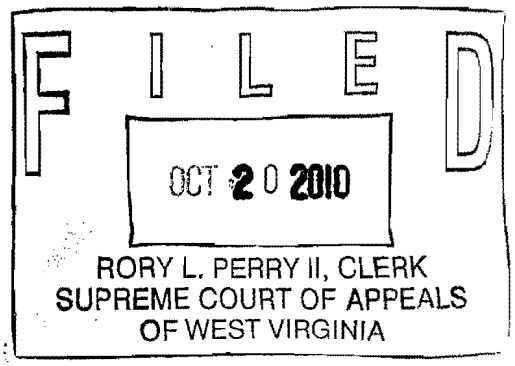
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF APPELLANT




MZRP, LLC, a West Virginia Limited Liability Company

Plaintiff Below, Appellee

vs.) No. 35692

Wayne County Civil Action
Number 07-C-073

Logan Cannel Coal Company (dissolved);

Jackson Building and Loan Association (dissolved);

Henry Copley;

Defendants Below,

and

Huntington Realty Corporation, a West Virginia Corporation;

Appellant

Counsel for Appellant:

James W St Clair
W.Va. State Bar I.D. 3547
630 1/2 Seventh Avenue
Huntington, West Virginia 25701
Phone 304-525-5910

# TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Contents | i |
| Table of Authorities | ii |
| I. Kind of proceedings and nature of ruling in the Circuit Court | 1 |
| II. Statement of the facts of the case | 2 |
| III. Assignment of errer and lower court decision | 7 |
| IV. Discussion of the law with points and authorities relied upon and relief prayed for. | |
| 1. The Circuit Court and the County Commission both determined that the Moses Fork Tract does not exist. | 7 |
| 2. In the alternative, the Moses Fork Tract is not the 12 Pole Tract. | 9 |
| 3. The Circuit Court erred in not holding the deed from the Special Commissioner was so vague as to be void. | 13 |
| 4. The Circuit Court erred in failing to consider the public policy ramifications of its decision. | 14 |
| V. Relief sought | 16 |

# TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Bailey v. Baker, 68 S.E. 2d 74 (W. Va. 1951) | 9,10, 11, 12 |
| Collins v. Reger, 57 S.E. 743 (W. Va. 1907) | 12 |
| Male v. Moore, 74 S.E. 685 (W. Va 1912) | 12 |
| Thaxton v. Beard, 201 S.E. 2d 298 (W. Va. 1973) | 12 |
| Webb v. Ritter 60 W. Va. 228 (1906) | 14 |

| Statutes, etc. | |
|---|---|
| W.Va. Code 11A-3-1 | 9 |
| W Va. Code 11A-3-31 | 11 |
| W.Va. Code 11A-3-53 | 9 |
| M. J. Deeds Sec. 23 | 13 |
| Transcript of Proceedings held November 23, 2009 | 7, 8,13, 15 |
| Opinion Letter of April 1, 2009 | 2, 10, 11, 13 |

## I. KIND OF PROCEEDINGS and NATURE OF RULING IN THE CIRCUIT COURT

Although this matter was filed initially as a routine "quiet title" action following a tax sale, it is now a case which addresses, among other issues, the adequacy of a legal description in a tax deed and the justification to "judicially relocate" a 100 acre tract of land. The question in this case could be as simple as: does a tax deed mean what it says, and does it say what it means?

The subject of this case is a 100 acre parcel of land situate at the junction of the Wayne, Mingo and Lincoln Counties lines. This property is located on the waters of 12 Pole Creek and Boardcamp Hollow (the 12 Pole Tract). MZRP did not buy this 100 acre tract at a tax sale, but instead purchased and received a deed describing property as "100 Acre Fee, Moses Fork, Lincoln District, West Virginia" (the Moses Fork Tract). MZRP procured its deed to the Moses Fork Tract from the Deputy Commissioner at a sale of Delinquent and Nonentered Lands in Wayne County after paying $55.00.

The quiet title action filed by MZRP does not seek to confirm its title to the Moses Fork Tract, but rather the lawsuit can now be aptly described as a "judicial relocation" action. MZRP claims that the Moses Fork Tract is really the 12 Pole Tract, even though approximately1.83 miles separates the two property areas.

MZRP filed suit in the Circuit Court of Wayne County, West Virginia on March 28, 2007, against Logan Cannel Coal Company, which was dissolved on July 14, 1934 (Logan Cannel); Jackson Building and Loan Association, which was dissolved on August 1, 1934 (Jackson); Huntington Realty Corporation (Huntington), and Henry Copley (Copley). Service of process was attempted on Copley, Logan Cannel and Jackson by publication after MZP filed an affidavit alleging that their whereabouts were unknown. No attempt to serve Huntington was

almost two months after suit was filed, and not until after Huntington observed the notice of publication in the local newspaper and filed a Motion to Dismiss on May 16, 2007.

