillating back and forth as to whether valuation is properly a legislative or judicial function. In the first case on the question, the action of the circuit court was held to be "plainly ministerial and not judicial". Eighteen years later the court declared that "the ascertainment of the values of property is strictly judicial". Then just before the turn of the century the court held the question of valuation to be of a legislative nature, but since 1929 the cases have held that the question of valuation is again judicial and there will be review by the courts.

[1] W. VA. CODE (Michie, 1937) c. 11, art. 13B, § 25, (1), (3). This section has been changed and now allows the deductions of the items under consideration. See W. VA. CODE (Michie Supp. 1939) c. 11, art. 13B, § 25.

[2] 12 S. E. (2d) 813 (W. Va. 1940).