In the

Supreme Court of the United States

MARY LOUISE GREEN PASCHALL, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	No. 72-922
	)	
CHRISTIE-STEWART, INC., et al.,	)	
	)	
Appellees.	)	

Washington, D.C.
October 16, 1973

Pages 1 thru 48

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

MARY LOUISE GREEN PASCHALL, ET AL., Appellants,	:	
v.	:	No. 72-922
CHRISTIE-STEWART, INC., ET AL., Appellees.	:	

Washington, D. C.
Tuesday, October 16, 1973

The above-entitled matter came on for argument at 10:55 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM J. LEGG, ESQ., 1800 United Founder Tower, Oklahoma City, Oklahoma 73112; for the Appellants.

JOE S. ROLSTON, III, ESQ., Suite 300, Local Federal Building, Oklahoma City, Oklahoma 73102; for the Appellees.

- - -

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-922, Mary Louise Green Paschall v. Christie-Stewart, Inc.

Mr. Legg, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM J. LEGG, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEGG: Thank you, Mr. Chief Justice, may it please the Court:

This case is an appeal from the Supreme Court of Oklahoma, and it deals with the due process clause of the 14th Amendment under the Mullane v. Central Hanover Bank & Trust Co. and subsequent cases, concerning notice requirements, and it also deals with the equal protection clause of the 14th Amendment under interpretations of state law by the Oklahoma Supreme Court.

Q When did you first raise the equal protection issue, Mr. Legg?

MR. LEGG: I raised it in the brief to this Court and the reason for that is that the case -- the decision in the Oklahoma Supreme Court worked what I considered an equal protection situation as compared with the previous case by the Oklahoma Supreme Court. That had not come out until the appeal.

Q Did you raise it in your jurisdictional statement here?

MR. LEGG: I believe I did.

Q I couldn't find it there. I thought it was first appearing in your brief.

MR. LEGG: It may have been the basic brief. Our basic point has been all along the notice requirements under the Mullane decision, but we thought the equal protection argument was involved also when the decision by the Oklahoma Supreme Court came down.

The facts are that the appellants are the successors in interest of mineral owners under forty acres of land in Seminole County, Oklahoma. These mineral owners own no surface rights at all. It was strictly severed mineral interests. The Oklahoma law is that the surface owners are committed to pay the ad valorem taxes, and the mineral owners have no responsibility for that.

In 1952, the surface owner failed to pay the ad valorem taxes and the county treasurer put the land on the publication notice for the original sale in 1953. Now, in Oklahoma, ad valorem tax sales are an administrative process by the county officials. It starts with an original sale when the surface owner fails to pay the taxes, and the county treasurer must place the land on that original sale if the taxes are not paid. He publishes notice for the original sale and in the publication notice he includes only the description of the land, and there is no personal service or process or any mailing or posting on

the land or anything of that nature at the original sale.

At the sale, there are two ways that it can go. If there is a bid by an individual -- now I am speaking of the law in effect in 1953 -- if there is a bid by an individual, the individual receives a certificate of paid taxes. If there is not a bid by an individual, then it is bid off to the county treasurer and he receives the certificate.

Q Does any property then pass at that time to the county?

MR. LEGG: It is a lien, it constitutes a lien on the land which I would assume would be a property interest under the due process clause in the later decisions. I believe there is a decision that holds that the complete title does not have to be held to have due process rights.

Q I take it then you are making no challenge to the original sale here?

MR. LEGG: Well, I am making no challenge to the original sale except that it forms the basis of the entire tax sale procedure. And one of my key points is that if there had been notice given adequate under the Constitution at the original sale, then we could not argue that there was no notice at the time of the resale. But since there wasn't any notice at the original sale and the resale in our argument, then we feel that we have to consider the original sale.

Q Incidentally, now that I have you interrupted,

why is there a difference between the two statutes? One calls for three weeks published notice, the other one for four weeks published notice. It makes no difference, I suppose.

MR. LEGG: I don't know the reason for it. It is there, I do know that.

Q And then the resale, you must name the owner?

MR. LEGG: In the resale --

Q At least he was named here?

MR. LEGG: In the resale, the owner must be --

Q Of the surface. Of the surface.

MR. LEGG: Well, it says the owner as appears on the records of the county treasurer.

Q Well, there is only one owner who is taxes.

MR. LEGG: The surface, the surface owner.

Q So that means the surface, doesn't it?

MR. LEGG: That is what it boils down to, yes, sir.

Q And in the offices of the treasurer, there is no record of any mineral owners?

MR. LEGG: There wouldn't be in the county treasurer's office

Q What?

MR. LEGG: There would be none in the county treasurer's office.

Q But nextdoor in the county clerk's office there is a --

MR. LEGG: That's correct.

Q -- the mineral interest is recorded?

MR. LEGG: Correct.

Now on that point, sometimes the records of the county treasurer have names of owners of the mineral interests but not in relation to those -- in other words, if they owned another tract in that county, their names and addresses would appear, but not in relation to that --

Q If they were surface owners in the county?

MR. LEGG: If they were surface owners, yes.

Q Right. That fact would appear in the treasurer's office.

MR. LEGG: It would appear in the county treasurer's office, yes, sir.

Now, in the resale there also is no requirement for notice to the mineral owners as such, there is no requirement for survice of process or posting on the land or mailing or anything of this nature. So what we have is under both at the time of the original sale and also at the time of the resale, we have nothing but publication notice; and in the original sale there is no naming, there is just a description of the land, at the resale there is no notice by naming of the mineral owner as such.

So at the time of the 1956 resale, it is our position that our people had no constructive notice under the Mullane

decision and the subsequent decisions. They had no duty to pay the taxes to begin with, and their names were not there, except over in the county clerk's office.

Q What difference would it make if your client were a lessee, a long-term lessee, twenty years?