MZRP moved for a default against all Appellants, except Huntington, because of their failure to file and answer or otherwise plead. This motion was granted and the case proceeded against Huntington alone.

After discovery, MZRP moved for summary judgment, and Huntington filed a response. Following oral arguments, the trial court filed its Opinion Letter dated April 1, 2009, which, in effect, found for MZRP by relocating the 100 acres from Moses Fork to 12 Pole. Motions to Reconsider or Amend, or for Relief of Judgment, were denied, and on December 15, 2009, the Final Order was entered affirming the Opinion Letter of April 1, 2009, as well as the Order entered in connection therewith on September 9, 2009. This final order denied Huntington's Motion to Amend or Reconsider and granted an injunction against Huntington. This Petition for an Appeal, timely filed, seeks a reversal of the lower court's decisions.

## II. STATEMENT OF THE FACTS OF THE CASE

By a deed dated January 20, 1893, S.S. Vinson conveyed to Logan Cannel Coal Company the 12 Pole Tract, along with a nearby 50 acre mineral tract. The words "Moses Fork" do not appear in the legal description for either tract. On December 3, 1927, Logan Cannel borrowed from Jackson $109,050.00, and executed a deed of trust on thirteen separate parcels, some near the 12 Pole Tract, situate in Wayne and Mingo Counties, West Virginia. This trust deed contained all of the real estate owned by Logan Cannel, except the 12 Pole Tract. For some unknown reason, the 12 Pole Tract was omitted from the trust deed.

Following the stock market crash of 1929, Jackson instituted foreclosure proceedings on the thirteen parcels of Logan Cannel property listed in the aforesaid deed of trust, and acquired title to these thirteen tracts. Jackson subsequently conveyed the thirteen Logan Cannel tracts to Huntington on August 7, 1934, as part of its insolvency, reorganization proceeding. Huntington owns the thirteen tracts to this day. Therefore, Logan Cannel was the record owner of the 12 Pole Tract up to the time of its dissolution in 1934.

The name or designation "Moses Fork" first appears as a description used by the Wayne County Assessor to describe a 100 acre tract on its Land Books in 1895. The Assessor had previously assessed the 12 Pole Tract accurately to Vinson. In 1895, the Assessor recognized the conveyance from Vinson to Logan Cannel and assessed the tracts to Logan Cannel. However, there was no listing of the 12 Pole Tract. What one finds in the 1895 Land Books, and in the Land Books for subsequent years, is a 100 acre tract described as being located on Moses Fork. It is not known whether the Assessor intended for the designation "Moses Fork" to refer to the 12 Pole Tract, or to another parcel actually located on Moses Fork. To add to this confusion, the Wayne County Clerk's Grantor and Grantee indices reflect that there was a deed transfer of a tract described as 100 Acres Fee Moses Fork from Jackson to Huntington in 1935. Yet the deed referenced only the thirteen Logan Cannel tracts, with no conveyance of a 100 acre tract, Moses Fork, 12 Pole or otherwise. The Wayne County Assessor recorded this transaction on the 1935 Land Books and assessed Huntington for the phantom 100 Acres Fee Moses Fork from 1935 until 1949. The assessed taxes were apparently paid by Huntington until 1940. Thereafter the taxes on the phantom Moses Fork 100 acres became delinquent in 1940 and it was sold at a delinquent land sale to Henry Copley on December 20, 1948.

Henry Copley subsequently requested the Wayne County Commission to review the transfer, and on December 27, 2005, the County Commission, sitting as the Wayne County Court, determined that the tract described as 100 Acres Fee Moses Fork "DOES NOT EXIST." See Exhibit K attached to Appellee's complaint. Meanwhile, on August 17, 2004, the West Virginia State Auditor certified for sale a 100 acre tract located on Moses Fork as delinquent in the name of Logan Cannel for tax years 1935 to 2003. The Deputy Commissioner of Delinquent and Nonentered lands subsequently sold the Moses Fork Tract to Mitzi Williams, a local attorney, for $55.00. Ms. Williams assigned her purchase to MZRP, LLC, a company which she organized. Thereafter, Ms. Williams requested the statutory notice concerning the delinquent land sale be forwarded only to Logan Cannel. Neither Huntington, Copley nor Jackson were sent the statutory notice of sale. On January 12, 2005, the Deputy Commissioner issued a deed to MZRP, LLC. The operative language in the deed delivered to MZRP is as follows:

