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Taxation--Assessment of Undivided Interests--Land Book Assessment Amendment

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TAXATION — ASSESSMENT OF UNDIVIDED INTERESTS — LAND BOOK ASSESSMENT AMENDMENT. — The defendants owned jointly the minerals under a large tract of land. For five years the property was assessed separately to the respective owners according to their undivided interests therein. Portions of these assessments each year being unpaid the State brought suit to sell for the benefit of the State School Fund, alleging that the property had been forfeited under Section 6, Article XIII of the Constitution for failure to have it charged for taxes on the land books. The defendant's demurrer being overruled, the ruling was certified for review. *Held*, where it is undertaken to assess land by undivided interests, the entire taxes must be paid else all the land is forfeited for non-entry on the land books. *State v. Phillips*.¹

Prior to the recently adopted Land Book Assessment Amendment a tax deed based on an assessment of an undivided interest was irregular and would be set aside as null and void.² Where land was entered on the land books by undivided interests and any one of these was omitted for a period of five years, the land became forfeited for non-entry, even though all the taxes had been paid on all the undivided interests so assessed.³ The instant case has extended the principle by declaring a forfeiture for non-entry where all the undivided interests were entered but taxes paid on only a part of them. To redeem any undivided interest, taxes on all such interests had to be paid,⁴ the person so redeeming being given a lien on the land for the proportionate shares of the tax burden of his co-owners.⁵

The injustice frequently occasioned by the fact that the holder of an undivided interest could not redeem his single interest prompted the Legislature of 1925 to provide that one could have

¹ 176 S. E. 233 (W. Va. 1934).

² *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915 (1908). The court held that the statutes W. VA. CODE (1899) c. 29, § 36 (requiring assessment either as tracts or town lots), and § 29 (requiring separate assessment of surface and minerals after severance) did not contemplate the assessment of undivided interests. It is submitted that the court could have given a more liberal construction to those statutes, and had that been done the case of *La Follette v. Nelson*, *infra* n. 9, would have been decided differently.

³ *Caretta Railway Co. v. Fisher*, 74 W. Va. 115, 81 S. E. 710 (1914). No forfeiture occurs, however, when all the undivided interests are entered and all assessments paid, notwithstanding the invalidity of such assessments. *Jarrett v. Osborne*, 84 W. Va. 559, 101 S. E. 162 (1919); *State v. Guffey*, 82 W. Va. 462, 95 S. E. 1048 (1918).

⁴ *Allen v. La Follette*, 94 W. Va. 700, 120 S. E. 176 (1923); *State v. King*, 64 W. Va. 546, 68 S. E. 468 (1908).

⁵ W. VA. REV. CODE (1931) c. 11, art. 9, § 8,

an undivided interest separately assessed.⁶ The Code Commission struck it from the 1931 Code and expressly provided that land could be assessed only as an entity.⁷ The 1931 Legislature then amended the 1931 Code restoring in substance the old provision.⁸ This was held unconstitutional,⁹ but the constitutional barrier was removed by the ratification on November 6, 1934, of the Land Book Assessment Amendment.¹⁰ The statute,¹¹ being permissive, afforded the desired result. The amendment, on the other hand, appears unequivocally to make separate assessment mandatory.¹² Hence, any suggestion of revising the statute by the amendment is negated by the fact that the two are inconsistent, the former being permissive, the latter mandatory.¹³ There are, however, measures¹⁴ now pending in the legislature worded in permissive terms, the drafters apparently having overlooked this distinction. If one of these bills were passed it is difficult to perceive how it could withstand judicial scrutiny.

Possibly it was not intended to render separate assessment imperative, but the language used is objectively unambiguous. In any event, a permissive provision would have been wiser, for the objections to any assessment of undivided interests would be far less potent since, to a large number of cotenants, such assessment will prove onerous and undesirable. Tax administration

⁶ W. Va. Acts, 1925, c. 54, § 39. See n. 8, *infra*.

