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Some Observations on Bailey v. Baker

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COMMENTS

SOME OBSERVATIONS ON *BAILEY v. BAKER**

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One of the most controversial decisions handed down by the West Virginia Supreme Court of Appeals in recent years is its decision in *Bailey v. Baker*.[1] It has evoked considerable informal discussion and comment by members of the bar whose practice includes certification of land titles, and is of interest to others for considerations both practical and academic. While lawyers specializing in title certification are, for the most part, unequivocally in disagreement with the holding of the court, it is observed that there are many other lawyers who are equally firm in their support thereof. The court itself was sharply and inexorably divided. Two dissenting opinions were filed,[2] the most vigorous of which was upon rehearing by a member of the court who had, upon the original hearing, voted with the majority, and who, in his dissent, referred to the majority opinion on rehearing as "unsound and wholly untenable."[3]

On rehearing, a strong brief, exhaustive of the authorities, was filed in support of the minority view by the Charleston Bar Association and various attorneys as *amici curiae*. In order, therefore, to appraise intelligently the decision, under these circumstances, it is necessary that both views be carefully considered. Positions so unalterably opposed cannot be reconciled, but they can be understood. If the majority opinion is sound, it can be fortified through understanding of the minority opinion. If it is "unsound" and "untenable", an understanding of the infirmities that make it so will speed the day when it may be overruled or neutralized by appropriate legislation.

The suit grows out of a tax sale to plaintiff Bailey in December, 1942 of certain property declared delinquent in 1941, which property was formerly owned by one Caufield. Caufield had pur-

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[1] 68 S.E.2d 74, *rehearing*, 70 S.E.2d 645 (W. Va. 1952).

[2] Fox, J., at 79; Haymond, J., 70 S.E.2d 645, 647.

[3] Haymond, J., dissenting, at 645, 647.

chased the property as "Lots Nos. 1 and 2" in the year 1917, but through a mistake of the assessor the lots were assessed as "Lot 182, Block B, Homedale Addition", and taxes were paid thereon from 1918 through 1940. The error of the assessor may be explained "by the use of the sign '&' (ampersand) between the figures '1' and '2', which appear on the blotter of the assessor's office for the year 1917, used in making the 1918 assessment, which rather plainly resembles the figure '8'; . . . ."[4]

In compliance with Chapter 11-A, Article 3, of the Code, the clerk of the county court of Kanawha County executed a deed on June 1, 1944, conveying to plaintiff "the real estate so purchased, situate in Charleston Rural District, Kanawha County, West Virginia, bounded and described as follows: " 'Being Lot 182, Block B, Homedale Addition, Charleston Rural, Kanawha County, West Virginia * * *.' " By deed dated May 11, 1950, defendant Baker, with knowledge of the tax deed to Bailey, acquired his claim to Lots 1 and 2 from the widow and devisee of Caufield. On the following day, Baker redeemed the lots from the state auditor, and thereupon instituted an action of ejectment against Bailey to recover possession thereof. Thereafter Bailey instituted this cause in chancery seeking to enjoin Baker from prosecuting the action of ejectment and to compel the clerk of the county court of Kanawha County to correct the tax deed of June 1, 1944, so that the property described therein would appear as "Lots 1 and 2" instead of "Lot 182".

The supreme court reversed the ruling of the trial court and held that the assessment to Caufield, from 1917 to 1941, of Lot 182 was a void assessment; that the tax deed to plaintiff Bailey was likewise void; that Lots 1 and 2 were forfeited to the state for nonentry; and that Lots 1 and 2 were properly redeemed by defendant Baker.

On rehearing, the court adhered to this decision, and in further support thereof attached particular significance to the fact that plaintiff Bailey accepted the tax deed that "described a lot which was not in existence, and which only a cursory examination of the recorded plat, which was in the tax grantee's line of

[4] 68 S.E.2d 74, 76.

title, and to which reference was made in the tax deed, would have so disclosed."[5]

The one issue decisive of the conflicting claims of the litigants upon this record is whether the assessment of Lots 1 and 2 as "Lot 182" was void or merely irregular. As succinctly stated by Judge Fox:

> "Unless a court of equity may, in the circumstances of this case, hold that the mistaken and improper assessment which was clearly made in this case, nevertheless constituted a legal assessment of Lots 1 and 2, as correctly described, then the deed to the plaintiff is void."[6]

Two other propositions are discussed and resolved by the court, neither of which is fundamental to the rationale of the decision, but both of which are complementary thereto. It was upon the second of these propositions that the petition for rehearing was primarily based. They are: (1) Do Sections 28 and 29, Article 3, Chapter 11-A of the Code[7] operate to validate the Bailey deed? (2) Is the court bound by the decision announced in Point 6 of the syllabus in the case of *Stiles v. Layman*,[8] in the absence of an express holding here overruling the same?

