IN THE SUPREME COURT OF THE UNITED STATES

TEXACO, INC., ET AL.,
Appellants
v. No. 80-965
LOUISE F. SHORT, ET AL.,
And
EDEN H. POND, EDNA H. BOBE AND CONSOLIDATION COAL COMPANY,
Appellants
v. No. 80-1018
ULYSSES G. WALDEN, JR., ET AL.

Washington, D.C.

Tuesday, October 6, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 o'clock p.m.

APPEARANCES:

JOHN L. CARROLL, ESQ., 2230 West Franklin Street Evansville, Indiana 47712; on behalf of Appellants.

VERNER P. PARTENHEIMER, JR., ESQ., 219 N. Hart Street, Princeton, Indiana 47670; on behalf of Appellee.

# C O N T E N T S



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PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Texaco against Short and the consolidated case.

ORAL ARGUMENT OF JOHN L. CARROLL, ESQ.

ON BEHALF OF THE APPELLANTS

MR. CARROLL: Mr. Chief Justice, and may it please the Court, we present here today four constitutional issues involving an Indiana statute. These issues relate to procedural due process, taking, equal protection and impairment of contracts.

Because of the shortness of time of the argument, I would like to limit my argument to two issues, procedural due process and taking.

The nature of the interest which is involved and which we say has been unlawfully and unconstitutionally extinguished by the state of Indiana is a fee simple mineral interest, usually in the state of Indiana dealing with oil, gas and coal.

Under Indiana state property law, those fee simple mineral interests have been determined to be vested property interests, separate and distinct from the surface ownership --

QUESTION: They've also been determined to be defeasible after 20 years, though, have they not?

MR. CARROLL: The statute itself has determined

that, Your Honor --

QUESTION: Well, that's part of Indiana property law, isn't it?

MR. CARROLL: Not prior to the passage of this act, Justice Rehnquist.

QUESTION: Well, so you would say this act is perfectly all right prospectively but not retroactively.

MR. CARROLL: In terms of prospectively, on any deeds which are created after the date of the act, I don't think there's any question about it being consitutional and valid. Yes, sir. It is the retroactive nature of it and the lack of notice inherent within the statute that we think has the constitutional flaw.

QUESTION: But you don't have a notice in any statute of limitations, do you? To take a typical state statute of limitation for adverse possession for real property, open and notorious possession for ten years. When that time is run, title changes and there isn't any notice that you get.

MR. CARROLL: That's correct. We think this is not similar, Justice Rehnquist, to a statute of limitations because it is essentially different in its character and primarily different because the intent of the statute, as we see it both in terms of what briefs have been filed on behalf of the Appellees and the state as well as the

decision of the Indiana Supreme Court was, to extinguish these interests, and the notice provision, the grace period provision, was merely incidental to that but it was not with the intent of preserving the interest.

Now, statutes of limitation, by their very nature, go to the question of retaining the integrity of the judicial process. They're saying that we don't want courts to make judgments about matters which are stale causes of action. Here, there never was a cause of action dealing with this property prior to the passage of this act.

QUESTION: But Indiana, in effect then, has given you more than you say a statute of limitations would.

MR. CARROLL: No, I --

QUESTION: They've given you a grace period.

MR. CARROLL: They have given us a grace period, and even statutes of limitations, if you're going to shorten a statute of limitation, Your Honor, requires a grace period. It is true that the cases say that there is no vested right in a statute of limitation. We say there is a vested right in this property which is involved here, but in terms of statutes of limitations, everybody understands that a time is running on a cause of action. And you have to understand there is a time limitation after which it runs out.

That was not true of the interests that are

involved here prior to the passage of this act. And we think that the purpose of a statute of limitations is to retain the integrity of the judicial process, is a far cry from the statute we have here, which deals with an intent to extinguish a valid property right interest, only because the state determines that they think it could be better developed by somebody else.

If you start with the premise that you're dealing with a vested property right, and if you say that this statute is intended to extinguish that right, -- and throughout you will see that that is shown to be the intent of the statute, to extinguish that right.

QUESTION: Well, Mr. Carroll, suppose it were a proceeding between the mineral owner and the surface owner, who I gather is the beneficiary of this statute, say to build a quiet title brought by the mineral owner against the surface owner. And the surface owner does not interpose the statute of limitations.

MR. CARROLL: There is no statute of limitations that applies to these --

QUESTION: That's what I'm trying to get. The surface owner automatically prevails? Is that it? This is not -- statute of limitations are ordinarily a matter of defense, aren't they?

MR. CARROLL: Following notice. That's correct.

If he defaults following notice -- and we don't have any quarrel with the statute if there was a notice provision involved with the statute. It is the lack of --

QUESTION: That's unusual, as my Brother Rehnquist suggests, isn't it?

MR. CARROLL: No, I don't think so. In the first place, this statute is very unique.

QUESTION: Can you suggest any statutes of limitations that have notice provisions?