MR. LEGG: I would assume that the lessee or mortgagee would have the same rights under the Mullane decisions as --

Q Even though there is no record of the lease in the treasurer's office and probable none in the -- there may not be in the clerk's office.

MR. LEGG: In the clerk's office it would be a recordable document, and if it were a long-term lease --

Q Recordable but not necessarily --

MR. LEGG: It would be recordable -- you don't have to record in Oklahoma. I mean it is not absolutely necessary to record in Oklahoma for the validity of the document, in any event.

Q But it is against the subsequent owners, I suppose?

MR. LEGG: Yes, in order to forestall third parties, yes. You would have to record it.

Q So you would make the same argument as against lessees, mortgageas?

MR. LEGG: I believe we would have to make the same,

on principle --

Q You really would be changing the practice of the treasurer's office substantially in --

MR. LEGG: Yes, this would change, there is no doubt about that.

Q If you prevail here, what unsettling effect, if any, will this have on Oklahoma titles?

MR. LEGG: On Oklahoma what?

Q Titles.

MR. LEGG: Well, I think it will change the case law in Oklahoma. It will probably result in changing the statutory law of Oklahoma. As far as the upsetting of titles, I believe it would be limited to a five-year period, because we have a five-year statute of limitations. Where there is notice to the owner --

Q I gather that while there may be separate ownership of minerals and surface --

MR. LEGG: Yes, sir.

Q -- minerals are not separately taxed, are they?

MR. LEGG: They are not separately taxed until they become productive.

Q Right.

MR. LEGG: At that time, there is an in lieu of production tax.

Q But in what we are talking about here, this

situation, they are not?

MR. LEGG: This is a non-productive situation.

Q But, as I understand it, non-payment of taxes by the surface owner results in the sale not only of the surface rights but also the mineral rights?

MR. LEGG: That is the construction placed upon these statutes by the Oklahoma Supreme Court.

Q All right.

MR. LEGG: Now, I might say in relation to production that the land has subsequently --

Q Even though under your Oklahoma law the mineral interest is separately recognized under the law?

MR. LEGG: It is a separately owned property interest, yes, sir.

Now, I would like to say this --

Q Perhaps, with respect to my question, which you were in the course of answering, your opponent will comment on it when he is up as to the unsettling effect, if any, upon Oklahoma --

MR. LEGG: Yes, back to that, I think the statute of limitations is the barrier to a full discruption of all titles in Oklahoma. I think the Shroeder case can be read to the effect that the statute of limitations would not apply. But I think in our land title situation, the difference is that the party, the tax sale purchaser goes into possession of the

surface. Now, at that point he sets up his notice even though there hasn't been notice through the statutory procedure, he sets up his notice by physically occupyhing the surface of the land and so the five-year statute would run as against ownership of the surface.

Now, as far as the mineral rights are concerned, it is our view that that occupation of the -- occupancy of the surface is not notice, it is not occupancy of the mineral rights until there is actual drilling there, because there is nothing to put anyone on notice or to put the severed mineral owner on notice that his rights are being claimed by someone else. The surface owner, the occupancy of the surface puts that person on notice. So that if you don't have constitutional notice under the tax sale procedure, going into possession substitutes that as notice as far as the surface owner is concerned. But in order to -- if you don't have constitutional notice during the tax sale to the mineral owners, and someone goes into possession of the surface without going into possession of the minerals, there is nothing to put the mineral owner on notice. There is no substitution through possession that puts him on notice. He has to rely on someone actually drilling a hole there or mining, or whatever it takes.

Q Then, in answer to my question, with respect to mineral rights there will be a chaotic result in Oklahoma if you prevail here?

MR. LEGG: Well, if there has been an attempt to explore, there will not be chaos. For those on those tracts of land that have been explored, the statute of limitations will start running and there will be a five-year period. For those mineral interests that have not been explored, there has been no action taken to take the mineral rights under possession, and if there was no statutory notice given, constitutionally effective, then their position would be the same as it always has been. They would still be owned by the former owner.

Q If you go back four years, now, into a tax sale of what you are describing as a non-productive mineral interest?

MR. LEGG: Well, are you referring to the forty-year statute in Oklahoma?

Q I just guessed.

MR. LEGG: Well, there is a thirty-year land statute in Oklahoma, but it doesn't apply to mineral rights.

Q Well, would there -- you say that because the mineral owner doesn't have notice from a new surface claimant going into effect, does the five-year -- the five-year statute doesn't apply to him. Is there any statute that would operate on the non-product mineral claim?

MR. LEGG: The case law in Oklahoma on the statute of limitations is that the possession of the surface is not possession of the minerals, except in the case of a resale tax deed, not in the case of a certificate tax deed, but only in

the case of a resale tax deed, and this is where the equal protection of the law comes into my argument.

Q Let me ask one more question, if I may, to try to wind up this one aspect. Then as to a non-producing mineral interest, there isn't any statute of limitations in Oklahoma that would bar a man going back and making this constitutional claim that you make here with respect to a sale that had taken place twenty, thirty or forty years ago?

MR. LEGG: There is no statute of limitations except in the case of a resale tax deed, which we have here, as construed by the Oklahoma Supreme Court.

Q And what is the statute of limitations for a resale tax deed?

MR. LEGG: That would be five years.

Q But that requires some sort of notice, doesn't it, going into possession?

MR. LEGG: There are no notice --

Q But you were equating going into possession on the part of the surface claimant with a form of notice to the former owner that would start the statute running.

MR. LEGG: Yes.

Q There is no analogous going into possession with respect to a non-productive mineral interest, is there?

MR. LEGG: You would have to drill or you would have to take possession of the mineral rights in some way, yes. And

this is established case law in Oklahoma.

Q Yes, but if you had -- the only time the question of starting the statute of limitation comes up for the resale tax deed is if you have an invalid one supposedly, isn't it?