> "Whereas, in pursuance of the statutes in such cases made and provided, Angela D. Bruce...did on 8/17/2004, sell the real estate hereinafter mentioned and described for the taxes delinquent thereon for the years 1935 to 2003, for the sum of $55.00....and MZRP.... did become purchasers of such real estate, which was returned delinquent in the name of Logan Cannel Coal...."
>
> The deed continued, that the Special Commissioner: .. "doth grant unto MZRP, LLC, a West Virginia Limited Liability Company, grantees, its successors or assigns forever, the real estate so purchased, situate in the County of Wayne, bounded and described as follows: **Cert. No 504432, described as: 100 Fee Moses Fork, Lincoln District.**" (See Exhibit F attached to Appellee's complaint)

This is the extent of the legal description for the property MZRP acquired from the Deputy Commissioner. There were no metes and bounds locating the property conveyed nor any back references to prior deeds. Rather, the deed simply states a quantity of land (100 Acres Fee) and a singular monument (Moses Fork). There is a reference to a certificate number, but that certificate has not been produced by MZRP in the course of this litigation, nor is the certificate

recorded in the Clerk's Office. There is a reference in the deed to Logan Cannel Coal Company, but there was no property assessed to Logan Cannel for the years 1935-2003: the company was dissolved the year before. Huntington was assessed the 100 acres on Moses Fork from 1935 to 1948, with that same tract assessed to Copley from 1949 to2003.

MZRP thereafter sought to "judicially relocate" the property which it had acquired at the tax sale by means of this lawsuit. MZRP never employed a surveyor to locate the Moses Fork Tract. Rather, three years after purchase, MZRP hired attorney Bruce Toney, who is not a surveyor, to render his opinion about the location of the Moses Fork Tract. Mr. Tony deduced, apparently using a process of elimination, that the 100 tract described in the tax deed was not really located on Moses Fork, but rather was the 12 Pole Tract described in the 1893 deed from Vinson to Logan Cannel. Mr. Toney pointed out correctly that there is a 100 acre tract described in the 1893 deed to Logan Cannel. He also pointed out accurately that the Assessor's Office listed on the Land Books one account assessed to Logan Cannel in 1934, for a 100 ac tract on Moses Fork. He was unable to address the fact that there was no property assessed to Logan Cannel from 1935 to 2003 as asserted in the tax deed. He deduced that the land described in the 1893 deed is the same land assessed by the Assessor and thereafter sold by the Deputy Commissioner.

Such a deduction should not really be described as a legal opinion, but rather more of an "educated guess". And, this guess-work addresses only a possible mislabeling in the land books, and not in the deed. The 1893 deed's metes and bounds description of the 12 Pole Tract is as follows:

> Beginning at two sycamores and two sugar trees at the corner of the three counties of Wayne, Lincoln, and Logan, on the west bank of the right fork of 12-Pole River: thence down the same W 32° 12' W 87 poles to a stake S 40° W176 poles to two chestnut oak on paint of walks S 1° 30' W 30 poles to a small double chestnut oak on a cliff S 68° 30'

> E 46 poles to five chestnut oaks on a ridge S 26 poles to a chestnut oak and chestnut in a gap N 40 E on or near the County line between Wayne and Logan Counties 182 poles to the place of the beginning. Containing it is said 100 acres as the same or more or less of this bring a sale in gross and not by the survey. This tract is known as the John Jude and also the John Brewer survey. Also the coals, minerals , mineral substances of every kind and character, oils and gases of every descriptive in on or under and the rights of way and privileges in or under and over that piece or parcel of land said county of Wayne on Turkey Creek containing 50 acres being the same _____of land that was conveyed to SS. Vinson one of the parties of the first part by William R. Spaulding , his wife and others by deed bearing date the 1st day of May 1890 and recorded in the County Court Clerks office of said Wayne County on the 12th day of August 1890 in Deed Book No. 33 page 118 referenced to said deed is here under for the interests rights and privileges here conveyed as well as to the patent therein referred to for further and full description of said tract of land and the parties of the first part covenant to warrant especially the land and the interest rights and privileges hereinbefore conveyed. (See Exhibit A attached to Appellee's complaint).

Note, the words "Moses Fork" are nowhere within the above description. There are numerous other monuments in the description that could have been used by the Assessor to name or label the tract, such as "County Lines", or "John Brewer survey" or "12 Pole River".

