Mississippi College Law Review

Volume 3 | Issue 2 Article 2

6-1-1983

Constitutional and Practical Problems in Legislation to Termination Non-Productive Mineral Interests

Shirley Norwood Jones

Custom Citation
3 Miss. C. L. Rev. 175 (1982-1983)

VOLUME 3 SPRING 1983 NUMBER 2

MISSISSIPPI COLLEGE LAW REVIEW

CONSTITUTIONAL AND PRACTICAL PROBLEMS IN LEGISLATION TO TERMINATE NON-PRODUCTIVE MINERAL INTERESTS

*Shirley Norwood Jones**

I. THE PROBLEM

A problem that has been receiving increasing attention in recent years, not only in Mississippi but in a number of other states, is determining a proper means of eliminating severed mineral interests of long standing. The problem arises in part because of the difficulty in locating persons who own no interest in the surface and whose interest in the minerals may be very small. The mineral severance may arise either because the grantor reserved the minerals when the surface was sold or because only the mineral interest was conveyed. Where the conveyance was on minerals alone, there are often numerous mineral conveyances, sometimes with each conveying a smaller interest than the one before.

Anyone who has done much title work has discovered that it is indeed a rare title which has a completely unbroken line of conveyances from the original patent to the present time. If a title search is to go back to the patent and include all instruments and other pertinent data from the patent to the search date, obviously the work involved in certifying a title becomes greater every year as more and more conveyances appear of record. The factor that has most helped the ordinary real estate search is the usual recognition of adverse possession.[1] The minimum period of a title search in Mississippi is usually considered to be thirty-one years, being the ten year period of adverse possession plus a twenty-one year period to cover the minority of an owner[2] although, depending on the purpose of the search, a search covering fifty or sixty years

---

*Professor of Law, Mississippi College. B.A. 1950, J.D. 1952, University of Mississippi School of Law.

1. *See* McCaughn v. Young, 85 Miss. 277, 37 So. 839 (1905). The essential, generally recognized elements of adverse possession are set out: "The occupancy must be hostile, actual, open and notorious, exclusive, and continuous for the statutory period."

2. MISS. CODE ANN. § 15-1-13 (1972).

is often made.[3]

An abbreviated title search will not suffice where severed minerals are involved. In most jurisdictions, including Mississippi, it is well established that adverse possession of the surface of the land does not enure to the benefit of one claiming the minerals where there has been a severance of the minerals prior to the beginning of the adverse possession.[4] The Mississippi case of *Huddleston v. Peel* set out this well-recognized rule, stating "after title to the surface estate has been severed from title to the underlying mineral estate, title to the minerals cannot be acquired by adverse possession of the surface alone."[5] It is because of this limitation on adverse possession that other remedies have been sought to terminate mineral interests. Practically all jurisdictions recognize that severed minerals can be adversely possessed only through actual drilling or at least by some type of operation for the production of minerals. The Mississippi Supreme Court pointed out that this seems to be the universal rule as well as the rule adhered to by our court.[6] On the other hand, the adverse possession, once begun, will continue to run even after a severance takes place.[7]

II. Texaco, Inc. v. Short

Legislation dealing with severed minerals is variously found under the title of "Dormant Mineral Acts" or "Mineral Lapse Acts" and sometimes "Marketable Title Acts." Questions relating to the legality of this type of legislation were answered in part by the United States Supreme Court in January of 1982 with its decision in the case of *Texaco, Inc. v. Short.*[8] In this case the United States Supreme Court upheld the constitutionality of an Indiana statute which provided that a severed mineral interest which was not used for a period of twenty years would revert to the estate out of which it was carved unless the mineral owner filed a statement of claim in the local county recorder's office. The statute also provided for a two-year grace period during which the owners of such mineral interest could file their statements of claim.[9]

---

3. E.g., the time required for certificate for owner Title Insurance Policies varies from 50 to 60 years.

4. 1 WILLIAMS AND MEYERS, OIL AND GAS LAW § 224.1 (1981).

5. 238 Miss. 798, 802, 119 So. 2d 921, 923 (1960), *suggestion of error overruled,* 238 Miss. 798, 120 So. 2d 776 (1960).

6. 238 Miss. at 802, 119 So. 2d at 923. *See also* Cook v. Farley, 195 Miss. 638, 15 So. 2d 352 (1943); White v. Merchants & Planters Bank, 229 Miss. 35, 90 So. 2d 11 (1956).

7. 238 Miss. at 802, 119 So. 2d at 923.

8. 454 U. S. 516 (1982).

9. *Id.* at 518.

Most of the discussions concerning the statute in Indiana, including that of the United States Supreme Court in *Texaco, Inc. v. Short*, seem to assume that the minerals would, under the statute, go back to the owner of the surface. The statute in fact provided that the unused interest should be "extinguished" and that "ownership shall revert to the then owner of the interest out of which it was carved."[10] While the Indiana Supreme Court stated, "the act removes this impediment [the severed mineral interest] by returning the severed mineral estate to the surface rights owner,"[11] this in fact was not the language of the statute although it was the incidental effect in *Texaco, Inc. v. Short*. In spite of assumptions to the contrary in cases not dealing with the subject, statutes such as that in Indiana would return the interest to the surface owner only where there was not an intervening conveyance.