MR. LEGG: Not under Walker v. Hoffman.

Q Because I thought the law was that the resale tax deed was valid against the mineral interests without notice at all.

MR. LEGG: No. Under Walker v. Hoffman, which was a certificate tax deed case, the court held, the Oklahoma Supreme Court held that possession of the surface is not possession of the minerals.

Q Yes.

MR. LEGG: And consequently the tax deed, if it is invalid in its inception, is invalid. But there is language in that same case -- it didn't deal with the resale situation -- but there is language in that same case that holds to the effect -- says we will hold that if it is a resale, then it is a completely new title and possession of the surface will --

Q Is notice to the mineral interests?

MR. LEGG: -- is notice to the mineral interests.

Q And so that would -- even if the tax deed, resale tax deed were invalid for some reason --

MR. LEGG: Yes.

Q -- it would still start to -- possession of the surface would still start the five-year statute running?

MR. LEGG: To that, I assume that is what --

Q And on that basis, if Oklahoma -- if you won this case and Oklahoma stuck to that rule, the unsettling effect on mineral interests would just be five years?

MR. LEGG: That's true, except that --

Q Well, I said if Oklahoma stuck to that rule.

MR. LEGG: If it did, but this gets into my equal protection argument.

Q I understand that, if they stuck to the rule.

MR. LEGG: That's correct.

Q That is not true of a certificate of sale though, is it, as opposed to a resale?

MR. LEGG: A certificate tax deed --

Q A certificate tax deed.

MR. LEGG: -- the possession of the surface is not possession of the minerals.

Q So there the unsettling effect could go back indefinitely?

MR. LEGG: Yes, but that is decided law in Oklahoma. That was the Walker v. Hoffman case exactly, is that this lady -- I believe it was a lady -- owned the minerals rights and the tax, the certificate tax deed purchaser claimed the mineral rights.

Q This case won't upset that -- won't affect that

rule. That is already the rule in Oklahoma?

MR. LEGG: That is already the rule in Oklahoma.

Q Mr. Legg, would you refresh my recollection as to how the county would have been able, as a practical matter, to give notice to the owners of the mineral rights upon whom no taxes are assessed? Would that have required a title examination?

MR. LEGG: That will require, if the mineral owner's name and address is not in the county treasurer's office, he would have to go to the county clerk's office to find it. Now --

Q But when he went to the county clerk's office, would he have to go through the land books examining titles, or a lawyer would?

MR. LEGG: He would have to go to the indexes of the land records to find out who claims the minerals or if any are outstanding.

Q That could go back --

MR. LEGG: It could go back to statehood, yes. That's right. But the fact is that the mineral interest is a separately owned interest, separately owned property, and that property owner has received no notice that his rights are in jeopardy.

Q I understand that. I was just curious that there appears to be no provision either for taxing the owners o- the mineral rights or providing some readily available list

so that the authorities would know who they are.

MR. LEGG: That's true.

Q In our state they tax them.

MR. LEGG: Beg pardon?

Q I just said in Virginia they tax the owners of mineral rights.

MR. LEGG: Yes, in a number of states they do. In Oklahoma, they become taxable in the event of production.

Q What I am unclear on is what right does the state have to extinguish this right if there is no duty to pay taxes?

MR. LEGG: Well, this is part of our argument, Justice Marshall. We have no duty to pay taxes, the severed mineral interest.

Q You don't owe the state anything.

MR. LEGG: Under the state law, taxing law, we don't.

Q But you lose your property.

MR. LEGG: But it is a separately owned property interest and it is lost if the surface owner fails to pay the taxes.

Q What do you have to say about the obligation of the owner of these mineral rights to keep some track of whether the taxes are being paid by the surface owner? Shouldn't he ought to pay a little attention to that, since his rights could be extinguished?

MR. LEGG: I believe he should, yes, sir. I think

that, since he has no duty, it would be an ordinary and reasonable assumption on his part that his surface owner is paying the taxes, and that is about all I can say about that, because the --

Q Well, is there any presumption that people pay their real estate taxes?

MR. LEGG: There is no presumption in Oklahoma that I know of.

Q Well, in the earlier --

MR. LEGG: There is a statutory requirement that it be done.

Q In the earlier days of the country, when eastern banks and mortgage companies were financing large portions of the purchases in the western part of the country, these insurance companies and banks checked every year to see whether the taxes were being paid.

MR. LEGG: Yes. The oil companies do that. I believe Justice White asked about that, too. The oil companies and the mortgagees regularly check for payment. But it is the individual landowner that is not ordinarily going to check on that kind of a situation. He will make an assumption that it is being paid. Now --

Q The mineral owner doesn't check to see whether the surface owner has paid the taxes?

MR. LEGG: Ordinarily I would assume that he would

not do that.

Q Doesn't he have the same reason for doing it that a mortgagee has for doing it?

MR. LEGG: Yes, there is the same liability, yes, sir. But if there were --

Q He has the same economic risk, hasn't he --

MR. LEGG: He has the same economic risk.

Q -- depending, of course, on the --

MR. LEGG: Yes. The mortgagee is dealing with wide holdings, a lot of economic interest is involved, and he is --

Q Not necessarily. One widow might have a mortgage on a farm or a piece of land --

MR. LEGG: Yes, but I was referring to the large mortgagees who do check. I am familiar with their procedures, and also oil companies do check to make sure.

Q Is there any procedure in your state whereby an owner of a mineral interest could go to the treasurer and say, "By the way, add me to your list of interested parties in the event the tax isn't paid"?

MR. LEGG: Well, there is no statutory provision for that. I don't know whether it would be valid or not. If he could do that --

Q Recorded in the clerk's office is notice to everybody except the purchaser of the tax deed, I guess?

MR. LEGG: Yes, and the county treasurer, according

to the decision.