Huntington employed a licensed surveyor from Wayne County to locate the 12 Pole Tract on a USGS topographical map. (Huntington's Exhibit C attached to its Motion for Summary Judgment, a copy of which is attached hereto) The surveyor was also asked to include on that same map a delineation of the drainage area of Moses Fork in Lincoln District of Wayne County. The map makes it readily apparent that the 12 Pole Tract does not lie within the Moses Fork watershed. In fact, a distance of 1.83 miles separates the Tract from the Moses Fork watershed at its nearest point.

Two years after purchase, on March 27, 2007, MZRP filed this action against Appellants. Huntington is the only one to appear and answer. Following numerous pleadings and two hearings, the case was decided in favor of the MZRP. Huntington seeks reversal of the judgment in order to obtain the right to bid on the 12 Pole Tract at a proper delinquent land sale.

## III. ASSIGNMENTS OF ERROR AND LOWER COURT DECISION

1. The Circuit Court erred in finding that the Deputy Commissioner's deed for 100 acres on Moses Fork describes the 12 Pole Tract in spite of the fact that the Circuit Court agreed with the Wayne County Commission's finding that the Moses Fork Tract does not exist.

2. The Circuit Court erred when it found that the 12 Pole Property is the same property described in the Deputy Commissioner's deed as 100 acres fee Moses Fork, when the two properties are approximately 1.83 miles apart.

3. The Circuit Court erred by not finding the deed from the Deputy Commissioner to be so vague as to void?

## IV. DISCUSSION OF THE LAW WITH POINTS AND AUTHORITIES RELIED UPON AND RELIEF PRAYED FOR

1. <u>The Circuit Court and the County Commission both determined that the Moses Fork Tract does not exist.</u>

On November 29, 2009, the trial court held a hearing to consider Huntington's Motion to Amend the Judgment or Relief from the Judgment. The trial court stated on page 27, line 19 of the hearing transcript, "... There was no hundred acres on Moses Fork." The Judge reaffirmed this on page 28, line 10 of the transcript, when he said, "It [the 100 acres on Moses Fork] doesn't exist.... That's exactly what the problem is." Huntington agrees with the trial court's statements, contending all along that the 12 Pole Tract cannot be the same non existent property as MZRP acquired by the tax deed.

This conclusion is supported by a decision made by the Wayne County Commission sitting as the County Court. By way of background, on December 20, 1948, the Deputy Commissioner of Delinquent and Nonentered Lands sold to Henry Copley "100 Acres Fee, Moses Fork, Lincoln District, Wayne County, West Virginia." This is the same description

contained in the MZRP deed. More than 50 years later, Mr. Copley made an application to the County Commission seeking relief from the real estate tax assessment of his 100 acre Moses Fork property. The Wayne County Commission agreed and entered an order on December 27, 2005, determining that the property previously acquired by Henry Copley, designated as Map 29 Parcel 8, that being the 100 acre fee on Moses Fork **"...does not exist."** See Appellee's Exhibit K attached to its Complaint.

The order of the Wayne County Commission has never been challenged, much less overturned. It is as valid today as it was when entered in 2005 and is *res judicata* on this issue. As such, the 100 acres Moses Fork entry in Lincoln District should have been deleted from the land books by the Wayne County Assessor's Office. The Assessor should have been aware of the entry of the County Commission's Order, because it was duly recorded in the office of the County Clerk of Wayne County on February 21, 2006, and again on April 1, 2007. Further, a delinquent assessment in the name of Henry Copley and described as 100 Fee Moses Fork was dismissed by the Assessor of Wayne County on February 27, 2006.

Accordingly, there has been a judicial determination by both the County and the Circuit Courts that the 100 acres on Moses Fork in Lincoln District does not exist. This is precisely the non-existent tract which Mitzi Williams purchased on August 17, 2004, at a tax sale. The fact that the County Commission made this determination 15 months after Ms. Williams' purchased the property merely confirmed what she should have known at the time of her purchase - she bid on something that did not exist. The trial court commented at Page 23 beginning at Line 19 of the transcript:

> "...the purchaser (Attorney Williams) at the tax sale dropped the ball and was negligent by -- and it's my understanding that any tax sale property you not only have a lawyer's certificate as to the change of title, but you also have a surveyor certify that this property is there."

The delinquent land sales statutes grant buyer's such as Ms. Williams the right to receive a refund for purchasing non-existent tracts. *W.Va. Code §11A-3-53.*

MZRP may retort that what it purchased at the auction from the Deputy Commissioner was the land previously owned by Logan Cannel. The problem with this rejoinder is that the sale of delinquent and nonentered lands is just that - a sale of land. It is not a sale of another's interest in land, but rather the land itself which is sold. In this case, the land sold and purchased is 100 acres on Moses Fork, Lincoln District. But, as determined by the County and Circuit Courts, the tract does not exist.

