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## The Land Book Assessment Amendment--Enabling Legislation

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THE LAND BOOK ASSESSMENT AMENDMENT —  
ENABLING LEGISLATION

By judicial interpretation, prior to the Land Book Assessment Amendment, entry and assessment on the land books of undivided interests in land was not within the contemplation of the West Virginia Constitution. Land had to be entered and assessed as an entity, except insofar as there had been a severance into freehold estates such as separation of the ownership of the surface and minerals.<sup>1</sup> Judge Poffenbarger in *Toothman v. Courtney*<sup>2</sup> put the first substantial<sup>3</sup> stamp of disapproval on entry and assessment of undivided interests by holding such procedure incurably improper and a tax deed based upon it null and void. That decision has been faithfully followed in regard to tax deeds and forfeiture for non-entry on the land books,<sup>4</sup> with the single exception in respect to the latter, that no forfeiture follows where both all the undivided interests are listed and all the taxes paid.<sup>5</sup> All attempts to permit assessments by undivided interests have been fraught with pitfalls. The latest legislative enactment,<sup>6</sup> prior to the Amendment, was held unconstitutional in *LaFollette v. Nelson*.<sup>7</sup> The effect of that ruling, however, has been obviated by the adoption of the Land Book Assessment Amendment, making it compulsory for the owner of an undivided interest to have it entered as such on the land books.

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<sup>1</sup> In such cases separate entry and assessment have always been mandatory. W. VA. REV. CODE (1931) c. 11, art. 4, § 6; *cf* W. Va. Acts 1863, c. 118, § 21. These estates were saved from forfeiture, however, if they were assessed as part of the whole, so long as the taxes on the whole were paid. *United Fuel Gas Co. v. Hays Oil & Gas Co.*, 111 W. Va. 596, 163 S. E. 443 (1932); *Kiser v. McLean*, 67 W. Va. 294, 67 S. E. 725 (1910); *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307 (1907); *State v. Lowe*, 46 W. Va. 451, 33 S. E. 271 (1899).

<sup>2</sup> 62 W. Va. 167, 58 S. E. 915 (1907).

<sup>3</sup> See *Sharp v. Smith*, 17 W. Va. 221, 237 (1880).

<sup>4</sup> *State v. Phillip*, 176 S. E. 233 (W. Va. 1934); see (1935) W. VA. L. Q. 167; *LaFollette v. Nelson*, 113 W. Va. 906, 170 S. E. 168 (1933); *Allen v. LaFollette*, 94 W. Va. 700, 120 S. E. 176 (1923); *Jarrett v. Osborne*, 84 W. Va. 559, 101 S. E. 162 (1919); *Hutchens v. Denton*, 83 W. Va. 580, 98 S. E. 808 (1919); *State v. Central Pocahontas Coal Co.*, 83 W. Va. 230, 98 S. E. 214 (1919); *State v. Guffey*, 82 W. Va. 462, 98 S. E. 1048 (1918); *Caretta Railway Co. v. Fisher*, 74 W. Va. 115, 81 S. E. 710 (1914); *Lawson v. Pocahontas Thin Vein Coal Land Co.*, 73 W. Va. 296, 81 S. E. 583 (1913); *Toothman v. Courtney*, *supra* n. 2; *Barnes v. Bee*, 138 Fed. 476 (C. C. N. D. W. Va. 1905); See *Sharp v. Smith*, *supra* n. 3.

<sup>5</sup> *Jarrett v. Osborne*, *supra* n. 4; *State v. Guffey*, *supra* n. 4; *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484 (1906).

<sup>6</sup> W. Va. Acts 1931, c. 53.

<sup>7</sup> 113 W. Va. 906, 170 S. E. 168 (1933).

The Amendment was followed by an enabling act,<sup>8</sup> passed March 8, 1935, effective immediately. The first sentence of the act places undivided interests in land on exactly the same level as land held as a complete unit, by providing that the word "land", when used in chapters eleven and thirty-seven of the Code, be read to include all undivided interests in any estate in land.<sup>9</sup> It is at least questionable whether such an amendment by reference is constitutional within Article VI, Section 30 of the West Virginia Constitution, providing that "no law shall be revised, or amended, by a reference to its title only".<sup>10</sup> Certainly the method adopted by this act is not the most desirable means of effecting the important changes contemplated. It merely adds to the already weighty task of an attorney in ferreting out statute law.<sup>11</sup>

The Legislature of 1925 first provided for the separate assessment of undivided interests.<sup>12</sup> Consequently, from that year to date the land books reveal a large number of such entries and assessments. The enabling act validates all of these improper entries and assessments. Thus, where all the taxes have been paid, the land is protected from forfeiture. Where taxes are unpaid and the undivided interest has been sold to the state for non-payment, the act reverts in the former owner the title to his undivided interest, and provides further that "upon proper showing to the assessor", the owner or the state may have the undivided interest entered on the land books and back-taxed for the years during which title was in the state. When, however, the undivided interest was sold not to the state but to a third person, under a tax deed, the tax deed is validated, and the former owner has no recourse.