Q And the county treasurer.

MR. LEGG: Yes.

Q But does anyone ever -- does the treasurer ever receive that sort of notice so that --

MR. LEGG: I have no experience on that, Justice White.

Q It would seem sensible, wouldn't it?

MR. LEGG: The problem with it would be that if there was a statute that permitted him to do that, then I think it would be dependable.

Q But it would be sort of a second recorder's office though, wouldn't it?

MR. LEGG: Yes, it would be, and there would be -- as a matter of fact, I have attempted to have instruments recorded even in the county clerk's office, and they sometimes refuse that, because there is no statutory provision for receiving that kind of an instrument.

I think if I have given you the facts and the statutory law, I think that is basically my case with the questions that have been asked.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Legg.

Mr. Rolston?

ORAL ARGUMENT OF JOE S. ROLSTON, III, ESQ.,

ON BEHALF OF THE APPELLEES

MR. ROLSTON: Mr. Chief Justice, and may it please the Court:

I believe it is absolutely imperative that the chronological order of facts as to how this case reached this Court be spelled out. First, we are dealing with forty acres of land in Seminole County, as Mr. Legg has indicated. The taxes became delinquent for four years. The first delinquency occurred in '52 and subsequently until '55.

In '56 a resale -- in 1956, a resale tax deed was issued in May to the appellees. It was filed of record on June 6, 1956, and it covered, in addition to the forty acres, some twelve other parcels of real estate. Thereafter, in 1963, the appellees executed and oil and gas lease to Christie-Stewart Oil Company, who was actually the party plaintiff when this litigation first arose.

During the period from 1956 until 1965, when the law suit was filed, the trial court found that the appellees had been open, notorious, adverse and in continuous possession of the property. And one of the elements of the holding of the trial court was that the claims of the appellants was barred by the statute of limitations.

The suit by the oil company was filed in 1965 in order to perfect their lease, because their attorneys who examined the

title of course realized that this was a resale tax deed and there was always a degree of uncertainty about its validity.

The appellants then filed an answer and a cross petition and brought in the appellees as parties defendants. The appellees then filed an answer to the cross petition in which they specifically raised the statute of limitations, that the appellants were barred.

The first issues in the case, the validity of the oil and gas lease, was adjudicated by the trial court in 1965, and then for some reason unknown to myself, since I was not personally involved in the original trial, the issues as between the appellant and the appellees was not decided until 1969. During that period, an oil well was drilled upon the property and production had, and I am sure this keenly increased the interest of all parties when that occurred.

I think it is also absolutely necessary that this Court have a crystal clear understanding of the statutory procedure of tax sales in Oklahoma. First of all, the statutes hold that it is the burden of the taxpayer to come forward and pay his taxes.

Q As to the surface owner, right?

MR. ROLSTON: As to the surface owner, yes, Your Honor, to come forward and pay the taxes. Mr. Legg is correct in that non-producing oil and gas interests are not subject to the ad valorem tax. They are deemed included in the surface. Only

when production first arises do severed minerals bear any ad valorem tax, and that is in lieu of tax for gross production.

After the taxes become delinquent, there is a certificate sale which occurs. At that time, the county treasurer runs a publication setting forth the legal description of the property and the amount of tax due. Any party can then come in and buy a certificate. This allows the party to have a lien upon the land. One of the requirements at that time is that the purchaser must pay the full amount of the tax. So at that period the county treasurer has collected his tax. He has performed his service as required by law and collected 100 cents on the dollar for the delinquent taxes. The certificate holder then is required to hold the tax certificate for at least two years and any time after two years and before ten years, which bars the certificate by statute of limitations, he may apply to the county treasurer for a tax deed. Now, the specific statute that gives the tax certificate holder that right provides that he will obtain, upon receipt of the tax deed from the county treasurer, a perfect title provided that the tax certificate holder give notice to all of the owners of the property, not owners as reflected by the records of the county treasurer's office but all of the owners. Therein lies the distinction --

Q The mineral owners as well as --

MR. ROLSTON: That is correct. The Oklahoma Supreme Court has by numerous cases held that the term "owner" as used

in that statute, in placing that burden upon the tax certificate holder, includes the mortgagee, it includes any lien holder, it includes severed mineral interests and so forth.

Now, Mr. Legg has referred to some confusion between the Supreme Court of Oklahoma in the case involving a tax certificate deed when it did not apply the statute of limitations. The distinction in that case is that it was a certificate deed, and it was stipulated in that case that the tax certificate holder, when he applied for the tax deed, did not give the statutory notice to the then mineral owner, and the court said that one of the conditions precedent to you acquiring your perfect title is that you fulfill your obligation by statute and give the notice, and therefore since you did not give the notice the mineral holder's interest was never acquired by your certificate deed, therefore, having never acquired his interest, the statute of limitations would not run because you were not in possession of his interest, having not acquired it under the deed.

Q What is the name of the case that so held?

MR. ROLSTON: Walker v. Hoffman, Your Honor, as set forth in our brief.

Now, if, as Mr. Legg has indicated, if there are no bidders at the tax sale, then the property is bid in by the county treasurer and he is required by law to hold the taxes for two years. During this period of time, anyone having any

interest in the property is free to redeem it. The Supreme Court has also held that a non-producing mineral holder may redeem taxes at any time and thereby obtains a lien upon the interest of the surface owner and may enforce that lien by equitable foreclosure.

Q Well, is it your argument then that any due process requirements are satisfied by the requirement that in order to get a perfect title, the holder of the certificate must give notice to everyone, including ---

MR. ROLSTON: That is correct.

Q -- the mineral owner?

MR. ROLSTON: And I don't think Mr. Legg would raise any issue about our present statutes on tax --

Q My question is, your answer to the due process claim is that due process is satisfied by that provision of your law?

MR. ROLSTON: As to the tax certificate, yes, sir.