MR. CARROLL: Any statute of limitations -- for example, if a statute of limitations were passed saying that all actions for personal injury must be filed within one year, let's say. And prior to that it had been two years. And that would apply to existing causes of action. That would be an unconstitutional taking of that interest, because you cannot, by the statute of limitations, eliminate the interest. That would be --

QUESTION: Well, a statute of limitations doesn't really eliminate the interest. It eliminates the enforcement of the interest.

MR. CARROLL: That's correct. And the Supreme Court of the state of Indiana specifically in this case has said that this statute eliminates the right.

QUESTION: The right --

MR. CARROLL: The underlying right or rights.

QUESTION: The right to enforce?

MR. CARROLL: And I'm talking about all of the rights. There are no rights left after this statute has done its job that it sets out --

QUESTION: But this effects a defeasance of the title, then, doesn't it?

MR. CARROLL: It results in what the statute calls an extinguishment of title.

QUESTION: Right, and the transfer of the title to someone else.

MR. CARROLL: Yes, and that's the point because it isn't an extinguishment of title, the title doesn't go away, the interest in the minerals don't go away. They are transferred by virtue of the act from one party to another, as part of the stated purpose of the act.

Now, we think that if the stated purpose of the act is to extinguish --

QUESTION: So for that reason you say this is not really a statute of limitations --

MR. CARROLL: We do not say it's at all --

QUESTION: It goes way beyond that.

MR. CARROLL: It goes far beyond that.

QUESTION: Well Congress, shortly after the second World War after this Court had made its portal-to-portal pay ruling retroactively made them inapplicable, did it not, and

that statute was never struck down.

MR. CARROLL: I don't think it was -- was it ruled on by this Court?

QUESTION: Second Circuit.

MR. CARROLL: But not on a constitutional issue that had been brought before this Court, so I'm not able to answer that particular question, Justice Rehnquist.

QUESTION: What would happen if the state changed its adverse possession law from 20 to 10 years?

MR. CARROLL: If the state changed its -- you see, the problem is that there was no adverse possession law possible in mineral interests in the state of Indiana prior to this act. There's probably none today.

QUESTION: I assumed my question was hypothetical.

MR. CARROLL: If the state would change its adverse possession law and attempt to do it retroactively and say that all things in which there had been adverse possession for 10 years and 20 years, if the effect of that act was to, as of the time of its passage, eliminate titles, then I submit to the Court that that would be an improper act and would violate the Constitution.

QUESTION: I assume that it would be any state's adverse possession law -- I don't understand all these qualifications you're putting in. It just says the same law that required 20 now requires 10, period. Nothing else.

What's wrong with it?

MR. CARROLL: If that ten years has already run, and prior to that it was 20 years, then I think there are cases that clearly say that that's an unconstitutional taking; that you cannot change a statute of limitations so as to, by the very passage, eliminate rights already accruing.

QUESTION: I didn't know that adverse possession was a statute of limitations. It's a different animal.

MR. CARROLL: But it has a time limit built within it.

QUESTION: It certainly does. And I think a state can do it, don't you? Can change it? Well, could the state change it to 30?

MR. CARROLL: The state can indeed change --

QUESTION: But it can't change it to ten?

MR. CARROLL: Yes, it can change it to ten. The question is can it do it retroactively.

QUESTION: Is that retroactive? I don't know.

MR. CARROLL: The point I'm making, Mr. Justice Marshall, is that if they change it to ten and it had --

QUESTION: Well, I'm trying to get at your point about you have to give notice. Because I'm waiting for that case --

MR. CARROLL: All I'm saying is the statute cannot

be used retroactively --

QUESTION: I'd like to see that case about this notice.

MR. CARROLL: I'm not talking about notice; I'm talking about the constitutionality of the statute on its retroactive effect on the statute of limitations or adverse possession.

QUESTION: Mr. Carroll, this statute had no retroactive effect, did it? Supposing it -- it was passed in 1971, was it?

MR. CARROLL: Yes, indeed.

QUESTION: Supposing everybody in the state got a copy of the statute when it was passed, and everybody was told, in effect, if you don't pay any taxes on your mineral interests in the next two years, they will no longer be your property. Would it be unconstitutional?

MR. CARROLL: If everybody had notice of the act in the manner that you prescribed, in my judgment it would not be unconstitutional.

QUESTION: Don't we normally presume that the citizens have notice of the statutes that are passed?

MR. CARROLL: And I understand the general principle of jurisprudence about how everybody is presumed to know the law, how ignorance to the law is no excuse --

QUESTION: Your case rests on the assumption that

that's an unrealistic presumption?

MR. CARROLL: The case rests on the fact that that's a legal fiction.

QUESTION: Well, a lot of people know the law, particularly if they invest in mineral rights and if they generally follow what goes --

MR. CARROLL: That's true, but if you're trying to deal with a due process issue, and if you're trying to deal with a property which is about to be extinguished --

QUESTION: Well, you've got two years at the time the statute was passed.