In many instances where minerals have been sold, there have been a number of different mineral conveyances. For example, Smith might convey a one-half interest in the oil, gas and minerals under Blackacre to Brown. Brown might then convey a one-quarter interest in the minerals (half of his half) to Green. If Green fails, under legislation such as that in Indiana, to register his minerals or to explore for production, his one-quarter interest would not revert to Smith, the surface owner, but rather would revert to the immediately preceding mineral owner, Brown. The statutes do not deal with just when Brown would have to file to preserve the minerals he received by reverter; presumably he would have twenty years from the date they reverted to him. Of course, Brown would have to file within the first twenty-year period to preserve the one-fourth interest never conveyed to Green. The Indiana-type statute does not appear to contemplate the problem, but presumably anyone owning severed minerals would have to file every twenty years in order to preserve each interest which he acquired whether through lapse or reverter or by purchase. Unfortunately little effort seems to have been expended on the many problems of interpretation which will eventually develop under these statutes.

There are three prime questions which were considered in *Texaco, Inc. v. Short*, and which tend to come up in most of the cases dealing with these statutes. These questions are:

(1) Whether the lack of prior notice of the lapse deprived the former owner of the minerals of his property without

10. *Id.*

11. Short v. Texaco, Inc., 406 N.E. 2d 625, 627 (Ind. 1980).

due process of law in violation of the fourteenth amendment to the United States Constitution.

(2) Whether such a statute effects a taking of private property without just compensation in violation of the contract clause of the United States Constitution; and,

(3) Whether exceptions for owners with a large number of minerals would invalidate the entire statute as depriving the smaller owners of equal protection of the law in violation of the United States Constitution.

In *Texaco, Inc. v. Short*, the United States Supreme Court held that the Indiana statute did not violate any of these provisions of the United States Constitution. There was a dissent by four justices[12] who felt that some form of pre-extinguishment notice was necessary to meet consitutional guarantees. The Indiana statute in question did not require that any pre-lapse notice be given.[13] Neither was there any indication in *Texaco, Inc. v. Short* that the party losing his minerals had any actual notice that the statute had been enacted. The majority did not require notice in advance of the forfeiture of the mineral interest as would be required in a judicial proceeding because the statute was found to be more in the nature of a statute of limitations. The Court concluded that appellants may be presumed to have notice.[14] Apparently this is a conclusive presumption.

The Indiana Supreme Court found that the Mineral Lapse Act was a permissible exercise of police power. It was conceded by the United States Supreme Court that in Indiana (as in Mississippi) [15] a severed mineral interest was a "vested property interest." [16] The United States Supreme Court recognized[17] that it had, since early times, permitted unused or abandoned interests in property to revert. An argument recognized in the early cases was that the statutory "extinguishment" could properly be viewed as the withdrawal of a remedy rather than the destruction of a right.[18]

In answer to the argument that the Mineral Lapse Act took private property without just compensation in violation of the fourteenth amendment, the Supreme Court responded that the state does not need to compensate the owner for the consequences of

12. The dissenters were Justices Brennan, White, Marshall and Powell.
13. *Texaco, Inc.*, 454 U.S. at 520.
14. *Id.* at 533.
15. *See* Merrill Engineering Co. v. Capital National Bank, 192 Miss. 378, 5 So. 2d 666 (1942).
16. *Texaco, Inc.*, 454 U.S. at 525.
17. *Id.* at 526 (citing Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831)).
18. *Texaco, Inc.*, 454 U.S. at 528.

his own neglect.[19] The Court concluded that the state may treat a mineral interest, not used for twenty years, as abandoned and that after abandonment the former owner retains no interest. Since it was the abandonment that caused the loss of interest and not a taking by the state, there was no cause for compensation. The Supreme Court also held that the two-year grace period was adequate against an argument that the statute was invalid because retroactive.

The vigorous dissent in *Texaco, Inc. v. Short* found the principal question to be whether the state of Indiana had deprived the appellants of due process by extinguishing their pre-existing property interests without regard to whether or not they knew of the existence of the requirement for filing.[20] The dissent stated that the statute requires the filing of a claim every twenty years.[21] In fact, the statute did not deal with refilings but presumably this was the intent of the legislation.