⁷ W. VA. REV. CODE (1931) c. 11, art. 4, § 6.

⁸ W. Va. Acts, 1931, c. 53. " When any person or persons are, or becomes, the owner or owners of any undivided interest or interests in land, or in the surface, coal, oil, or other estates therein, the owner or owners of such undivided interest or interests may, on request to the assessor, and without the consent or acquiescence of the other joint owner or owners of the other undivided interest or interests, have such undivided interest or interests assessed to him or them separately and independently of other undivided interest or interests therein; "

⁹ *La Follette v. Nelson*, 113 W. Va. 906, 170 S. E. 168 (1933).

¹⁰ W. VA. CONST., art. XIII, § 6. "It shall be the duty of every owner of land, or of an undivided interest therein, to have such land, or such undivided interest therein, entered on the land books of the county in which it, or a part of it, is situated, " Does this not mean that the duty is to have undivided interests assessed as such?

¹¹ N. 8, *supra*.

¹² *Lynch, J.*, in *Baer v. Gore*, 79 W. Va. 50, 52, 90 S. E. 530 (1916), said: "Generally, 'shall', when used in constitutions and statutes leaves no way open for the substitution of discretion." See also *Simms v. Sawyers*, 85 W. Va. 245, 101 S. E. 467 (1919); *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845 (1909); but *cf.* *Herold v. Townsend*, 113 W. Va. 319, 169 S. E. 74 (1933).

¹³ Had the amendment been permissive, the statute would still not have been revived, for this can be accomplished only by express provision for revival. *State v. Hecker*, 109 Ore. 520, 221 Pac. 808 (1923); *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 497, 38 L. R. A. (N. S.) 77 (1911).

¹⁴ H. B. Nos. 43, 76, 106; S. B. No. 53.

will be more complex and expensive. The amendment will, moreover, as was pointed out in *Toothman v. Courtney*,¹⁵ tend to complicate land titles and make them less secure. All of these difficulties would be much smaller were the amendment permissive.

The amendment is self-executing because it is obviously not addressed to the legislature and the duty which it imposes, that of entering in the land books by undivided interests land so held, may be imposed without the aid of legislative enactment, since the land books themselves are already provided for by statute and the amendment merely changes the manner of entry. Thus the amendment is now in effect; enabling legislation is not required.

—WILLIAM H. WALDRON, JR.

TRADE-MARKS AND TRADE-NAMES — JURISDICTION — GOODS OF DIFFERENT CLASSES. — The plaintiff, a manufacturer of fountain pens and other similar writing instruments sold under the registered name "Waterman", enjoined the defendant, producer of drugs, perfumes and other similar articles, to which he had recently added razor blades, from using plaintiff's trade-mark thereon. The plaintiff had never been engaged in manufacturing razor blades. Both parties were citizens of the same state. The defendant contended that the court had no jurisdiction and that the goods were not of the same class. *Held*, the federal ground was substantial enough under *Hurn v. Oursler*¹ to warrant the court in retaining jurisdiction of the nonfederal ground, even though the federal claim was decided adversely; the owner of a trade-mark is protected on goods not only to which he has applied mark, but also on such other goods as might naturally be supposed to come from the owner. *L. E. Waterman v. Gordon*.²

In the principal case the plaintiff's trade-mark was properly registered under the Federal Trade-Mark Act.³ This act requires the Commissioner of Patents to establish classes of merchandise for purpose of trade-mark registration.⁴ If the registrant is not satisfied with such classification he may appeal to the Court of Ap-

¹⁵ N. 2, *supra*.

¹ 289 U. S. 238, 53 S. Ct. 586 (1933).

² 72 F. (2d) 272 (C. C. A. 2d, 1934).

³ For the federal Trade-Mark Act generally see 25 STAT. 628 (1909), 15 U. S. C. A., § 81, *et seq.* (1927).

⁴ 34 STAT. 169 (1906), 15 U. S. C. A., § 131 (1927).