2. <u>In the alternative, the Moses Fork Tract is not the 12 Pole Tract.</u>

It appears that either one of two events occurred that led to the contest in this case: either the County Assessor made an error in 1895 when the 100 acre tract owned by Logan Cannel was assessed as Moses Fork; or a 100 acre tract located within Moses Fork was erroneously assessed to Logan Cannel when it belonged to someone else. Whichever of these errors occurred, and why either occurred, can be the subject of much guess and speculation. Nonetheless, the effect is the same - the 12 Pole Tract, described in the 1893 deed, was not assessed in 1895, nor has it ever been assessed since that time. The assessment to Logan Cannel of 100 Acres located on Moses Fork was then, and has since been legally determined to be void. The 12 Pole Tract is now, and has been, since 1895, unassessed, unsold, and hence forfeited to and is currently held by the State. *W.Va. Code §11A-3-1.* The tax sale and subsequent Deputy Commissioner's deed to MZRP for the Moses Fork property does not put the 12 Pole Tract back on the Land Books.

Huntington makes this assertion based upon a line of cases which stand for the proposition that, "A tax sale under a void assessment, or where there is no assessment, and a

deed made pursuant to such sale are void." Syl. Pt. 4, *Bailey v. Baker*, 68 S.E.2d 74 (W.Va. 1951). That decision is instructive in this matter because it also involved an incorrect description in the Land Books. In 1917 a deed was made and delivered to J.A Caufield describing the parcels conveyed as "Lots Nos. 1 & 2 in Block B of Homedale Addition". However, from tax year 1918 and thereafter, the Assessor entered an erroneous assessment to Mr. Caufield for the two lots by designating them as "Lot 182 in Block B of Homedale Addition". This Court surmised that the Assessor probably mistook an ampersand (&) separating the numbers 1 and 2 as an 8. This mistake was significant because what was sold at the tax sale was lot 182. But lot 182 did not exist. The Court determined, in essence, that the purchaser at the tax sale was precluded from looking behind the actual deed to explain what was intended to be sold. Rather, the Court confirmed that what the purchaser acquired was the property described in the deed, which in that case, was non-existent.

A similar problem probably occurred in this case as well. The Assessor may have inadvertently listed the 12 Pole Tract as a Moses Fork Tract. Both the *Bailey* predecessor in title, and Logan Cannel, only had one parcel listed on the Land Books. If the *Bailey* tax sale had been the sale of the prior owners' <u>interest</u> in property, then the *Bailey* deed would have been valid to convey lots 1 & 2 because a review of the records would have shown Lots 1 & 2 were the only property owned by Mr. Caufield. However, this Court held that the deed is the operative instrument, and therefore what was transferred by that deed was Lot 182. The purchaser at that tax sale was precluded from looking behind the tax deed to ascertain the proper legal description of property in order to correct the error.

The trial court recognized the applicability of the *Bailey* decision in this case, but attempted to distinguish it. The lower court noted in its Opinion Letter, on page one, "In *Bailey*

Lot 182 did not even exist..." In this case, the Moses Fork Tract does not exist either. The circuit court then continued, "In this case, there is a prior reference with good metes and bounds description that could be examined to determine where the 100 acres is located." (Page Two of the Opinion Letter) This misapprehends the contents of the MZRP deed. The Deputy Commissioner's deed to MZRP does not have any "prior reference to another deed with a good metes and bounds description". The tax deed merely mentions the name 'Logan Cannel', but does not describe where Logan Cannel obtained its interest in the Moses Fork Tract. MZRP employed an attorney to deduce that the tax deed tract is the same described in the 1893 deed. Yet, this deduction is based on matters not contained on the face of the tax deed.

The trial court's distinctions are respectfully challenged for several reasons. First, the lower court overlooked his other finding, as well as that of the Wayne County Commission, which determined that the 100 acre tract on Moses Fork "did not exist". Second, there is no "prior reference" in the Deputy Commissioners Deed to MZRP any more than there was a prior reference in the *Bailey* deed. Third, this Court did not permit the purchaser in *Bailey* to go behind the Commissioner's deed, conduct a title search, and explain the scrivener's error (recording the "&" as an "8"). Likewise, MZRP should not be allowed to use Mr. Toney's deduction to go behind the deed to explain that Moses Fork really means 12 Pole. This Court should remain consistent in ruling that a tax deed means what is says, and says what it means. The Court should not permit a purchaser at a tax sale to change words and otherwise modify a tax deed by use of records and information not referenced nor contained within the four corners of the document of conveyance.