MR. CARROLL: You have a two-year grace period, which is meaningless -

QUESTION: Two years in which to perform a duty you should be performing in any event. You have a duty to pay taxes, I assume.

MR. CARROLL: That's correct. And if you have notice of that duty, we have no quarrel with this statute.

QUESTION: Well, assume it's a state that says publication is notice.

MR. CARROLL: That's right. That's exactly what the Minnesota case was --

QUESTION: Would that be okay?

MR. CARROLL: What the Minnesota case said was not constitutional. In Indiana, the very act we're dealing with

here, the manner of notice by publication of the act is by merely printing the act and putting it in the clerk's offices of the various counties. That's the only notice that there is.

Now, is that -- the question that really, I believe, is before this Court for decision as we see it is, is that notice sufficient to comport with the Mullane decision on procedural due process.

QUESTION: Mr. Carroll, under Indiana law, may mineral rights be taxed separately?

MR. CARROLL: They may indeed be taxes separately.

QUESTION: Are they taxed?

MR. CARROLL: Not very regularly. In some counties yes, in other counties no.

QUESTION: Is it up to the county?

MR. CARROLL: It is up to the county.

QUESTION: And if they are taxed by the county, does the county send out notices of taxes due?

MR. CARROLL: It does.

QUESTION: Were any notices received in these cases?

MR. CARROLL: No, sir, these were not taxed by the county.

QUESTION: None of the property involved in this case involved --

MR. CARROLL: No, because an exception within the use rule relates to the payment of taxes, but they were not taxed.

And along that same line, Justice Powell, if it were taxed, and in order to transfer a title because of non-payment of tax there is still a notice requirement, --

QUESTION: Yes, I understand that, I'm familiar with the Virginia statute in that respect. But that would have put you on notice that you'd received a tax assessment.

MR. CARROLL: Yes.

QUESTION: And if you knew some counties in Indiana were taxing mineral rights, would that have suggested the desirability of making inquiry?

MR. CARROLL: Well, I think the matter of taxation of mineral interest is one way to solve the problem that Indiana feels that it has. If these mineral interests were taxed in the way in which other real properties were taxed, and if they didnt' pay the tax the property could be sold at tax sale like any other property, and that's perfectly legitimate, there's no problem with that. Nothing constitutional about that. But under Indiana law, as in Virginia law and most other state law, when you sell property at tax sale, the man is entitled to notice that his property is about to be sold at tax sale, with the right to redeem. And there wasn't any such notice here and there

wasn't any such right to redeem following the two-year grace period.

So I think it's distinctly different from the way in which taxes can be treated, but taxation is the way to deal with these old dormant mineral interests, because if the people are interested in them, they will pay the tax, they will keep it up. If they're not interested in them, they avoid the tax, it is sold at tax sale and the problem is solved.

QUESTION: Well, they may be a more desirable way to deal with it, but don't you have to convince us that the way Indiana has chosen to deal with it violates the federal Constitution of the United States?

MR. CARROLL: Yes, and I would like the opportunity, Mr. Justice Rehnquist, to do that by showing to you that here, by virtue of the act, just looking at what effect the act had, it did indeed have the effect of taking what prior to the act was a fee simple mineral interest entitled under the Indiana state cases to the firmest protection of the Constitution. Two years later, after the passage of that act for those that did not know that they had an obligation to record, they were left with nothing unless they happened to have ten or more interests, in which they event they had a right to protect themselves by notice under certain circumstances if they otherwise qualified.

So --

QUESTION: Mr. Carroll, how does that differ really in terms of procedure from other marketable title statutes or recording acts or adverse possession laws? I just don't think that I perceive the procedural differences.

MR. CARROLL: Justice O'Connor, the difference between this and the Marketable Titles Act, for example, is that the purpose of the Marketable Titles Act is to clear up appendages to titles that go back, in the case of Indiana, 50 years. And there, you must have a 50-year chain of clear title. At the end of that 50-year period if you had 50 years chain of clear title, then the law under the Marketable Titles Act says we will confirm what you've always claimed in that 50 years to have.

The man in possession gets no more than what he has, in fact, claimed for the last 50 years. In one sense, marketable title acts are like adverse possession on the record. On the record you've been claiming these interests for 50 years. If you do so and the record is clear, at the end of that time, the law says, we're going to get rid of those old claims and you have a perfected title.

On the dormant mineral interest statute, however -- in this case, for example, Mrs. Short who acquired this property in 1974 had her property deed to her specifically setting forth these mineral interests. Now, that would not

qualify for marketable title because she didn't have a chain going back 50 years back to reminuence of title that didn't show these interests.

So what Mrs. Short ends up by virtue of this statute in having a title in more than she acquired when she purchased the property. In marketable titles you only get what you've been claiming and no more. So here, what you've done is to enhance the title that the man had and you do it within a two-year period. And I think that's a basic distinction between marketable titles and the effect of this act.