One serious problem of concern to the dissenters was the retroactive effect of the statute with no requirement of any specific notice to people with pre-existing property interests. The position of the dissent was that property owners should be able to rest easy in the knowledge that their property is secure and not have to watch the statutory enactments of the legislature in order to keep from losing their property. The dissenters found no affirmative state interest justifying a failure to provide pre-extinguishment notice.[22] In fact, under the Indiana statute a pre-extinguishment notice was necessary if the person in question owned ten or more mineral interests in the county and made a good-faith effort to register them.[23] The question arises of why legislation should be designed to protect large landowners while ignoring the small owner who is probably much more likely to be unaware of the legislation. It was the opinion of the dissenters that the statute in question violated the due process clause of the U.S. Constitution.[24]

One of the serious practical problems involved in legislation such as the Indiana statute is that if an exception is to be made for property owners holding ten or more pieces of property in a county, it is a practical impossibility to determine in a given

19. *Id.* at 530.
20. *Id.* at 540 (Brennan J., dissenting).
21. *Id.* at 541.
22. *Id.* at 522.
23. *Id.* at 520.
24. *Id.* at 554.

case whether the property right has been forfeited or not. Certainly one could not check every title in the county!

III. ABANDONMENT OF MINERALS

A fundamental problem to be dealt with when legislation to terminate mineral interests is considered in a state which recognizes the ownership of minerals as an interest in real property is the common law rule that real property cannot be abandoned. Mississippi takes the position that until brought to the surface and reduced to possession, oil or gas constitutes an interest in real estate and not personal property.[25] Many of the statutes either assume an abandonment or in fact treat the property as being abandoned in order to justify transferring it from one to another without compensation.[26] The majority opinion in *Texaco, Inc. v. Short* took the position that unused minerals could be abandoned but commented that if any taxes were paid on the severed minerals they would not be abandoned.[27] Neither the Indiana Court nor the U. S. Supreme Court indicated what, if any, type of tax could be paid on severed minerals in Indiana to keep them from being abandoned.

There are several theories of ownership which are important in the law of oil and gas.[28] When a person owns land in fee simple, he not only owns the surface but the minerals as well. The same problems are not encountered in fee simple ownership that are encountered when the surface has been conveyed or reserved apart from the minerals. In fact, probably no one would deny that the existence of separate mineral titles complicates title examinations.

At the start we must distinguish legislation in the civil law jurisdiction of Louisiana in which oil and gas, at least, have never been recognized as being subject to ownership separate from the surface but rather become a property interest only when removed from the ground. There is an entirely different problem in Louisiana from the great majority of the other states in the union, most of which, including Mississippi, [29] treat oil, gas and other minerals as an interest in the real estate.

States that treat oil and gas as incorporeal hereditaments tend to allow abandonment; while those treating oil and gas as cor-

25. *Merrill Engineering Co.*, 192 Miss. at 382, 5 So. 2d at 670.
26. II AMERICAN LAW OF PROPERTY § 8.98 (1952).
27. *Texaco, Inc.*, 454 U.S. at 529.
28. SIMES & TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION 239 (1960).
29. *See Merrill Engineering Co.*, 192 Miss. at 382, 5 So. 2d at 670.

poreal property tend to adhere to the common law rule that real property cannot be abandoned.[30] The authorities on oil and gas do not agree on whether a mineral interest is subject to abandonment even in jurisdictions which consider such an interest an incorporeal hereditament.[31] Williams and Myers state that if an interest is incorporeal, it is subject to abandonment;[32] yet Summers believes that only Louisiana will recognize termination by abandonment.[33] The major case recognizing abandonment is that of *Gerhard v. Stephens* from California.[34] Another serious problem even in jurisdictions that recognize loss of a mineral interest by abandonment is that no title can be cleared without litigation even if subject to abandonment. Application of abandonment would depend on a determination by a court that abandonment had in fact occurred. It seems to be widely recognized that "[s]ome method of terminating mineral interests after a period of inactivity seems the best means of insuring marketability of mineral interests." [35] Several remedies have been proposed in an effort to reunite the surface with the mineral interest. The most common proposal is one designed to cause the minerals to revert to the owner of the surface. Another proposal is to tax minerals which are severed from the surface so that if a tax is not paid they could be sold for taxes and perhaps reunited with the surface. This remedy is, of course, totally unavailable unless there is a provision in the state law for the separate assessment of minerals. Furthermore, just having such a statute certainly does not assure that the minerals will be separately assessed,[36] and if the sale goes to someone other than the surface owner, nothing has really been accomplished but to transfer the inactive mineral interests from one separate mineral owner to another.

The big problem with taxing minerals that are severed from the surface is the same problem that Mississippi faced prior to the 1946 enactment of the mineral stamp tax on severed minerals and the abolishment of the ad valorem tax on severed minerals.[37] Mississippi had found that in most cases the revenue produced

30. Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968); *see also* 1 WILLIAMS & MEYERS, OIL AND GAS § 210.1 (1981).

31. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Titles*, VII LAND & WATER L. REV. 73, 74 n.3 (1972).

32. 1 WILLIAMS & MEYERS, *supra* note 4, § 210.1, at 109.

33. 1A W. SUMMERS, THE LAW OF OIL & GAS § 139, at 320 (1954).

34. 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

35. Polston, *supra* note 31, at 75.

36. *Id.* at 76.