Chapter 11-A, Article 4, Section 2 of the Code, provides that every owner of land is charged with the duty of having such land "entered for taxes on the land books of the appropriate county", of having himself "charged with the taxes thereon", and is obligated to "pay the same". Such section further provides that when for any five successive years the land shall not have been so entered and charged, then by operation of law, without any proceedings therefor, it shall be forfeited to the state.[9] The former owner of any such real estate so forfeited to the state for non-entry, or any other person entitled to pay the taxes thereon, may redeem such real estate at any time prior to its certification by the auditor for sale.[10] The majority reasons that the assessment of Lot 182 was not, in fact, an assessment of Lots 1 and 2 and therefore the latter, not having been entered for taxes on the land books from 1918 to

[5] 70 S.E.2d 645, 646.
[6] 68 S.E. 2d 74, 80.
[7] W. Va. Acts 1941, c. 117, art. 3, §§ 28, 29.
[8] 127 W. Va. 507, 33 S.E.2d 601 (1945).
[9] See also W. VA. CONST. Art. XIII, § 6.
[10] W. VA. CODE c. 11A, art. 3, § 8 (Michie, 1949).

1944, inclusive, were forfeited to the state. The defendant Baker, as assignee of the former owner, qualified as a person entitled to redeem under the statutory and constitutional provisions, and did so within the time specified by statute, and thus is the true owner of such real estate.

Judge Fox would have found for the plaintiff Bailey on equitable principles; *i.e.,* that the mistake was acquiesced in by the state and the property owner for more than twenty years; that the deed, though containing an incorrect description, should, in a court of equity, pass title to the lots intended to be assessed; that the assertion by defendant Baker, as assignee of the property owner, of a forfeiture of the property cannot be heard at this time because such property owner himself could not have made the assertion were he alive; and that any other ruling would be dangerous to the security of land titles.

That the decision by the majority may be dangerous to the security of land titles is also suggested in the dissenting opinion of Judge Haymond. In this connection, he has the following to say:

> ". . . . it will increasingly disturb the stability of the title to a veritable multitude of parcels and tracts of land, which have been assessed by an incorrect designation, subject those lands to forfeiture, and cause confusion and uncertainty in land titles which, until this decision, have been regarded as good beyond serious question or successful attack."[11]

The court concludes that the provisions of Sections 28 and 29, Article 3, Chapter 11-A, are not applicable for the reasons that: (1) Section 28[12] specifically refers to the title to real estate vested

[11] 70 S.E.2d 645, 648.

[12] "Sec. 28. Title Acquired by Individual Purchaser.—Whenever the purchaser of any real estate sold at a tax sale, his heirs or assigns, shall have obtained a deed for such real estate from the clerk of the county court or from a commissioner appointed to make the deed, 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 any person who was entitled to redeem, unless such person is one who, being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of sections sixteen, thirty, thirty-one, thirty-two or thirty-five, [§§ 999(101), 999(115), 999(116), 999(117) or 999(120)] of this article. The tax deed shall be conclusive evidence of the acquisition of such title. The title so acquired shall relate back to January first of the year in which the taxes, for nonpayment of which the real estate was sold, were assessed."

in or held by the person who was entitled to redeem. In this case, the property which the owner was entitled to redeem was Lots 1 and 2 and not Lot 182. (2) There is no issue of any irregularity, error or mistake in respect to any step in the *procedure* leading up to and including delivery of the tax deed to bring the case within the language of Section 29;[13] rather, the irregularity or mistake concerns a discrepancy in the *identity* of the property.

The court reviewed its several former decisions involving a similar question and, with the exception of *Hardman v. Ward,*[14] endeavored to distinguish each on its facts from the case at bar. With reference to the cases of *Cain v. Fisher,*[15] *Robey v. Wilson,*[16] and *Leach v. Weaver,*[17] it was found that there was an incorrect tax assessment in each, but that such improper assessment related to the *quantity* of land charged and not the *identity* of the property.