MZRP may contend that the provisions of *W.Va. Code §11A-3-31* would correct the irregularity of the title it acquired. This provision provides:

> No irregularity, error or mistake in respect to any step in the procedure leading up to and including delivery of the tax deed by the clerk shall invalidate the title acquired by the purchaser unless such irregularity, error or mistake is, by the provisions of section six of this article or section two, three, four or six, article four of this chapter, expressly made ground for instituting a suit to set aside the sale or the deed.

A similar provision to the one above was raised in *Bailey*, and the Court found that it did not cure the defect in that case. The designation of Lots 1 & 2 as "Lot 182" was not a mere irregularity, error or mistake in the procedure leading up to the sale. Rather, the error resulted in an assessment of Lot 182, and not Lots 1 & 2. The buyer at the tax sale purchased Lot 182, and was not allowed to later claim to have acquired Lots 1 & 2 merely because that is all the property the prior owner, Mr. Caufield, actually owned.

Any tax deed must be founded and predicated upon a valid assessment. In *Thaxton v. Beard*, 201 S.E.2d 298 (W.Va. 1973), a deed from the Deputy Commissioner to the appellee was based on a void assessment. The assessment combined two separate tracts of land owned by two different people, which the Court determined was an invalid assessment and did not support a deed from the Deputy Commissioner. See also *Male v. Moore*, 74 S.E. 685 (W.Va. 1912) (property assessed and sold under the name "Hoonbrook" was invalid to sell property actually owned by Hornbrook); *Collins v. Reger*, 57 S.E. 743 (W.Va. 1907)(property assessed and sold under the name "Martha Hedrick" was invalid to sell property actually owned by Martha Helmick.

In this case, MZRP seeks to do what the claimant in *Bailey* attempted to do. MZRP claims that the acreage it purchased is really not on Moses Fork, but rather is located nearly two miles East on another watershed - 12 Pole Creek. What was NOT sold by the Deputy Commissioner was the 100 ac tract described in the 1893 deed to Logan Cannel (the 12 Pole Tract). That tract was not certified to the Commissioner and hence was not sold. Huntington

asserts that the 12 Pole Tract remains with the Auditor until such time as it is properly certified and sold.

3. The Circuit Court erred in not holding the deed from the Special Commissioner was so vague as to be void.

The lower court also opined at page two of its Opinion Letter that, "The tax deed does not intend to give a detailed description of the property forfeited to the State or sold for delinquent taxes". Huntington agrees that detail is not required. However, at a minimum, "A deed of conveyance, to be effective as evidence of title, must either in terms or by reference to other designation, give such description of the subject matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty. If it does not the deed is void. A deed which conveys no particular spot on the ground can transfer no title." M.J. *Deeds* § 23.

Huntington employed Gregory Perkins, a professional licensed surveyor from Wayne County, who could not locate the Moses Fork Tract based on the description in the tax deed. He did find, however, that the separation between the Moses Fork watershed and the 12 Pole Tract, at its closest point, to be 1.83 miles. (Surveyors affidavit attached to Huntington's Motion for Summary Judgment).

It is hornbook law that a deed should contain: 1) the names of the grantor and grantee; 2) a granting clause; and 3) a description sufficient to permit the location of the property. The deed from the Special Commissioner, in this case, met requirements 1) and 2) but is sorely lacking in requirement 3). As can be seen from the map prepared by Surveyor Perkins, Moses Fork is a very large watershed area. A 100 acre portion of it could be anywhere in that area. Judge Pratt confirmed this when he stated at Page 29, Line 1 of the hearing transcript, "Well, I have seen special commissioner's deeds. They never enter a description." The fact that it is a common practice to omit a legal description does not cure this defect in the case at bar.

This Court addressed a similar problem in *Webb v. Ritter*, 60 W. Va. 228 (1906) when it found a description attempting to transfer, "All that certain tract or parcel of land situate in McDowell County, West Virginia on Rings Branch, Peggy's Fork and Laurel Creek, all tributaries, of the Dry Fork and Tug River, supposed by estimation to contain one hundred acres be same more or less." to be void. The Court went on at page 229 to find that, "A deed must, by its terms, give a mark of the property by which it can be identified."