37. MISS CODE ANN. § 27-31-73 (1972).

did not justify the labor involved in assessing and collecting the tax. Most of the minerals were not being separately assessed and those that were did not bring enough revenue to justify the tremendous job of having all of these minerals properly assessed on the tax roll. To eliminate this problem Chapter 409 of the Laws of 1946 was enacted, effective April 10, 1946.[38] All nonproducing leasehold interests upon oil, gas and other minerals created after the effective date of the act and also non-producing interests in oil, gas and minerals excepted by or reserved to the grantor separately from the surface were exempted from ad valorem taxes on or after January 1, 1947. The statute further provides that a sale for taxes of the surface or the remainder of the fee shall not, in any manner whatsoever, affect the interest exempted. Provision was also made for application for exemption and payment of a stamp tax on minerals previously severed.[39]

The mineral documentary tax[40] is levied on the filing and recording of every lease or other writing conveying a separate mineral estate whether the conveyance transfers the minerals or reserves them. The tax is payable by the grantee of a lease or mineral deed and by the grantor when minerals are reserved,[41] and the statute as it presently exists specifically exempts interests passing by descent or will.[42]

Another solution that has been proposed is to prohibit separate ownership in fee of the mineral interest.[43] This drastic solution does not deal with the constitutional objections to the termination of already existing separate mineral interests. Neither is it met with enthusiasm by those owning separate minerals or by those not wanting to be deprived of the right to sell their minerals while retaining the surface. This method seems to be a rather radical solution to the entire problem. Should a man be deprived of his right to sell part of his minerals? For example, while a well is being drilled, often a partial mineral interest is sold. If the well turns out to be a "dry hole," the landowner has still realized something. This realization would be lost if the minerals could not be sold separately or else the landowner would have to sacrifice part of his surface estate in order to realize anything from his minerals.

---

38. The tax on non-producing gas, oil and mineral interests is now found at MISS. CODE ANN. §§ 27-31-71 to -87 (1972).
39. MISS CODE ANN. § 27-31-75 (1972).
40. *Id.* at § 27-31-77.
41. *Id.* at § 27-31-81.
42. *Id.*
43. Polston, *supra* note 31, at 77.

Still another proposal sometimes advanced is to enact legislation allowing adverse possession of the minerals by the surface owner without an ouster through the filing of an adverse claim. One of the problems involved in this type of legislation is the type of notice that should be given to the mineral owner. If adverse possession begins to run merely by the filing of a claim, then every ten years every owner of severed minerals would have to check the records to be sure no adverse claim had been filed. On the other hand, even if such legislation required notice sent to the last known owner, what action must the owner take upon receipt of the notice? Must he then drill within ten years? Suppose the drilling results in a dry hole, does he lose his minerals or does he have another ten years before adverse possession can run against him? Would the legislation be constitutional as applied to present severed minerals? To say the least, much litigation would result from such legislation and with such legislation we would be without the guidance of *Texaco, Inc. v. Short.*

A report of a special subcommittee of the Mississippi House of Representatives concluded as follows:

> It is the feeling of the committee that misunderstanding and misinformation have led to a constant call for legislation which would return previously severed minerals to the surface owners. It must be remembered that all severed mineral owners have a valuable property right for which consideration was given. No one to the committee's knowledge is recommending that property be taken from severed mineral owners without just compensation. Everyone is in agreement that to take this property right without notice to the agreement that to take this property right without notice to the owner and a method to maintain the right by the owner would be unconstitutional and unconscionable.[44]

Any time that an owner, who could under present law retain his property without drilling, is required to drill to keep from losing his property, serious constitutional questions arise. Drilling is a much more drastic requirement than the registration as upheld in *Texaco, Inc. v. Short* and it can hardly be said that such a requirement does not take away a valuable property right without compensation.

IV. Local Interest and Statutes

In Mississippi, the increasing interest in the return of severed minerals to the surface owner has been primarily by landowners' associations, who are, for the most part, seeking to get back minerals which were sold by predecessors in title many years

44. Report of the Special Subcommittee on Severed Minerals to the Oil, Gas and Other Mineral Committees of the Mississippi House of Representatives, Regular Session, 1978, at 13.

before. The interest, of course, of the landowner is based on a belief that such legislation would benefit him by having severed minerals, not put into active production, returned to the owner of the surface. At first appearance this might seem to be true but it is also true that there are many acres in the state of Mississippi owned by large timber companies in which the minerals have been reserved by the former landowner.[45] Legislation designed for cutting off severed minerals and returning them to the landowner would, unfortunately, also cut off the reserved minerals and vest the ownership in one who never paid for them.[46]