The case of *Stiles v. Layman*[18] was endeavored to be distinguished on the ground that there the property substituted for the lot to be charged was "actually in existence". In that case, the owner of a town lot, which was correctly designated as Lot 93, through clerical error, was charged with Lot 92. Nevertheless, the court held that inasmuch as the owner had paid all state taxes levied under such erroneous designation, he paid "all state taxes charged or chargeable" on Lot 93, within the meaning of the Constitution, Article XIII, Section 3, thereby preventing forfeiture.

In further support of its decision, the court takes the position that the case of *Hardman v. Ward* is controlling. Syllabus 2 of that case is as follows:

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[13] "Sec. 29. Effect of Irregularity on Title Acquired by Purchaser.—No irregularity, error or mistake in respect to any step in the procedure leading up to and including delivery of the tax deed shall invalidate the title acquired by the purchaser unless such irregularity, error or mistake is, by the provisions of sections sixteen, thirty, thirty-one or thirty-two [§§ 999 (101), 999 (115), 999 (116) or 999 (117)] 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 of the purpose and policy set forth in section one [§ 999 (86)] of this article."

[14] 67 S.E.2d 537 (W. Va. 1951).

[15] 57 W. Va. 492, 50 S.E. 752 (1905).

[16] 84 W. Va. 738, 101 S.E 151 (1919).

[17] 89 W. Va. 49, 108 S.E. 494 (1921).

[18] 127 W. Va. 507, 33 S.E.2d 601 (1945).

> "A tax sale based upon an invalid assessment is void and a deed made by the county clerk to a tax purchaser pursuant to such sale constitutes a cloud on the owner's title which the latter has a right to have removed in a court of equity."

In that case, the land was returned delinquent for taxes unpaid thereon for the year 1931 and sold to the state. Thereafter, and in the year 1938, the property was again placed on the land books in the appropriate county, with title still in the state. The court ruled, in effect, that the assessment in 1938 was invalid, title thereto being in the state.

The dissenting opinion filed by Judge Fox and endorsed on rehearing by Judge Haymond acknowledges that the cases of *Cain v. Fisher, Robey v. Wilson* and *Leach v. Weaver* are distinguishable from the case at bar, but adds that the decisions rendered therein "sustain the general principle that a clerical mistake, or even more serious errors, will not be allowed to interfere with the validity of a tax deed otherwise legal and valid."[19]

The dissenting opinion filed by Judge Haymond, in addition to the reasons assigned by Judge Fox, disagrees with the majority view on the ground that there is no "material distinction" between the erroneous assessment in *Stiles v. Layman* and the equally erroneous assessment in the *Bailey* case. With reference to Point 6 of the syllabus of the *Stiles* case, Judge Haymond said:

> "The majority opinion now filed does not expressly overrule this sound pronouncement, though the present holding does so in effect, but instead engages in a labored and, I think, an unsuccessful effort to distinguish it from the situation presented in the case at bar. I can see no valid or material distinction between the erroneous assessment of Lot No. 93, by the designation of Lot No. 92, in the Stiles case, and the instant equally erroneous assessment of Lots 1 and 2 by the designation of Lot No. 182 . . . ."[20]

It cannot be denied that there is a recognizable distinction between an assessment of property involving a mistake as to the *quantity* of land charged and one involving a mistake as to the *identity* of the property. Reasonable minds, however, will differ as to the soundness of making such distinction the ground upon

[19] 68 S.E.2d 74, 80 (W. Va. 1952).
[20] 70 S.E.2d 645, 647 (W. Va. 1952).