Since the 1925 Act<sup>13</sup> was permissive rather than mandatory, a large number of co-owners continued to have their land entered in the usual way, as an entity. Inevitably, some properties were returned delinquent or forfeited and sold to the state. Insofar as

<sup>8</sup> H. B. No. 264, amending W. Va. Acts 1933, c. 40, § 9, which corresponds to W. VA. REV. CODE (1931) c. 11, art. 4, § 6.

<sup>9</sup> This must be understood to mean undivided interests of a freehold quantity. See *infra* n. 20.

<sup>10</sup> See Horack, *Constitutional Limitations on Legislative Procedure in West Virginia* (1933) 39 W. VA. L. Q. 294.

<sup>11</sup> Will the next supplement of Michie's Code contain all sections of Chapters 11 and 37 of the Code with a cross-reference to H. B. No. 264?

<sup>12</sup> W. Va. Acts, 1925, c. 35, § 39. The provision was stricken from the Official Code of 1931.

<sup>13</sup> *Supra* n. 12.

the state now holds such title, a co-owner may, upon application to the auditor and by the payment of all taxes due on his interest, redeem his single undivided interest, or he may redeem any or all of his co-owners' undivided interests, providing this be done either before the state sells to a third person or before January 1, 1939, whichever occurs first. In the event that a co-owner so redeems any of the undivided interests of his co-owners, he is subrogated to the lien of the state for the taxes that should have been paid by the other co-owner, conditioned, however, upon the filing of his lien within one year after the redemption.

At an early date the doctrine of *Van Horne v. Fonda*<sup>14</sup> was adopted by West Virginia. By this doctrine the mere fact of co-tenancy creates a fiduciary relation. Thus it has been held that a joint owner who buys in his co-owners' interests at a tax sale holds such tax title as a constructive trustee.<sup>15</sup> More recently, however, the rigidity of this rule has been relaxed to the extent that no constructive trust is raised unless the person entitled thereto offers, within a reasonable time, to share the expense with the tax purchaser.<sup>16</sup> The enabling act abolishes the *Van Horne v. Fonda* doctrine by providing that such a trust shall be prima facie non-existent.<sup>17</sup> A constructive trust may, of course, still be shown, but the mere relation of co-tenancy will not raise it.

Following the constitutional mandate of the Amendment, the enabling act makes compulsory the entry on the land books by the owner of all undivided interests in any estate in land. However, those undivided interests may be grouped together for the purpose of assessment, at the request of any co-owner.<sup>18</sup>

<sup>14</sup> 5 Johns. Ch. 388 (N. Y. 1821).

<sup>15</sup> *Allen v. LaFollette*, *supra* n. 4; *Lannerd v. Burnam*, 93 W. Va. 744, 117 S. E. 682 (1923); *Jarrett v. Osborne*, *supra* n. 4; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269 (1898); *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216 (1898); *Battin v. Woods*, 27 W. Va. 58 (1885); *Notes* (1928) 54 A. L. R. 874, (1933) 85 A. L. R. 1535; see *Preston v. Dixon*, 89 W. Va. 539, 109 S. E. 704 (1921); *Sommers v. Bennett*, 68 W. Va. 157, 69 S. E. 690 (1910); *Clark v. Beard*, 59 W. Va. 669, 674, 53 S. E. 597 (1906); *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579 (1896); *Curtis v. Boland*, 35 W. Va. 124, 12 S. E. 1113 (1891). *Contra*: *Kennedy v. De Trafford*, [1897] A. C. 180.

<sup>16</sup> *Sattes v. Sattes*, 113 W. Va. 708, 169 S. E. 392 (1933); *Smith v. Casto*, 107 W. Va. 1, 148 S. E. 566 (1929); *James v. James*, 77 W. Va. 229, 87 S. E. 364 (1915); see *Abbott v. Williams*, 74 W. Va. 652, 82 S. E. 1097 (1914); *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019 (1899).

<sup>17</sup> "Non-existent" is hardly an apt word since a constructive trust, being a creative of equity, is non-existent until declared so by decree. The meaning, however, is clear.