One of the arguments frequently advanced to justify mineral lapse acts or dormant mineral legislation is the problem which prospective developers encounter in locating all of the persons owning interests in the minerals. In some states the lack of a means of locating these persons or of a means of proceeding without locating them does give an oil and gas developer a serious problem. The problem arises because even with pooling statutes, one who develops without obtaining leases from all mineral owners must bear any loss from a dry hole without a corresponding increase in interest in the event that a good well comes in. Mississippi does not have the problem of locating the owners of mineral interests to the same extent that many jurisdictions have because of receivership statutes.[47] The receivership statutes were designed to encourage exploration and development and provide that a person claiming or owning any mineral interest in a tract of land upon which mineral production is desired may file an affidavit in the chancery court of the county in which the land is located and have the chancery clerk appointed as receiver of the mineral interest claimed or owned by a person whose whereabouts or identity is unknown. Under this statute the receiver has the power and authority by court order to execute a lease, the terms of which shall be at least as favorable to the absent person as other leases in the same tract of land.[48] A statute also provides for the disposition of the lease proceeds held by the receiver.[49]

Mississippi's receivership statute has done much to eliminate the practical problem concerning missing mineral interest owners. In the absence of such a statute, when owners of an interest cannot be located, the mineral interests are at best, assuming com-

45. *Id.* at 14.
46. *Id.*
47. MISS. CODE ANN. § 11-17-33 to -37 (1972).
48. *Id.* at § 11-17-33.
49. *Id.* at § 11-17-34.

pulsory pooling, treated as unleased acreage with no contribution to the cost of a dry hole though they would contribute to the cost of the well should production come in.

Prior to the decision in *Texaco, Inc. v. Short* there had been a number of statutes introduced in the Mississippi legislature. In practically every session in recent years statutes have been introduced containing some type of mineral reverter legislation. At least partially because of the considerable doubt about the constitutionality of such legislation, the bills invariably die in committee. With the decision of the U. S. Supreme Court in *Texaco, Inc. v. Short* there has been a renewed interest in this type of legislation not only in the Mississippi legislature but elsewhere. At least thirteen separate bills were introduced in the 1983 regular session of the Mississippi legislature. Some of these were statutes similar to the Indiana act interpreted in *Texaco, Inc. v. Short* and others were statutes designed to impose an ad valorem tax on severed minerals.

The public benefit usually cited to justify mineral lapse-type legislation is the promotion of exploration and development by removing the problem of mineral owners who are either unknown or cannot be located. Of course, the purpose must not be simply to take one person's property and give it to another or the act would be patently unconsitutional. In fact, in states upholding legislation, the tendency has been to find that there was no effective means of dealing with unknown mineral owners other than some type of lapse statute. As mentioned above, Mississippi does not have this problem to the same extent as states without receivership statutes.[50]

V. Other Jurisdictions

A number of other jurisdictions have enacted legislation designed to remedy the severed mineral problem. Courts have not been consistent in decisions regarding these statutes although, in the majority of cases, the statutes have been upheld as not violative of due process, equal protection or impairment of contract clauses of state and federal constitutions.[51]

The Michigan Supreme Court upheld Michigan's Dormant Mineral Act[52] as being within the police power of the state of

50. *Id.* at § 11-17-33 to -37.
51. *See generally* Annot., 16 A.L.R. 4th 1029, 1037-43 (1982).
52. Mich. Comp. Laws § 554.291 (1967).

Michigan in the case of *Van Slooten v. Larsen.*[53] The Michigan act provided that if the owner of severed oil and gas failed to take actual possession or transfer by recorded instrument or record notice for a period of twenty years, that the interest would be deemed abandoned. The court held due process did not require a hearing prior to vesting title in the owner of the surface estate; nor did it unconstitutionally impair the obligation of contract. The court further found the act did not create an evidentiary presumption of abandonment but rather was designed to increase marketability by creating a rule of substantive law and further found that there is a statutory presumption that due process is violated only if there is no rational connection between the facts established and the facts to be presumed.

In *Chicago and Northwestern Transportation Co. v. Petersen*[54] the Wisconsin Supreme Court held the Wisconsin law unconstitutional. The law in Wisconsin required a severed interest to be registered within three years and thereafter a tax of fifteen cents per acre had to be paid each year in order to maintain the severed mineral interest.[55] The trial court, affirmed by the Wisconsin Supreme Court, found that the statute was unconstitutional as violating the due process and equal protection clauses of the U. S. Constitution. In finding that the statute was unconstitutional because its enforcement provisions denied procedural and substantive due process, the court recognized that mineral rights are an interest in land.[56] The legislature could not take the property of one and give it to another.