The tax deed in this case does not even identify the branch of Moses Fork wherein the 100 acres is located, unlike the deed in *Webb*. Therefore, this deed must be void for uncertainty. MZRP also cannot rely on the prefatory language in the deed as part of the identification of the property. This language describes the real estate 'hereinafter mentioned and described" as being sold "for the taxes delinquent thereon for the years 1935 to 2003... returned delinquent in the name of Logan Cannel Coal Company;". This back reference is, in and of itself, insufficient to identify the property. Even if one uses that information to seek a description, it leads to a dead end. The Wayne County Land Books for years 1935-2003 **lists no property assessed to Logan Cannel**. The company was dissolved in 1934. Further, the "100 acres Moses Fork" was assessed to Huntington from 1935 to 1948, and thereafter to Copley.

4. Public policy considerations.

Huntington suggests this Court take into account a substantial public policy concern flowing from the lower court's ruling. Mitzi Williams and her company purchased a non-existent parcel on Moses Fork, and then later, by this quiet title action, attempt to claim that what was purchased was a tract laying some distance away. A deleterious effect of this switch is to thwart Huntington from having an opportunity to bid on the 12 Pole Tract. This leads to

another adverse effect, that being the citizens of Wayne County could have benefitted financially by an active, contested bidding process for the 12 Pole Tract, a contest that may have occurred had the 12 Pole Tract been described correctly in the sale notice. The $55.00 paid by Williams is only a pittance of the amount Huntington would have paid for the 12 Pole Tract because of its ownership of adjoining lands. To avoid this result, the lower court should have declared that what MZRP acquired the property described in the deed - 100 Acre, Moses Fork, which has been determined by the County and Circuit Courts to be nonexistent.

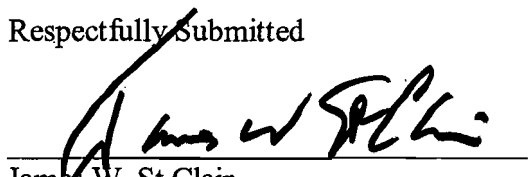
The trial judge recognized the need for this Court to consider the policy ramifications of its decision. In denying Huntington's Motion to Reconsider, the trial judge stated at Page 27, beginning at Line 6, "... surveyor's certificates were very important because a lot of people bought blue sky and the surveyors were the ones that could tell them 'you didn't buy anything.' ... So, if they don't have a surveyor's certificate, I think that's a mistake. That's bad business."

It is interesting that MZRP has never had the Moses Fork Tract surveyed - all it wants is the 12 Pole Tract described in the 1893 deed. The lower court continued to determine at Page 28, Line 20, "They (the assessor) should have taken the hundred acres on Moses Fork off the books..." The Judge was concerned about the numerous errors made by public officials, and concluded at Page 24 Line 24 "....-there were a lot of mistakes made, but I don't think just because there were mistakes made that it was not delinquent property and not subject to a delinquent purchase; and it was. I may be wrong, and I think that's something the Supreme Court needs to look at." the Judge continued at Page 29, Line 9, "That is a final judgment. It is appealable. **To me, I would welcome an appeal on a case like this.**" (Emphasis added)

## V. RELIEF SOUGHT

Huntington respectfully prays that the decision of the Circuit Court of Wayne County West Virginia be reversed, that it be determined that Appellee did not acquire by tax deed the 12 Pole Tract described in the 1893 deed, and for such other relief as this Honorable Court deems appropriate.

Respectfully Submitted



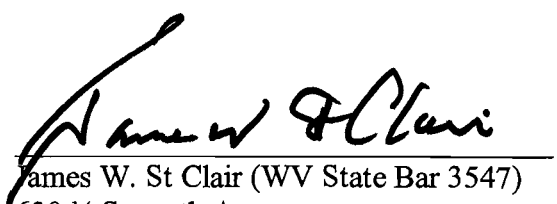
James W. St Clair
Attorney for the Appellant
630 1/2 Seventh Avenue
Huntington, WV 25701
WV State Bar Number 3547
Phone 304-525-5910
email: jwstclair01@hotmail.com