which to arrive at different results. Where the mistake is as to quantity, there is little question but that the particular property owned by the taxpayer is being charged, even though under an improper and perhaps inadequate assessment. In the case of a mistake as to the identity of the property, there may be doubt that the particular property intended to be charged is being assessed at all; in this situation, it is only through the adoption of a different or substitute description that the taxpayer can be said to have complied with the constitutional and statutory duty of having his land "entered for taxes on the land books of the appropriate county".[21] The court, speaking through Judge Riley, clearly points out the distinction between the two classes of cases and thereby justifies its apparent departure from the articulate reasoning of certain of its former decisions. The distinction made by the court between the case of *Stiles v. Layman* and the *Bailey* case is, however, certainly more finely drawn, and is, in the opinion of the writer, superficial rather than substantial. The only discernible difference between the comparable facts of the *Stiles* and *Bailey* cases is that in the former, the lot mistakenly substituted on the land books for the property intended to be charged was "in existence", whereas in the latter, there was no such lot as Lot 182. In the *Stiles* case, the court seems to be willing to recognize the fact of a substituted description, *i.e.,* Lot 92 for Lot 93, but in the *Bailey* case is unwilling to do so because of the nonexistence of the property. Both cases concern a mistake in the identity of the property charged and it is not perceived how or in what manner the existence or nonexistence of the property mistakenly assessed does or should affect the validity of the assessment, if the landowner pays all taxes chargeable thereon in good faith. If it is considered sound and of sufficient importance, under the circumstances, to make the distinction between a mistake as to quantity and one as to identity of property the basis for arriving at different conclusions, it would seem desirable not to labor it further. To compromise or further qualify the distinction on the basis of existence or nonexistence of the property mistakenly identified on the land books not only throws doubt upon its soundness but results in considerable confusion in the law. In this connection, it is sug-

[21] W. VA. CODE c. 11A, art. 4, § 2 (Michie, 1949); W. VA. CONST. Art. XIII, § 6.

gested that it would have been better had the court specifically overruled the *Stiles* case. If the reasoning of the court in the *Bailey* case is fundamentally sound, it is submitted that the result reached in the *Stiles* case conflicts therewith, and there should be no reluctance in overruling the latter decision.

On the other hand, an analysis of the equities involved, as well as a consideration of the adverse effect of the decision upon the stability of land titles, has convinced the writer that the distinctions made in the *Bailey* case are erroneous.

The general law on this subject, followed in other jurisdictions, is stated as follows:

> "The few cases passing on the question seem to be agreed that if a landowner pays a tax believing in good faith that it is assessed against his land, though that land is not accurately described in the assessment, the payment discharges from the tax the land in exoneration of which it is intended."[22]

It is noted that the curative elements mentioned in the above quotation are (a) good faith on the part of the taxpayer, and (b) the payment of the taxes. It is not disputed in the *Bailey* case that the taxpayer Caufield paid taxes on Lot 182 in good faith, thinking that he was paying taxes on the property which he, in fact, owned. The state received such taxes for a period of over twenty years. The taxpayer and the state thus adopted the erroneous description, *i.e.*, "Lot 182", for the true description of the property. If the delinquency and sale had occurred during the lifetime of Caufield, certainly he could not be heard to complain of the sale, inasmuch as he had theretofore paid his taxes under such adopted description. He could not disavow the effect of his long-continued payment of taxes under the adopted description and at the same time claim a benefit through his failure to have the land properly assessed.

That the decision in the *Bailey* case will disturb the stability of land titles cannot be gainsaid. A cursory examination of the land books of the several counties in the state will doubtless disclose hundreds — if not thousands — of assessments which are improper by reason of an incorrect description. Under this decision, if such erroneous assessments have been carried for a period of

[22] 23 A.L.R. 79 (1923).

five years without correction, the land is thereupon forfeited to the state of West Virginia for non-entry and must be redeemed by the taxpayer. The unhappy result is that thousands of taxpayers who have for many years felt secure in the soundness of their property titles now find themselves divested thereof by a court decision which results in such titles being transferred to the state of West Virginia by operation of law.

It should also be remembered that the decision in the *Bailey* case emanated from a court of equity. In speaking to lawyers, it is unnecessary to do more than to refer to the underlying principle that courts of equity are remedial and were created to ameliorate the harsh and unyielding rules of the common law.

With all deference to the opinion of the court, and giving due consideration to the dissenting opinions, the writer's conclusions may be stated briefly as follows:

In the *Bailey* case, the erroneous assessment of Lots 1 & 2 as "Lot 182", through a clerical error of the assessor, was merely irregular and not void. The factual distinction which the court makes between a mistake as to quantity and one as to the identity of the property is not considered sufficient grounds upon which to arrive at different results. In fact, there was no mistake in the identity of the property in the *Bailey* case but merely an error in the description, which was adopted and acted upon by both the taxing authority and the taxpayer for a period in excess of twenty years; and to base an attempted further distinction upon the existence or nonexistence of the property substituted on the land books is to resort to reasoning so finely drawn as to be almost illusory.