The Nebraska statute[57] was held unconstitutional insofar as it applied retroactively in *Wheelock v. Heath*[58] and in *Monahan Cattle Co. v. Goodwin,*[59] both of which were handed down by the Nebraska Supreme Court on the same date. Both cases involved retroactive application of the statute, and the statute in each case was held to be unconstitutional only insofar as it purported to apply to severed minerals existing prior to the enactment of the statute. The Nebraska Supreme Court found that an intent to abandon was necessary, recognizing that a severed mineral interest constitutes an estate in fee simple in land or a corporeal hereditament. Both cases held that statutory provisions which declared mineral rights

53. 410 Mich. 21, 299 N.W.2d 704 (1980), *appeal dismissed,* 455 U.S. 901 (1982).
54. 80 Wis. 2d 566, 259 N.W.2d 316 (1977).
55. WIS. STAT. ANN. § 700.30 (West 1981).
56. *Chicago & N. W. Transp. Co.*, 259 N.W.2d at 319.
57. NEB. REV. STAT. § 57-228-231 (1981).
58. 201 Neb. 835, 272 N.W.2d 768 (1978).
59. 201 Neb. 845, 272 N.W.2d 774 (1978).

were abandoned unless the record owner had exercised ownership within twenty-three years immediately prior to the action to cancel the interest were unconstitutional as violative of both the due process and contract clauses of the federal and state constitutions insofar as they purported to operate retroactively.

The only savings clause that the statute in Nebraska had was that if an action asserting an interest in severed minerals was filed within two years, the owner of the severed mineral interest could make his appearance and assert his interest therein and he would then be deemed to have timely and publicly exercised his right of ownership. In the *Wheelock* case, the court pointed out that in effect the statute provided for a conclusive establishment of intention to abandon. "At common law legal title to land could not be lost by abandonment."[60] Mineral interests are vested property rights and are subject to the protection of the due process clause. The court distinguished a mere possibility of reverter which could be lost from an outright severance of the minerals.[61]

In the Illinois case of *Wilson v. Bishop,*[62] the Illinois court also recognized that a severed mineral interest was a freehold estate.[63] It was the opinion of the Illinois Court in this decision prior to *Texaco, Inc. v. Short* that the U. S. Supreme Court required that due process at a minimum provided notice and an opportunity for a hearing. The Illinois case discussed the Indiana state decision of *Short v. Texaco, Inc.*,[64] but was unpersuaded by the reasoning of the Indiana Supreme Court. Unfortunately for those contending that the rule adopted in Illinois should be the law, the subsequent U. S. Supreme Court decision in *Texaco, Inc. v. Short* affirming the Indiana Supreme Court appears to have established that where there is a reasonable savings clause that legislation such as that enacted in Indiana would now be valid.

The Minnesota statute was dicussed in *Contos v. Herbst.*[65] That case found that the Mineral Registration Act[66] was not itself unconstitutional but that the procedure for forfeiting severed minerals was unconstitutional. The court felt that notice prior to forfeiture to the state should be required for procedural due process. Of course, this case too was prior to *Texaco, Inc. v. Short,* but the

60. *Wheelock*, 272 N.W.2d at 771.
61. *Id.* at 773.
62. 82 Ill. 2d 364, 412 N.E.2d 522 (1980).
63. *Id.* at 524 (interpreting ILL. ANN. STAT. ch. 30 § 197 (Smith-Hurd 1969)).
64. 406 N.E.2d 625 (Ind. 1980).
65. 278 N.W.2d 732 (Minn. 1979), *appeal dismissed sub. nom.*, Prest v. Herbst, 444 U.S. 804 (1979).
66. MINN. STAT. ANN. §§ 93.52 to -.58 (West 1977).

question was laid to rest in Minnesota when, subsequent to the *Herbst* case, the Minnesota legislature amended the statute to deal with the decision.[67] As summarized in the note of decisions to the amended code, the original Registration Act did not violate the uniformity clause of the Minnesota Constitution, but procedures attending forfeiture violated due process of both the state and federal constitutions because the notice provisions were considered inadequate and because the owner of severed minerals who failed to comply with registration was denied an opportunity for hearing before forfeiture.

The Florida statute provided for the termination after twenty years of easements and rights of entry which allowed access to minerals.[68] The Florida Supreme Court in *Trustees of Tufts College v. Triple R. Ranch,*[69] held that the statute limiting to twenty-year periods easements and rights reserved for the purpose of mining, drilling, exploring or developing should not be applied retroactively. The statute was subsequently amended specifically to provide for prospective as well as retrospective operation.[70] The preceding section provided for the extinguishment of such rights.[71]

The statute enacted in South Dakota in 1976 and later amended[72] provides for the filing of an affidavit which would bar a severed mineral interest and also merge the severed interest with the surface unless the person claiming the severed interest had previously recorded an instrument describing the severed mineral interest. The recording would be valid for ten years and could be rerecorded. No case had reached the South Dakota Supreme Court as late as 1982 when a comment on such a statute appeared in the South Dakota Law Review.[73]

The Georgia statute, enacted in 1975 and amended,[74] provides for presumptive adverse possession of mineral rights which had not been worked nor taxed for a period of seven years. Subsequent to the passage of that statute, the case of *Nelson v. Bloodworth*[75]

67. *Id.* at § 93.55.
68. FLA. STAT. ANN. § 704.05 (West 1979).
69. 275 So. 2d 521 (Fla. 1973).
70. FLA. STAT. ANN. § 704.05 (West 1979).
71. *Id.* at § 712.04.
72. S.D. COMP. LAWS ANN. § 43-30-8.1 (Supp. 1981).
73. Truhe, *Surface Owner v. Mineral Owner or "They can't do that, can they?"* 27 S.D.L. REV. 376, 416 (1982).
74. GA. CODE ANN. § 85-407.1 (1978).
75. 238 Ga. 264, 232 S.E.2d 547 (1977).

was decided by the Georgia Supreme Court. The court avoided a constitutional issue by holding that the statute did not begin to run until July 1, 1975, so that there could be no cause of action under the statute prior to seven years from that date.