Again, though, if -- I want to recur back to the purpose of the Indiana Legislature in passing the act, because throughout the briefs and the --

QUESTION: I know you want to be concerned with the purpose, but as I understand your brief, you're objecting to the procedure, and I don't see how the difference in purpose is significant if it's the procedural due process that you're concerned with.

MR. CARROLL: Right. First, we say that the passage of the act itself is not a due process notice that in any way satisfies the Mullane test.

QUESTION: So would it be your position that the Marketable Titles Act and the Adverse Possession Act nationwide would be defective on the same ground?

MR. CARROLL: Not at all. This court now has not passed on the Marketable Titles Act. Wisconsin, or Minnesota has passed on the Marketable Titles Act constitutionally and found them to be constitutional; whereas, they have found this act to be unconstitutional and have distinguished between the two acts and found them to be basically different.

And the procedural due process question goes to the issue of what the state is attempting to achieve. Marketable Titles has a benign purpose in terms of protecting old titles. This has a stated state policy of extinguishing these interests.

QUESTION: I don't understand your distinction that procedural due process depends on whether the state had a benign purpose or a non-benign purpose. I thought it was simply procedural due process meant a matter of adequate notice, regardless of the state's purpose.

MR. CARROLL: And I think that's true, you're correct in that statement, Justice Rehnquist. From that standpoint, except that it explains why there wasn't any notice provision in this statute that you would normally expect to find when you're going to extinguish rights.

For example, if a taxing statute was passed saying that if you don't pay your taxes when they are due on the date they are due, there's an automatic forfeiture of rights

under that taxing statute. Now, in terms of expectations of people owning property, that goes beyond any expectation of the property owner.

So also here, in terms of the expectation of a fee simple title holder, he has no reason to believe that in a two-year period for failure to register that his failure to do so is going to extinguish his property right.

QUESTION: Do you think a change in the rate of the Internal Revenue Code requires a notice to be sent to each taxpayer?

MR. CARROLL: No, indeed, I do not. I think here, however, where you're talking about extinguishment and you're talking about adoption of an act, and you give no notice other than the adoption of the act, and we all recognize that the adoption of the act is not, in fact, notice. You see, the act has to premise itself on a theory of abandonment.

An abandonment is generally intended to be an intentional act. And if we get notice --

QUESTION: Wait a minute, counsel. An abandonment is generally intended to be an intentional act?

MR. CARROLL: As it relates to real estate, yes, Mr. Chief Justice. But you cannot abandon real estate in most of the states -- California I think has an exception to that. In most of the states and certainly in the state of

Indiana.

QUESTION: You can't do it by negligence and confusion and lapse of memory. Is that what you're telling us, in most states?

MR. CARROLL: If your title is of record and the fact that you let the weeds grow --

QUESTION: And adverse possessors.

MR. CARROLL: That, of course, is a different issue if there is an adverse possessor. But we're talking about abandonment which is independent of anybody else coming in on top of your property.

They're proceeding on an abandonment theory here, the theory is that if they didn't record their interest in the two-year period they intended not to be bothered with it, or they weren't around to protect it. The evidence in this case indicates that the appellants here were living in the area or known in each instance when there was a 60-day notice provision given under the statute, and within that 60-day period in each instance, the appellants in this case did respond, did put their interest of record in the case of Short v. Texaco and did contact the surface owner in the Pond v. Walden case, which resulted in an agreed case to be filed testing the act. But all of that was after the time that the two years had expired, beyond the time of the act.

But the point is that there was no intent to

abandon, and they responded as soon as they knew. But absent that notice that is directed toward the individual, we submit that that that does not comply or comport with the general sense of fairness that we think is necessary under the Mullane case and is procedural due process.

QUESTION: Mr. Carroll, may I ask you one other question about the Indiana practice on taxing these interests. I think you indicated they tax them in some counties and not in others.

MR. CARROLL: The statute provides for it, yes. It's not uniform.

QUESTION: But in those counties in which they do not tax, do they not tax any mineral interests, no matter how valuable, or is it that there is a practical --

MR. CARROLL: I think they're probably not very selective, Justice Stevens. I think that in some counties they do and some tracts they do.

QUESTION: But are there -- are you suggesting there are counties in which they impose no taxes at all on mineral interests regardless of their value?

MR. CARROLL: I'm sure that there are counties that do not. I don't have --

QUESTION: I got the impression it was kind of a question if there are nickels and dimes they don't bother but it there's a significant amount of money involved, they

might.

MR. CARROLL: That may very well be the answer.

QUESTION: Because if it's such a petty amount, then there's kind of an administrative explanation for not spending more money on notice and foreclosure and all the rest in order to collect 35¢ in tax.

MR. CARROLL: But taxation, as is true in Minnesota, is the way -- what they have done in Minnesota -- it was held unconstitutional in Contos again because of the lack of notice, and it's a very similar statute to here, and there they even had publication of notice statewide and in the counties. Here we have no notice.