Q Yes.

MR. ROLSTON: Because it does require notice to the owner. Now, when the property then moves on to the county treasurer, then the county treasurer, under the law as it existed at the time this deed was issued, is required to publish after two years of no redemption, he is required to publish, and at that time the name of the owner as reflected by the records of the county treasurer appears in the publication,

and a legal description of the property, and the amount of the tax due, and I believe there may be some other minor things. But there is --

Q By the owner, do you mean the surface owner?

MR. ROLSTON: The surface owner. Well, that is the only record in the county treasurer's office, is the name and address of the party who is paying the tax, in that case it is the surface owner. In many cases, if there are undivided interests in the surface owner, they may have more than one name.

Now, it is interesting to note that in 1965, the Oklahoma legislature changed the statute on resale tax deed requiring not only publication but also a mailing of a notice to the owner as reflected by the county assessor's office. Now, it is the position of the appellees that this clearly was an application of the Oklahoma legislature of the rules of Mullane and subsequent cases, since prior to that time the surface owner, even though he paid the tax, the only notice given was a publication notice. And I think if I was in a position to have to argue before this Court that that was the same situation with the mineral owners in Mullane and the other cases, I could not prevail. Clearly, I think the legislature in '65, when they amended the statute and required not only publication with the owners name in it, but also mailing to his last known address as reflected by the records of the county treasurer, they complied with Mullane or were attempting to

comply with Mullane --

Q But again that personal kind of notice under the '65 amendment was a notice only to the surface owner, wasn't it?

MR. ROLSTON: That is correct. Now, I think the Court must recognize that Oklahoma is a major producer of oil and gas. It has been so for a number of years. Great industries exist in Oklahoma based upon the production of oil and gas. People since statehood have become cognizant and aware of the value of mineral interests, and thus it is the exception rather than the rule in Oklahoma nowadays that you find a piece of ground which the minerals have not been severed, and in many cases if there has been production that has ceased, you may find thousands, literally thousands of various owners, the interest of which is almost beyond imagination. And I am not aware as to whether any justices have had occasion to examine a title for oil and gas and render an opinion, but I assure the court that it results in sometimes interests that -- you have to use a computer to determine the size.

Now, based upon counsel's argument for the appellants, all of these individuals would be entitled to notice.

Q What you're suggesting is that the 15/16 and 1/16 that you have in this case is by no means the furtherest mathematical progression?

MR. ROLSTON: No, Your Honor, it could be out as many as seven or eight decimal places. The interests -- as I say,

many of the original oil and gas pools in Oklahoma are no longer producing and the minerals then became non-producing, and subject again to ad valorem tax by the surface.

Q Mr. Rolston, as a practical matter, when someone is buying -- and I am now speaking as a practicing lawyer -- you have a client who is purchasing surface, purchasing land, does he make an independent check in these books that Mr. Legg referred to, to the index, to see whether there are some mineral rights?

MR. ROLSTON: Well, may it please the Court, Oklahoma is an abstract title state. The owner of the surface has an abstract title. All of the oil companies in purchasing leases rely upon abstracts by bonded abstractors who are examined by an attorney. These abstracts are compiled by the abstractor going to the county records, searching out all of the various instruments that have been recorded.

Q The county clerk, too?

MR. ROLSTON: The county clerk -- well, the county clerk is charged with the responsibility of recording instruments. All deeds, mortgages, leases, anything affecting the property --

Q This is not limited to the county auditor's record, then?

MR. ROLSTON: No, it is called county clerk, Your Honor.

Q That would then flush out any -- presumably it would flush out any claim of the subsurface rights?

MR. ROLSTON: That's correct. It would reflect any mineral deeds if the abstractor was instructed to obtain that type of abstract. It is possible to abstract a piece of property only as to the surface and omit the minerals which in many cases because of the size of the abstract, that is done. But at this point I would point out that one of my arguments is the great difficulty that counsel for the appellant asked this Court to place upon the county treasurer. Oklahoma is a tract index state, that is when I walk in and I file a deed covering a certain piece of property, reference to that deed is first made in the reception record, indicating that it was tendered for recording. Then it is mechanically put on an index book in particular the quarter section, township, range and so forth, indicating that on a certain date a certain warranty deed to somebody from somebody covering a certain property was recorded. That deed is then reproduced photographically in another book and page in another book, in order to find the details of the conveyance, such as the interests covered, and so forth, and any addresses that might appear, would require first of all that a party go to the track index book, research the title from patent forward to determine where a particular deed came into the chain of the title, or any particular deeds covering minerals, or which might purport to

cover minerals, or might be overriding royalty interests, or some type of reservation of life, estate, or so forth in the minerals. Then the party would have to take the book and page of each of these instruments, go then to the general recording data and examine each of the instruments in order to find out exactly what an instrument said, because the reference in the track index book is merely to the date it was recorded, the nature of the instrument, whether it be warranty deed, mineral deed, quit claim deed, mortgage, and the names of the grantor and the grantee, and the legal description of the property.

Q Do you have a separate grantor-grantee index in your county recorder's office?

MR. ROLSTON: Yes, Your Honor, there is.

Q Mr. Rolston, what is the interest of the state in extinguishing the mineral rights?

MR. ROLSTON: In my opinion, Your Honor --

Q You put great emphasis on the deed of the county clerk to collect every nickel of taxes. You said that. Well, once you have collected all of the taxes, what is the interest in extinguishing the other rights?