The Virginia statutes[76] were held constitutional in *Love v. Lynchburg National Bank & Trust Co.*[77] The Virginia statute provided that the owner of land subject to a claim could bring a suit praying extinguishment of the claim and joining the claimant as a defendant.[78] The suit must remain pending for at least six months during which the defendant could explore for and discover commercial minerals. The statute also provided for a prima facie presumption that there were no commercial minerals after thirty-five years. The problem with this approach is that litigation is required in each instance.[79] Furthermore, the Virginia statute has strange geographical limitations so that Polston wonders how it could have passed the test of constitutionality.[80]

It is not clear what effect the Virginia statute would have on non-executive mineral interests[81] since the Virginia statute contains a prima facie determination of lack of minerals after thirty-five years of inactivity and provisions for suit to be filed to quiet title to the mineral interest. The mineral owner is then given six months in which to explore for minerals, but suppose he has no right to explore? Is he without a remedy? Certainly the effect of such a statute on a non-participating royalty interest is not clear.

In North Carolina, where minerals have been severed from the surface and not listed for ad valorem taxes for ten years prior to January 1, 1965, and where the surface owner has an unbroken chain of title to the surface for fifty years, he is deemed to have a marketable title to the surfaces.[82] The statute declares that severed mineral interests recorded fifty years prior to September 1, 1965, are null and void unless within two years after September 1, 1965, a written notice is filed. The purpose is stated to facilitate land title transactions by extinguishing ancient claims. The statute further requires severed minerals to be listed for ad valorem taxes. Publication of the taxing requirement was to be made. Later in 1981, effective June 30, 1982, additional statutes were passed up-

76. VA. CODE § 55-154 to-155 (1981).
77. 205 Va. 860, 140 S.E.2d 650 (1965).
78. VA. CODE § 55-154 (1981).
79. SIMES & TAYLOR, *supra* note 28, at 242.
80. Polston, *supra* note 31, at 81.
81. *Id.* at 89.
82. N.C. GEN. STAT. § 1-42.1 (1967).

dating date requirements in various counties of North Carolina.[83] As of this writing, there is no decision of the North Carolina court interpreting the statutes.

Some statutes apply only to oil and gas and leave solid minerals unaffected and some deal only with solid minerals. Pennsylvania enacted prospective legislation dealing with the surface in 1957.[84] The legislation made a person liable who conveyed property with outstanding coal rights or rights of surface support unless the instrument set forth in capital letters or distinctive type a prominent notice. Of course, while this is helpful in giving notice of outstanding solid minerals, it does little to help where the outstanding interest is in oil and gas.[85]

The statute in Louisiana seems to be the source of most other legislation.[86] One of the big problems which has arisen is that of finding the geographical limit of the interests upon which the doctrine of prescription will operate.[87] Another question which frequently arises in Louisiana and will certainly be likely to arise elsewhere is that of what will interrupt prescription.[88] What particular tract will be included in that excepted from prescription when there is exploration or oil production? Must it be minerals under land included in the same deed? Must it be part of the same section? Suppose a tract of one owner is unitized with a tract of another and the drilling activities are only on the other owner's property? Will this constitute use of the unitized tract on which no drilling occurred? When we consider these questions, it is not at all surprising that litigation in Louisiana has been voluminous.

The Louisiana statute differs from the statute in Indiana in that in Indiana the geographical limitations which have plagued the Louisiana courts have been eliminated by reference to the instrument in which the interest was created.[89] The Indiana statute also creates as many mineral interests as there are grantees in the deed.

Polston takes the position that the phrase "out of which it was carved" in the Indiana statute refers to the person who created the mineral interest, recognizing that the terminating interest will always operate in favor of the immediate subdivider "so long as

---

83. *Id.* at § 1-42.2-6 (Supp. 1981).
84. PA. STAT. ANN. § 1551-1554.
85. SIMES & TAYLOR, *supra* note 28, at 243.
86. Polston, *supra* note 31, at 81.
87. *Id.*
88. *Id.* at 82. *See also,* 8 WILLIAMS & MEYERS, OIL & GAS LAW 565 (1982).
89. *Id.* at 93.

his interest is being reserved." [90] Polston believes that the terminating interest would bypass the immediate subdivider if his remaining interest is not being preserved. This should be the interpretation finally put on this type of statute but this is one area that should be clarified if the Indiana type statute is to be adopted. Both interests could terminate simultaneously since a conveyance would presumably not be a "we." At the instant of termination who would be the "then owner of the interest out of which it [the mineral interest] was carved"? There is nothing in the literal wording of the statute to keep the owner of the preceding interest who simultaneously lost his mineral interest under such a statute from acquiring an interest which he had conveyed and which was also allowed to terminate. Certainly, if the idea behind the statute is elimination of miscellaneous unproductive mineral interest, bypassing a lapsed interest would seem desirable.