Contos in Minnesota had notice by publication. They said that doesn't comply with Mullane; that you must have the best possible or practical notice that is available to be given. But in the Minnesota case in statute, he went on to say that in effect, if you give the notice and if you register the interest, then it's there to be taxed. And they set forth a special mineral interest tax. And if you don't pay the tax, you're going to lose the interest. And that is a perfectly consitutional way to solve this problem.

But to say that you've got a right to come in and give a two-year grace period and give no one notice of that two-year grace period that's going to severely impact on his property. Now, and we get down to practicalities, I'm sure,

if what we're talking about what the imposition of a tax, and it's a matter of a few dollars, then I don't think that the notice is going to be required. But where the remedy is extinguishment -- and I guess that really goes to the heart of what we're saying -- where the remedy is extinguishment within a two-year period, then justice and fair play would insist that there be notice before that extinguishment take place. Otherwise, we do not think that there has been fair play and that there has been compliance with the procedural due process --

QUESTION: Your time is running now. Are you going to address the taking question?

MR. CARROLL: Yes. I would like to just address the taking question by making reference to the Mahon case which this Court in most of the -- not most of your decisions -- in many of the decisions in recent years has reaffirmed the reasoning in the Mahon case and the decision of Mr. Justice Holmes in the Mahon case. In that instance, there was declared a taking because they could not take out all the subsurface coal, they would not let them allow subsidance. They didn't take all of the rights; they took part of the rights, and yet they said there was a taking, even though the benefit of the taking accrued to the surface owner.

And that's what accrues here. The taking, they

argue, is not a taking because the benefit goes to the surface owner. And yet Mahon is directly in point on the issue that you can still have a taking, even if the benefit is to the surface owner.

So we think that the Mahon case and the later cases clearly show a taking assuming that there is no valid notice that would be required under procedural due process. These two are so intertwined that the taking occurs and it occurs primarily because the failure to have a procedural due process requirement.

QUESTION: Suppose a state passes a statute and says that the state hereby acquires an easement over a certain described part of the state and specifically described the property, and that this easement will not be paid for unless somebody -- unless everybody who should know about this law comes in and asks for it within two years.

MR. CARROLL: I think there's an apt analogy, Justice White, to what we're talking about here. Where you're dealing with specific property and you're going to put either a burden on that property of the kind we're talking about, then I am suggesting that notice is a prerequisite before the law enforces --

QUESTION: Well, are you saying also that it's a taking even if there's notice?

MR. CARROLL: If there is notice and if you had

the opportunity to protect yourself --

QUESTION: And you don't.

MR. CARROLL: And you don't, then I do not think there's a taking.

Thank you.

CHIEF JUSTICE BURGER: Mr. Partenheimer?

ORAL ARGUMENT OF VERN P. PARTENHEIMER, JR., ESQ.

ON BEHALF OF THE APPELLEE

MR. PARTENHEIMER: Mr. Chief Justice, and may it please the Court, I'd like to commence by attempting to clarify for Justice Stevens what I believe is probably the situation concerning severed mineral taxation in both Indiana and, insofar as I know, the state of Illinois, which is about the limits of my general knowledge about this subject.

The policy seems to be that if the interest is being developed or is in use, then it is subject to a form of local ad valorem taxation. Also, if it is owned by a coal company or some operative organization which is in the process of producing coal, then generally that interest is placed on the tax rolls and assessed for taxation. Otherwise, interests in the hands of individuals are generally considered perhaps not very valuable and that it's not administratively very remunerative to impose taxes.

QUESTION: It is real property and not personal

property in these states, isn't it?

MR. PARTENHEIMER: In these states it's real property in both instances, yes, sir.

The Indiana Dormant Mineral Act we submit is essentially a recording act. The General Assembly determined that because of the elusive character of severed minerals, these types of interest required a re-recording periodically for the maintenance of the public records. It also acts as a statute of limitations with respect to claims which remain, for whatever reason, unrecorded for a long period of time.

The type of severances most affected by this act are severances of coal, oil, gas or any or all of them, either by a mineral deed or by a reservation in a general warranty deed, and these severances generally are perpetual on their face.

Unfortunately, the record in this case comes to the Court without any factual background concerning why the statute may have been enacted or why it was necessary. And if you will, I'm going to ask the Court to permit me to indulge in a few assumptions which I believe are reasonable and would form the basis of this statute in the mind of a legislator dealing with it.

First of all, my home county, Gibson County, has a total area of about 320,000 acres, or approximately 500

sections. There's not one section in that county that has not been drilled for oil, and approximately 40% of the county has been involved in coal development at one time or another.

QUESTION: This is southwestern Indiana?

MR. PARTENHEIMER: Yes, sir, southwestern Indiana. There are approximately seven mineral-producing counties in southwestern Indiana, and the rest of the state is essentially non-mineral producing.