MR. ROLSTON: All right, I will explain it this way, Your Honor, that if the county is not required to bid at the tax certificate sale, the county is done with the thing. It is up to the individual tax certificate holder to proceed further if he wants to acquire the property. If there are no bidders and

the county is required by law to bid the property, we then go to the resale. At the resale, you can buy the property for anything less than what the tax is due or anything more. And it is my opinion -- and, of course, not being a member of the legislature, I don't know the reasoning behind it -- but it is my opinion, in order to make it attractive, since the taxes are noq delinquent for four years, for a person to bid at the resale, the legislature deemed it advisable if you bid then the county will give you a perfect virgin title to that property, and that is to encourage bids, since they have already been around one time and received no bids and the second time out the county can sell it for less than the taxes due, or more if there are a number of bidders, but at that point if the county does not -- if there are no bidders at the resale, then the county is required to bid it in, and it is deed to the county commissioners.

Q It sounds to me like you could throw in the man's land next to it while you're at it.

MR. ROLSTON: I would not say that that could not conceivably happen, Your Honor.

[Laughter]

Q What happens with the producing mineral interest?

MR. ROLSTON: The law is very clear in Oklahoma. Producing mineral interests are -- the gross production tax, the taxes do not cover producing minerals.

Q They don't cover producing minerals and they are

separately owned? The only difference is that they are producing and they are taxed separately?

MR. ROLSTON: That is correct.

Q And the fractional interests are taxed separately?

MR. ROLSTON: Well, the amount of production determines the amount of tax.

Q I know, but who pays it?

MR. ROLSTON: Well, it is taken out by the oil companies at the time before they ever turn the money over to the royalty owner.

Q So that on producing mineral interests, the treasurer never knows who owns the mineral interests?

MR. ROLSTON: As I understand the operation --

Q It is just the operator?

MR. ROLSTON: The producer of the --

Q The working interest gets hit for like a sales taxes, sort of --

MR. ROLSTON: That is correct. That is my understanding of that operation. But I would point out, I think we rely most heavily on the case of Leigh v. Green, which we realize is a very old case, but I still think it is very sound. And of the basic points of that case, the court there said the process of taxation does not require the same kind of notice as is required in suit of law, or even in proceedings for the taking of private property under the power of eminent domain, it

involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underly them.

Now, I submit that the form of procedure employed in Oklahoma has been that way since statehood, for more than sixty years, that this -- almost this exact procedure, except as slightly changed in 1965, has been in process.

Q What case is that you are reading from?

MR. ROLSTON: That is Leigh v. Green.

Q Is that cited in your brief?

MR. ROLSTON: Yes, it is.

Q 193 U.S., isn't it? Is that the one?

MR. ROLSTON: Yes, it is a case involving Nebraska's tax law and which involved a land holder on a piece of property in an administrative sale, and they dealt that this case was in rem and created a new and independent title. Now, I realize that this Court apparently in Mullane indicated that, whether it was in rem or in personam was not necessarily the criteria for determining whether, you know, you were entitled to personal notice or whether the publication notice was sufficient. But I submit that this Court did not destroy the distinction between the two. It merely said that it is not necessarily controlling, and I have no quarrel with that decision.

Q Mr. Rolston, if the owner of a producing mineral interest becomes delinquent in his obligation to pay the lieu

tax, can that be made a lien on that producing interest and the producing interest ultimately sold in a similar proceeding to this?

MR. ROLSTON: I do not know the answer to that question.

Q Well, how does the state enforce the obligation of a delinquent owner of a producing interest to pay the lieu tax?

MR. ROLSTON: Well, the producer, that is the party who is operating the well and collects the money from the sale pays it directly to the state.

Q What if he doesn't pay it?

MR. ROLSTON: When I receive my royalty check, if I was fortunate enough to own minerals that were producing, it would show the gross production, less gross production tax, net to me, and that is all I would receive.

Q Well, what if the operator who is obligated to pay the tax, as the producer for all these people, doesn't pay it? What does the state do?

MR. ROLSTON: I am not familiar with the procedures they employ in that type of situation.

Q I ask again, I fail to find Leigh v. Green cited in your brief, but you are relying on it? It is cited in the other brief but it is not cited in yours.

MR. ROLSTON: I believe it is.

Q I don't see it. At least it is not in your index.

Q It is not in the index and I can't find it anywhere in the text.

Q But I take it now you are relying on it?

MR. ROLSTON: It is certainly an oversight on my part, Your Honor, because I have always considered that my stalwart case.

Q One other question: I listened to your description of checking titles, and this sounded to me just exactly like one checks titles in any other state.

MR. ROLSTON: There are some states which do not use abstracts of titles and employ private companies to search.

Q But I wondered about the significance of your displaying or outlining this detailed checking titles. It doesn't seem to me to be particulary onerous or unusual.

MR. ROLSTON: No, Your Honor. I wanted the Court to be absolutely certain as to the burden they would place upon the county treasurer if they required the county treasurer to embark upon a search, bearing in mind it would not necessarily be one property but could be hundreds of properties that were then delinquent. And I feel like that is a burden that this Court has not required under Mullane or subsequent case.

Q You do say that Oklahoma law puts the burden on the private purchaser before he gets a perfect title?

MR. ROLSTON: That's correct.

Q To give everybody notice, which means he has to go all through the process of searching, as you have described it, but that the Oklahoma law does not put that burden on the county treasurer if he is the one who gets the title, all he has to do is give the public published notice and there he names, as I understand it -- that is the resale, isn't it -- he names only the surface owner?

MR. ROLSTON: That is correct, Your Honor. The distinction I draw there, the tax has been sold, the state is no longer involved, it is a private individual and there is a distinction between a private individual enforcing a right he has obtained from the state, in my mind, and the right of the state to still attempt to collect the tax.

Q Well, I take it that we still have to decide whether in the case of the acquisition on resale by the treasurer, who gives only the published notice you describe, whether that satisfies Mullane and due process, don't we?

MR. ROLSTON: If the Court does not feel that the statute of limitations has barred the appellants' right of recovery, which I strongly believe it has, that the lower court found, I cannot explain to this Court in any way why the intermediate court of appeals and the Supreme Court of Oklahoma made no reference to the finding by the trial court that the statute of limitations barred it.