VI. MARKETABLE TITLE ACTS

Another approach to the elimination of unused severed mineral interests is through Marketable Title Acts. The Model Marketable Title Act[91] gives little relief to the problem under discussion because the statute applies only to record titles and is designed to render a record title marketable as against defects prior to the root of title. While such a statute will probably eliminate some dormant mineral interests, it does not eliminate "defects which are inherent in the muniments out of which such chain of record title is formed."[92] Another problem with such a statute is that a conveyance subject to outstanding minerals during the forty years (the suggested period) will keep those interests from being cut off. It seems that no matter what approach is adopted, the problems that arise are considerable.

Professor Barnett[93] recognizes the various difficulties that arise under the Marketable Title Acts. Among these are the possibility that completely extraneous deeds, in the absence of possession, could cut off a perfectly good prior recorded title as well as the fact that a person acquiring a Marketable Title under such act need not be a bona fide purchaser. Somehow it strikes many of us as unjust, to say the least, if someone could acquire title to our property (be it minerals or otherwise) simply by recording an extraneous

90. *Id.* at 94.
91. SIMES & TAYLOR, *supra* note 28, at 6; Polston, *supra* note 31, at 75.
92. Polston, *supra* note 31, at 75.
93. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45 (1967).

deed and keeping quiet for forty years. This supposed solution really does not seem to eliminate any problem except that of giving lawyers assurance that they can ignore anything other than recorded instruments. If the end to be sought is to have these conveyances apparent in the grantor-grantee indexes, even this is not accomplished as "wild" instruments would never be found (except by accident) if the search is being done by grantor-grantee index, which is usually the only official index.

Before the Marketable Title Act, grantees from record owners were certain that their interests were indefeasible provided that they recorded their instruments. This is not true under Marketable Title Acts.[94] Of course the prime object and major advantage of Marketable Title Acts is that they eliminate the problem of defects in the pre-root chain of the person claiming record title.[95] The Marketable Title Act also may operate without litigation. Unfortunately, as pointed out by Barnett, the interest of a person whose name was forged may be cut off automatically without notice of an adverse claim under such an act.[96] The real justification for Marketable Title Acts seems to be that of simplifying title examination as well as reducing the amount of curative action needed in order to obtain a good title.[97]

Of course, most of the development in the oil and gas industry takes place through a determinable interest—the oil and gas lease.[98] Such an interest ordinarily does not run for a long period of time and leases themselves do not usually create the principal title problems, even though problems can arise from leases which are not cancelled of record as well as from conveyances. In some jurisdictions statutes provide for notice to a lessee of a lease that has terminated with penalty against a lessee who fails to release a lease of record after notice.[99] Affidavits of non-production are also often used in lieu of releases. Fee interests cannot be disposed of quite so easily.

VII. CONCLUSION

A brief review such as this does not pretend to be an exhaustive survey of all legislation on the subject of dormant minerals, but rather to show some of the types of statutes that have been enacted

94. *Id.* at 83.
95. *Id.* at 84-85.
96. *Id.* at 85.
97. *Id.* at 91.
98. Polston, *supra* note 31, at 78.
99. SIMES & TAYLOR, *supra* note 28, at 240; MISS. CODE ANN. § 89-5-23 (1972).

in other jurisdictions, as well as to illustrate the different conclusions regarding constitutionality of these statutes prior to *Texaco, Inc. v. Short*. Even after *Texaco, Inc. v. Short* the question of constitutionality of many of these statutes is not laid to rest. Small variations in legislation and other laws of the particular state may well cause a court in a given situation to reach a contrary result.

Unfortunately, if marketability is the purpose of mineral legislation, many of the statutes leave titles worse off than they were before the statutes were enacted. How, short of litigation, would anyone ever know whether an interest had been forfeited for lack of "use" where there was no filing? In fact this type of legislation may well develop into another "lawyers' bill." Litigation should be prodigious, especially where proof is required that the owner not only had ten parcels (or some other number) in the county but made a diligent effort to register all ten of them. Of course, if title examiners are truly fortunate, they would not find any effort made to register minerals so they would not have to worry about diligent effort. X, who has no knowledge of a statute requiring registration or who is confused on just when the twenty years expires, clearly loses his minerals under most of these statutes, but Y, who knows about the statute and about the time registration is required, but who fails to register his mineral interest in Blackacre, does not lose his interest if he registered Greenacre and "made diligent effort" to register Blackacre, provided he could prove he had eight more parcels in the county, whether he registered them or not, provided he made diligent effort on the other eight. Somehow the justice of this type of legislation escapes the writer.