This oil and gas and coal development has occurred in really three phases for oil and perhaps two phases for coal, and it's been over a period of about three generations. Determining the ownership of land and interests in land from the public records, as I'm sure some of you are aware, is a difficult, time-consuming and very expensive job.

In my county, I have concluded from my own estimates that probably 15% or 48,000 acres may be affected by severed mineral claims. And if I project this throughout the state, I'm of the opinion at least that probably 336,000 acres or 1% of the entire state is affected by these types of severed mineral claims. So that it is, you can see, a rather localized problem.

In my opinion, the total number of claimants; that is, persons, affected by this act throughout the state may

be as many as 40,000, and perhaps 10,000 have had their rights extinguished under the act through their own failure to comply. So I hope that this gives you an idea at least of what I consider to be the size of the problem.

For the most part, these claims have been treated as valueless until they've been developed. They've not been assessed for taxes and estates have been settled in which they have not been accounted for, they are not referred to in the preparation of persons' wills. So that after a generation or two or three, we have a situation in which the interests become very intricately fractionalized and very difficult to track down as a matter of public record.

So this is the situation in which the General Assembly sought to construct a legislative remedy. That remedy, needless to say, had to be effective and efficient and should not have been unduly harsh. We think that the Legislature has done that. It may not be the proper answer for all states, but we think it's a proper answer for Indiana.

The mineral claimants have relied on the Pennsylvania Coal Company case, stating that the act effects a taking without compensation. We think that the act has provided a means whereby any claimant can preserve his interest. It's a simple and inexpensive means; he can simply file once each 20 years periodically, and he loses

nothing if he complies with the act.

If you will, in the words of this Court, the act has simply taken a single strand of this bundle of rights; that is, the single right to hold that interest perpetually in the future without a corresponding duty or obligation to periodically keep the public records up to date by making a re-recording.

We think that the act in this regard and this case are similar, for example, to the Eagle-Relick case, where I believe it was Mr. Justice Brennan who suggested that the appellants in that case were attempting to compel the government to regulate by purchase. We think this case falls in that category so far as the taking question is concerned.

QUESTION: Would you say that the case would be any different if the provision was that if there's not the filing within two years that the property escheat to the state?

MR. PARTENHEIMER: The property, Mr. Justice White, does not escheat to the state in --

QUESTION: I know it doesn't, but I just ask you would the question be the same if it did provide for escheat to the state.

MR. PARTENHEIMER: I think that that question can be answered with reference to the Dormant Mineral Act cases

-- I mean the dormant bank account cases, and I will get to those in a minute.

QUESTION: So your short answer is yes, it would be the same case on the taking.

MR. PARTENHEIMER: Well, I think when you interpose a taking by the state where the state itself obtains some proprietary interest, then I think there is a difference.

QUESTION: Why? Why?

MR. PARTENHEIMER: Well, then you get into the issue of a taking by the state for the purposes of the state. I'm reluctant to push that very far --

QUESTION: You could say that there should be -- it's less likely that there'd be a taking then because here, to the extent there's a taking it's a taking for private use. It's taking a fee interest in the one piece of property owned by X and giving it to Y.

MR. PARTENHEIMER: Well, we prefer to think that it is an extinguishment for purposes of --

QUESTION: I think you would.

MR. PARTENHEIMER: For the purpose of restoring the integrity of the property.

QUESTION: As long as I've got you interrupted, what if this act not only applied to mineral interests, but to all real property; any real property owner that didn't

file his statement within two years loses his property?

MR. PARTENHEIMER: Well, I think that there are recording acts in various circumstances where there is a justifiable public need, which do just that.

QUESTION: Well, this -- I'll just pose a case where the record is perfectly clear as to who owns the property, there's no doubt about it whatsoever. The taxes are paid; the person just happens to live out of the state and never heard of the law, and doesn't file. Do you think the state can take his property that way?

MR. PARTENHEIMER: I think the --

QUESTION: Without notice?

MR. PARTENHEIMER: I think that if there is an overriding public policy, the state certainly can, and there are instances in which the state has done just that.

QUESTION: You mean without paying him for it at all?

MR. PARTENHEIMER: Well, I grant you the case you put seems rather harsh, and I suppose it's difficult to disagree with you, but on the other hand, we do have a situation here in which there is notice of the law in which a simple remedy was provided.

QUESTION: Well, notice of the law, but the fact is you say these dormant interests have become very splintered because they go through various estates and there

may be 100 different owners living all over the United States. Right? Is that what you --

MR. PARTENHEIMER: It's conceivable, yes, sir.

QUESTION: Well, that's part of the problem that you wanted to cure, isn't it?

MR. PARTENHEIMER: Yes, sir.

QUESTION: I suppose you can assume that all those people living in New York and Alaska would know that they ought to file an interest.