## CERTIFICATE OF SERVICE

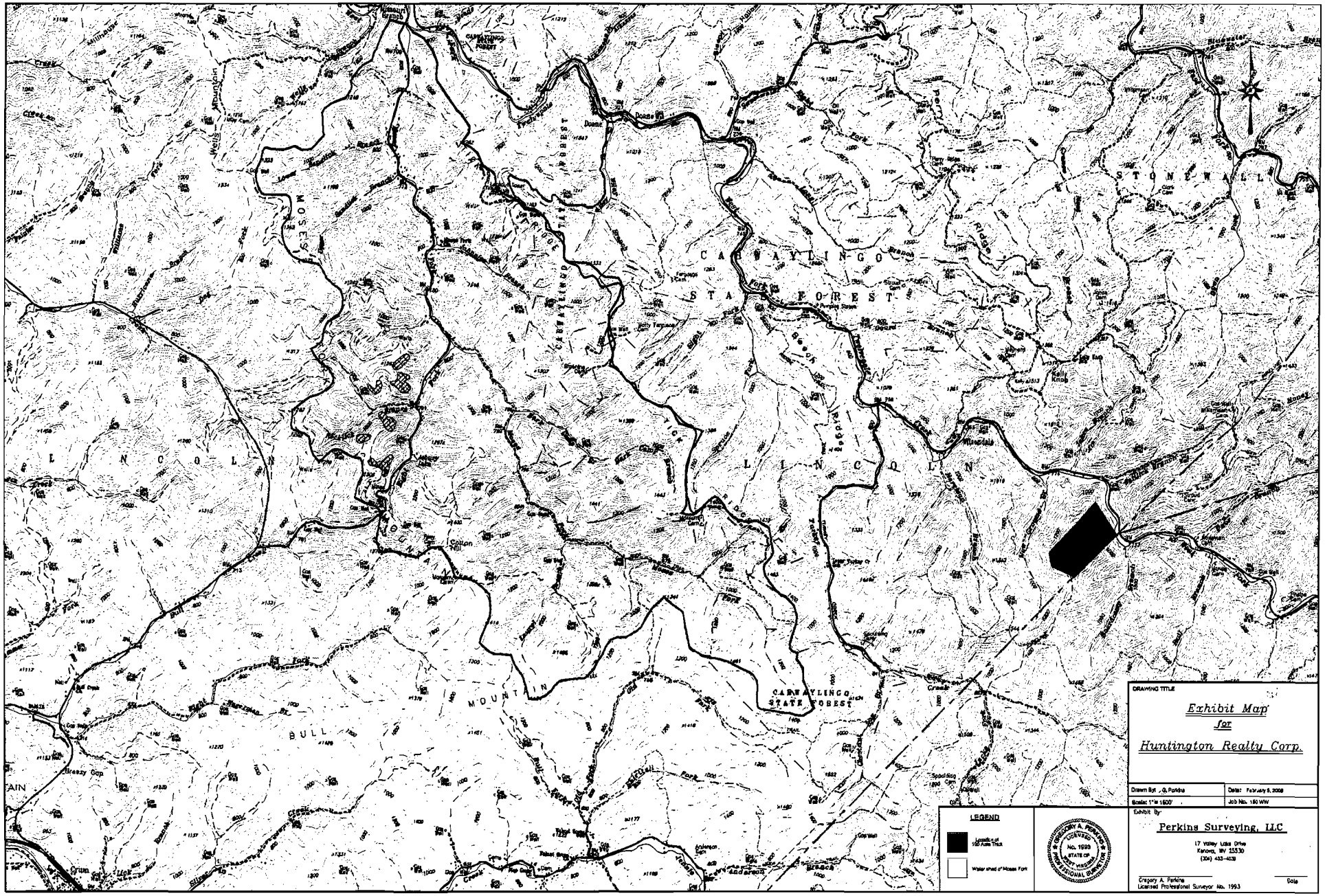
The undersigned, counsel for Huntington Realty Corporation, certifies that a copy of the attached Brief for Appellant to the Supreme Court of Appeals of West Virginia was served upon Appellee's counsel of record by First-Class mail, postage prepaid, by mailing to the following person:

Edward M Kowal, Jr.
Leslie Dillon
Campbell Woods
P. O. Box 1835
Huntington, West Virginia 25719-1835

Done this 20th day of October, 2010



James W. St Clair (WV State Bar 3547)
630 ½ Seventh Avenue
Huntington, West Virginia 25701
(304) 525-5910



CARWAYLINGO STATE FOREST
LINCOLN
STONEWALL
MOSES
BULL MOUNTAIN
Doane
Wilsondale
Breezy Gap
Anderson Branch
LEGEND
Location of 100 Acre Track
Water shed of Moses Fork
GREGORY A. PERKINS
LICENSED
No. 1993
STATE OF
WEST VIRGINIA
PROFESSIONAL SURVEYOR
DRAWING TITLE
Exhibit Map
for
Huntington Realty Corp.
Drawn By: G. Perkins
Date: February 5, 2008
Scale: 1" = 1500'
Job No. 150 WW
Exhibit By:
Perkins Surveying, LLC
17 Valley Lake Drive
Kenova, WV 25530
(304) 453-4039
Gregory A. Perkins
Licensed Professional Surveyor No. 1993
Date