<sup>18</sup> The observation in the note in (1935) 41 W. VA. L. Q. 167 that the Land

Questions may arise as to who is the "owner" and what is included within the term "undivided interest". Is it the duty of the legal owner or the equitable owner to list property? The Revised Code (1931) provides that "owner" shall mean the person holding the freehold in possession.<sup>19</sup> "Possession" does not mean a visible or actual possession but rather a vested ownership of freehold quantity.<sup>20</sup> Thus, the owner of an undivided interest, to be subject to separate entry, must have a life estate or better; mere licenses, leases and profits for a term for years are not properly entered on the land books.<sup>21</sup> The Code provides that the trustee, if in possession, shall list property for taxation, otherwise the *cestui que trust* must list.<sup>22</sup> If there are several trustees or beneficiaries in possession, it would seem that since they are co-owners they would be compelled to enter their undivided interests as such or be subject to forfeiture for non-entry. There is no practical reason for this, but the result follows as a logical conclusion from the compulsory listing of undivided interests. Forfeiture, however, is avoided whether assessment is made in the name of the legal owner or the equitable owner, so long as the taxes are paid.<sup>23</sup>

Heretofore, the state has never found herself in the relation of co-tenant with an individual by reason of forfeiture for non-entry, because where land was entered by undivided interests and

Book Assessment Amendment made mandatory the separate assessment of undivided interests was unwarranted, in view of the fact that entry on the land books and assessment, *i. e.*, valuation, are two separate and distinct phases of the process of taxation. Therefore, the questioning of the constitutionality of pending legislation, making separate entry mandatory and separate assessment permissive, was improper.

<sup>19</sup> W. VA. REV. CODE (1931) c. 11, art. 3, § 8.

<sup>20</sup> See *State v. South Penn Oil Co.*, 42 W. Va. 80, 100, 24 S. E. 688 (1898).

<sup>21</sup> *Toothman v. Courtney*, *supra* n. 2; *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 928 (1905); *State v. South Penn Oil Co.*, *supra* n. 18; see Note (1929) 59 A. L. E. 701 for general consideration of taxing leasehold interests as land. In view of the Land Book Assessment Amendment, will ground rents, *i. e.*, rents of a freehold quantity, be construed as coming within the meaning of the term "undivided interests"? It is submitted that such an interpretation is not within the purview of the Constitution or statute. *Cf. Willis' Ex'r v. Commonwealth*, 97 Va. 667, 34 S. E. 460 (1900), in which ground rent was held improperly entered on the personal property book for taxation, and that where no provision had been made for the taxation of ground rent, such property was not taxable.

<sup>22</sup> W. VA. REV. CODE (1931) c. 11, art. 3, § 3.

<sup>23</sup> *Whitman v. Sayers*, 9 W. Va. 671 (1876); see *Bradley v. Erwart*, 18 W. Va. 598 (1881); *Bogess v. Scott*, 48 W. Va. 316, 37 S. E. 661 (1900); *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 327, 61 S. E. 307 (1908).

forfeited, the whole of the estate was forfeited.<sup>24</sup> Such a relation is, under the new Amendment, now possible. The state will find no difficulty in bringing suit for partition, but the individual is confronted with the ancient maxim that the sovereign cannot be sued without its consent. By statute<sup>25</sup> the state has, in effect, given such consent. This statute provides that at the instance of a party entitled to partition, the state shall become a party plaintiff to a partition proceeding.<sup>26</sup> The suit is to be brought by the "proper official who has supervision of such state land",<sup>27</sup> For this ministerial act mandamus will no doubt lie. Costs of such suits are to be paid out of the proceeds of the sale. If there is partition in kind, presumably the party demanding the suit will be liable for the costs. No provision for this is made by the statute.

In drafting legislation addressed primarily to laymen clarity and simplicity are desiderata of even more than normal importance. It is regrettable that those ends are not better served in the enabling act under scrutiny. It is equally to be lamented that in some instances, and for the time being, i. e., until a course of interpretation has been marked out, this act is the sole guide of our county assessors. Whether the innovation introduced by the Amendment will operate to bring about "interminable confusion of land titles"<sup>28</sup> remains to be seen.

—WILLIAM H. WALDRON, JR.

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<sup>24</sup> *Supra* n. 4.

<sup>25</sup> S. B. No. 138, amending W. VA. REV. CODE (1931) c. 37, art. 4, § 1.

<sup>26</sup> Who is the "proper official"? It is probably the auditor since he is a member of the new Public Land Corporation of West Virginia created by W. Va. Acts, Ex. Sess., 1933, c. 54, § 1, as "state commissioner of forfeited lands".

<sup>27</sup> It is submitted that the same result as is accomplished by S. B. No. 138 could have been reached without resort to the act, since title to all state land is vested in the Public Land Corporation of West Virginia, a corporation which may sue and be sued. W. Va. Acts, 1st Ex. Sess. 1933, c. 54, §§ 1, 2.

<sup>28</sup> Judge Poffenbarger in *Toothman v. Courtney*, 62 W. Va. 167, 183, 58 S. E. 915, 921 (1907).