MR. PARTENHEIMER: I don't assume that people in general in those situations know the law. I think that is one of the presumptions that the law has to make in certain circumstances, and I think there are good reasons for it to be made in certain circumstances and this is one of them.

QUESTION: You said you were going to relate this to the escheat of bank accounts -- abandoned, neglected bank accounts.

MR. PARTENHEIMER: Yes, Your Honor. I think that probably the central issue in this case is just that; whether or not the incorporation of a traditional grace period in this type of law is still a constitutionally acceptable method of making the law work retroactively.

In connection with that central issue, I would like to discuss the early dormant bank account cases. Three of them have been cited, Security Bank v. California,

Anderson National Bank v. Luckett and Standard Oil v. New Jersey.

In the Security Bank and Standard Oil cases, the act provided for an adjudication, a final adjudication of abandonment of these bank accounts, and at the same time provided for a -- more or less simultaneously provided for -- a seizure of the bank accounts. The court in these two cases was dealing with not the depositor himself, but with the bank who naturally wanted to keep the windfall, wanted to appropriate the windfall for itself rather than turn it over to the state, and was arguing that it would be placed in double jeopardy if it had to give up the deposit without some kind of good notice to the depositor.

The court held that a simple newspaper publication was adequate for a notice to the depositor, so far as protection to the bank from double jeopardy was concerned because it was an In Rem proceeding. And I believe, certainly in the Security Bank case and I believe also in the Standard Oil case, the court did not decide any issues of constitutionality between the depositor himself and the state.

I think those cases were cases wherein adjudication was provided for, a court adjudication, and the court simply held that notice by publication was sufficient.

The Luckett case was a bit different. In that

case, the portion of the act which was appealed from only involved a transfer of custody of the deposit from the bank to the state through an administrative proceeding by the Attorney General. In that case, the holding of the court especially indicated that all of us, or all persons who deposit money in banks in the state make those deposits with notice of the conditions which the state imposes by law upon those deposits, and that we must be presumed to have notice that under certain circumstances the surrender of our bank accounts to the state may be compelled.

The court went on to hold that so far as the seizure of the property itself was concerned, the in rem matter, that the posting of a notice on the courthouse door was a sufficient form of notice to give to provide administrative jurisdiction to the seizure.

QUESTION: Mr. Partenheimer, is my recollection correct that at least in the New Jersey case -- I think I know something about that statute -- there was a period of years after the seizure when the depositor was able to begin a proceeding and get his money back.

MR. PARTENHEIMER: Yes, that is true.

QUESTION: Was it a number of years?

MR. PARTENHEIMER: I believe it was five years, if I'm not mistaken. Yes, five years I believe.

QUESTION: There's nothing like that under this

Indiana statute, is there?

MR. PARTENHEIMER: No, but this Indiana statute does not provide for an adjudication, either. The thought that you have is the fact that in the New Jersey case the statute provided a final adjudication, but then said that anyone who, because of lack of privy or lack of notice, was not bound by that adjudication had a five-year statute of limitation in which to sort of come in and reopen the matter.

QUESTION: But that does not happen in Indiana as to these mineral rights, does it?

MR. PARTENHEIMER: No, it does not because the statute itself provides for no adjudication at all. There is no proceeding at all involved.

QUESTION: That period allowed is something like the redemption period after the foreclosure of a mortgage or a trust, is it not?

MR. PARTENHEIMER: In the case Justice Brennan put, I would agree, yes.

While we're on that subject I would simply argue to the Court that not one of those cases, nor any other case, has ever held that an administrative or judicial proceeding is a necessary element of due process in a law affecting property rights.

In this case the appellants argue for notice of extinguishment of their rights. Well certainly, notice

would be of no value to them unless they had the opportunity to do something about it after the notice were given. Title puritive legislation characteristically has not done this. It relies on independent remedies such as ejectment and quiet title proceedings, and we think there are some practical reasons for that and I'd like to mention just two or three.

First, there is a great difficulty in identifying and locating who are the persons who would be -- to whom the act would be applicable. We can't send a copy of the general laws to every citizen, and if we did that still wouldn't provide him with any realistic notice of anything.

Secondly, if these people could be identified and located, who has the motivation to do it? Certainly not the state. The state has no obligation. Certainly not the owner of the servient interest. Why would that person who had the estate which was subservient, why would he be interested in providing notice to someone who was away and who had left his property and advise him that he should come back and do something to preserve it and take advantage of it. There simply is no logic that a statute of that type would work.

And finally, the public policy is as well served by the extinguishment of the right as by any other result.

Therefore, we think that there have been good

reasons for the simple use of grace periods. The statute is enacted, a grace period is allowed, and people are presumed after a certain period of time to have had sufficient interest in a property to care for it. This philosophy and reasoning of course has been annunciated many times. Personally, I like the view by Justice McKenna in a relatively old case, Ballard v. Hunter, that's 204 US at 262, and if I may, I'm going to quote just a little bit of his philosophy concerning this matter.