Q Well, this is an argument that the issue isn't even here.

MR. ROLSTON: I raise it simply because I think the record shows it.

Q The Supreme Court of Oklahoma didn't treat it in its opinion though, did it?

MR. ROLSTON: No, Your Honor. We were there on certiorari from an adverse decision to the appellees by the intermediate court of appeals of the State of Oklahoma, which reversed the trial court.

Q Do you have any comment on my question to your opponent about the unsettling effect of a reversal here?

MR. ROLSTON: Yes, Your Honor, I certainly do and would like to comment that -- and I cite in my brief Bomford v. Socony Mobil Oil Co., which is a Supreme Court case for Oklahoma, where they applied the Mullane rules to service by publications, and I would like to read to the Court the last paragraph of that case. It says: "Mindful of our duty to guard against any attempt to upset settled titles by imposition of new requirements which did not exist before, we declare that all procedural modifications enunciated herein shall not be construed as invalidating the publication process in this case or in any case in which the trial court's judgment shall have been rendered before the opinion becomes final."

Now, I submit that if this Court holds that the

statute of limitations has no application, then every tax deed issued, every resale tax deed issued in the State of Oklahoma since statehood is subject to attack.

Q That is not the problem, is it? Isn't that a state law question?

MR. ROLSTON: I think it is a matter that this Court must consider.

Q The statute of limitations?

MR. ROLSTON: No, consider what a decision of this Court would do to titles within the State of Oklahoma.

Q Well, you say there was a finding that the statute of limitations barred the claim anyway?

MR. ROLSTON: That was the trial court's -- one of the trial court's principal findings, as appears in the Appendix, the trial court's judgment.

Q Well, didn't the motion to dismiss affirm -- as I read your motion -- rely on that as a reason that we ought not to note this appeal, did you?

MR. ROLSTON: No, Your Honor.

Q You apparently relied primarily on Leigh v. Green as I read your motion.

MR. ROLSTON: That is correct. Now, there are Oklahoma cases which relied upon that, the most recent of which was offered to this Court in 1949 and was rejected, Cornelius v. Jackson, I believe the case was. But I have no dispute, Your

Honor, with the Court's rulings in Mullane or City of New York or Covey or Walker or Wisconsin or Schroder, I have no objection at all because I think those were proper results of the facts that were before the Court.

Q Well, you do argue that twice before we have refused to review the issue now presented to us --

MR. ROLSTON: That is correct.

Q -- both in Cornelius, which I gather was an Oklahoma case, wasn't it?

MR. ROLSTON: Yes, Your Honor.

Q And then there was a Kansas case, too?

MR. ROLSTON: There was a Kansas case very similar.

Q Robinson v. Hanrahan.

MR. ROLSTON: But I respectfully submit that the record in this case does not present sufficient fact to allow the Court to apply the rule in Mullane. The rule in Mullane simply says if the names are known or if they are very easily ascertainable, then you must give personal notice or something better than publication. There are absolutely no evidentiary facts in this case that would warrant this Court of saying that the rule should be blanketly applied, no facts at all. One witness testified at the trial, there were certain stipulations that no personal notice was received. I think it would be extremely dangerous for the Court to embark upon a strict application of Mullane without having that evidentiary fact before the

Court as to whether it is or isn't. I will argue that it will be extremely difficult to find the names of these parties, and Mr. Legg will argue the opposite, but that does not constitute a fact that this Court should predicate a decision upon.

Q Incidentally, that finding of statute of limitations, does that appear in your Appendix anywhere, the findings of the trial court?

MR. ROLSTON: It appears in great detail in the journal entry judgment of the trial court.

Q Well, I mean is that --

Q On the statute of limitations or just the fact that the statutory procedures were carried out here?

MR. ROLSTON: Well, also that -- not only that the deed was issued in compliance with all the statutory requirements, but that the five-year statute of limitations indeed applied and that the appellees had been in open possession. That may be in the jurisdictional statement and not reduced to the Court in the Appendix.

Q You said I would find that in the -- it is an appendix to the jurisdictional statement, isn't it?

MR. ROLSTON: I believe so, Your Honor.

Q Mr. Rolston, some of these subsurface deeds are filed, right? Mineral rights deeds are filed, aren't they?

MR. ROLSTON: Yes, Your Honor. There is no requirement that the mineral deeds be filed, but in most cases they

are.

Q Well, would it be too much to require that the county check to see if one is filed and notify him?

MR. ROLSTON: In my opinion, it would be, Your Honor.

Q Why?

MR. ROLSTON: It would require skilled parties, not just layment, they would have to determine the nature of the interest, whether not only -- just because a mineral deed appeared, then you would have to check to see whether that interest had been conveyed out. You must ultimately arrive at who the present owners are, or you haven't accomplished anything.

Q Well, that is not what I said. I said that one man files a deed. Would it be too much to notify him even though he has sold it?

MR. ROLSTON: You mean the county treasurer?

Q Yes.

MR. ROLSTON: No, Your Honor. I don't think that -- you cannot say that every piece of property is going to have just one deed. Therein lies the problem. I think that we may in most cases be dealing with literally hundreds, rather than one.

Q You would have a hundred mineral deeds on one piece of property?

MR. ROLSTON: Very easily, Your Honor. On 160 acres

of land, the mineral interests, as I pointed out to the COurt, can be divided up to as many as six decimal places. The interest is just -- it is very difficult, I understand, for the Justice --

Q Well, you could break up your surface the same way.

MR. ROLSTON: Yes, that's true.

Q And you still would have to notify them.

MR. ROLSTON: Because their names would appear on the records of the county treasurer if they are being assessed as to their interests. But there is no dispute as to the facts that the name of the non-producing mineral owner does not appear on the county records in the county treasurer's office, and I --

Q But it is in an office right next to him, it could be.