He says, "The law cannot give personal notice of its provisions or proceedings to everyone. Of what concerns or may concern their real estate, men usually keep informed. And on that probability the law may frame its proceedings. Indeed, must frame them and assume the care of proper to be universal if it would give efficiency to many of its exercises."

I have two further points that I would like to make. I won't argue the contract impairment theory because the opponent does not argue it and we simply feel that it is a slight regulatory impairment, and the same reasoning applies as applies with regard to the taking issue.

The remaining matter that I'd like to discuss just briefly is equal protection. In the briefs, we think the appellants' equal protection arguments are strained if not a little misleading. The Section 5 of the act has not one but

four requirements; all of which are equally important. It requires, number one, that the owner have had ten or more interests in the county. Number two, that he had made a diligent effort to preserve those interests. Number three, that he had, in fact, preserved some interests in the county. And number four, that his failure to preserve was through inadvertence.

We think it fair to say that the legislature could have concluded and reasonably so that a person who has ten or more interests in the same county probably owns them as a block, and probably acquired them for the purpose of development and probably would, in fact, develop these rights rather than simply hold and speculate on them.

We think the legislature could have concluded that one holding ten or more interests might have a significantly higher risk of inadvertently losing one or more than one through a mis-filing or an error in filing, a clerical misfeasance of some kind. And we think that the legislature could have concluded that such an error might bring on a very significant loss, or a more significant loss, to someone who held a lost of interests in a block as opposed to someone who held only one or very few scattered interests.

QUESTION: Do you know of any case that says that due process and equal protection is measured by how much money is involved?

MR. PARTENHEIMER: Well, I suppose that's a debatable question. The extent of the --

QUESTION: It would be debatable if you could give me a case. I don't think any protection has ever been considered that it only applies to the poor and doesn't apply to the rich, or only applies to the rich and doesn't apply to the poor. That's drawing the line on people who have got money, isn't it?

MR. PARTENHEIMER: Yes, sir, that would be. I agree with you on the equal protection question as such. I don't know that the due process standard is always the same, depending upon the quality or quantity of the interest involved.

QUESTION: Mr. Partenheimer, may I ask, what was your answer to your colleague's reliance on Mahon on the taking question?

MR. PARTENHEIMER: I think, Your Honor, that the fact that there is a means provided that is simple and expedient by a simple re-recording or re-filing to preserve this interest indefinite --

QUESTION: Something not present under the Pennsylvania scheme in Mahon?

MR. PARTENHEIMER: Oh, no. In the Pennsylvania act, once the act took place, their rights were gone, irretrievably.

I have one final point to make, and that is that the appellants and the trial court in this case tended to focus on the issue of who was a known owner and who might be an unknown owner, and to try to distinguish between those. In the situation as we perceive it, the question of who is an unknown owner and who is a known owner can only be determined by some kind of an objective standard. Everyone is unknown until he either makes himself known or until someone hunts him down and makes him known.

We think that the statute has provided an objective standard to determine who is going to be treated as known and who is going to be treated as unknown. Those persons who have used their interest or who have filed will be considered known. Those persons who have not, will be considered as unknown.

And accordingly, we think that this objective standard, together with the filing alternative and the incorporation of the grace period to cover the retroactive situation entitles this law to be treated as a constitutional exercise of the regulatory power of the state, and that the decision of the Indiana Supreme Court on this issue should be affirmed.

ORAL ARGUMENT OF JOHN L. CARROLL, ESQ.

ON BEHALF OF APPELLANTS -- REBUTTAL

MR. CARROLL: Two more comments, if I may. One is

we somehow have put this case based upon expediency, and I don't think we're going to make -- should not make constitutional judgments about what is expedient on the matter of whether we're going to give notice.

Counsel has said that the act is going to determine who is known and who is unknown as an owner. I submit that Section 6 of the act is an answer to the questions which are raised, because it will clarify and protect your recording statute, which he says this is; it will put on the record those that are known or unknown; and if you read Section 6, it is a perfect answer to procedural due process.

The only problem with Section 6 is it only applies if you have ten or more interests. Had it applied to all of the interests, we would not be here today. This is a statute which, by its nature, does not treat people who have less than ten interests fairly. It was designed to terminate their interest. But if you look at Section 6 you have a perfect answer to how it should have been done on a constitutional basis and protect everybody, be they rich, the poor, the large, the small owner, put the interests of record. Because if they don't come forward after the notice, then you can assume the surface owner is the owner. If they do come forward, then they have their interest of record. The statute does not do that, and it does not do

that because its intent is to extinguish that interest.

Thank you.

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

(Whereupon, at 2:50 p.m. the oral argument in the above-entitled matter ceased.)

# CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

TEXACO, INC., et al. vs. LOUISE F. SHORT, ET AL., and EDEN H. POND, EDNA H. BOBE AND CONSOLIDATION COAL COMPANY vs. ULYSSES G. WALDEN, JR. et al.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Suzanne Young