MR. ROLSTON: I cite for the Court the case of Ponder v. Eby, which the Supreme Court of Oklahoma there specifically held that it was the legislature's intent that the county treasurer was not to look beyond his own records in preparing notices, and I think that was clearly the intent of the legislature and --

Q That doesn't make it legal.

MR. ROLSTON: No, Your Honor, but that was their intent in not requiring that he go outside of his office.

Q What is that case again, the last one you just cited?

MR. ROLSTON: Ponder v. Eby. Thank you.

Q Before you sit down, may I ask, Mr. Rolston, is this the provision at page 17, statute of limitations, "The court further finds, orders, adjudges and decrees that from the date of the recording of said resale tax deed, on June 6, 1956, Garrett and Vaughn had been in open, continous, exclusive, and hostile possession," and so forth, "and that said contesting substituted as parties defendants are further forever barred and precluded by the statute of limitations from seeking to assert the invalidity of said resale tax deed," is that what you had reference to?

MR. ROLSTON: That's correct, Your Honor.

Q And who are the substituted contestants, substituted party defendants?

MR. ROLSTON: The original parties are deceased and their administrators and executors have been substituted.

Q And whom do you represent?

MR. ROLSTON: The appellees, the purchasers at the resale tax sale.

Q What is the relevance in this Appendix of the journal entry of judgment on page 15?

MR. ROLSTON: The Appendix, Your Honor --

Q Well, there is a journal entry of judgment on

the 14th day of June 1965, that in your Appendix brief to the jurisdictional statement, there is a journal entry of judgment with respect to a later date.

MR. ROLSTON: The first adjudication by the trial court in '65 was that the oil company did have a valid lease, it had leases from both parties at that time.

Q That isn't what this says.

MR. ROLSTON: As I pointed out before, I did not try the original case in the trial court.

Q Because this particular journal entry of judgment, and the case is styled under the same number and the same heading, there is no reference to statute of limitations. I thought maybe there might have been different entries of judgments with respect to different parties, different tracts of land.

MR. ROLSTON: Mr. Legg may be able to answer it for you.

MR. CHIEF JUSTICE BURGER: Mr. Legg, you have a few minutes left.

REBUTTAL ARGUMENT OF WILLIAM J. LEGG, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEGG: Well, in answering Justice White's question, this journal entry of judgment on June 14, 1965 did what Mr. Rolston said, it simply determined that the oil company owned a lease on this forty acres, whichever way the title was

finally decided as between the mineral owners, as between my clients and his clients. But then there was a later journal entry of judgment which is in the jurisdictional statement that determines --

Q Well, there is a finding then in the trial court that you were barred by the statute of limitations anyway?

MR. LEGG: There is a finding that the statute of limitations ran, yes, sir, but it was not argued in the appeal to the Court of Appeals, and it was not argued and no decision was made and it was not argued in the Supreme Court of Oklahoma and no decision was made in --

Q Were you the one that went to the Court of Appeals?

MR. LEGG: Yes, we appealed it.

Q And you didn't appeal from that finding?

MR. LEGG: No.

Q Then when the Supreme Court restored the trial court's judgments, those findings remained extant, is that not correct?

MR. LEGG: Yes. May I make three explanations. The reason for the four-year gap in the pursuit of this case that Mr. Rolston noted was that there were some estates pending and it wasn't carried forward until those estates were closed.

Then I would also like to point out that Oklahoma is the least -- is an example of the least strict tax foreclosure

procedure in the United States. It is strictly judicial -- I mean strictly administrative, it has no -- you don't have to ever go into court, you don't have to ever give any notice except this publication service. And there are eleven states in that category, according to my research, and there are fourteen states however that have fully judicial tax lien foreclosure procedures, where you have to bring all parties into court and foreclose it just like you would a mortgage, and in that situation there would have to be process issued to everyone.

And so we have eleven states with least strict, fourteen states with most strict, and we have thirty-nine states either most strict or somewhere in the middle where they have -- even though they are using an administrative procedure, they have to give notice, either formal service, formal process or mailing, or some nature that goes beyond just the publication in this case.

Q If I may, let me go back to this, your appeals up through the state court system. You did not appeal from this finding that the statute of limitations barred you?

MR. LEGG: We appealed --

Q That is, to the intermediate court of appeals, you did not bring this up?

MR. LEGG: We appealed from the decision, we did not specify that particular -- it is my recollection that there is nothing in our appeal document that touches on that, but I

wouldn't want to be bound by that statement. There may be something that -- we appealed from the total decision, but our basis of appeal, our strong argument was on the basis of Mullane, and that was from the very first. This particular point was not contested strongly, it may have been touched upon, but it wasn't --

Q Well, what good would it do you to win on Mullane if under state law you were barred anyway by the statute of limitations? I mean why did you appeal on just Mullane? It wouldn't do you any good.

MR. LEGG: We felt that there was a constitutional issue here, and this was what we were primarily concerned with.

Q If you are right on the constitutional issue, then the statute of limitations couldn't have started to run because you wouldn't have had adequate notice on the --

MR. LEGG: That was one argument --

Q That was the same as in the Schroder case, as I remember it.

MR. LEGG: That is exactly right.

Q Schroder v. New York.

MR. LEGG: The Schroder case would stand --

Q There was a claim there of the statute of limitation. But Schroder said I couldn't run because I didn't have the notice.

MR. LEGG: You're right.

Q There was a previous Oklahoma case that said that in resale cases, the possession of the surface is noticed.

MR. LEGG: An Oklahoma decision, yes.

Q Yes. You didn't attack that, did you?

MR. LEGG: There is dictum on that point in Walkver v. Hoffman.

Q When was that decided?

MR. LEGG: That was a 1965 case.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:55 o'clock a.m., the case was submitted.]

- - -