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Severed Mineral Interests of Unknown or Missing Owners in Kentucky

INTRODUCTION

In 1982, the Kentucky General Assembly passed legislation designed to facilitate development of severed mineral interests with missing or unknown owners.[1] This legislation provides a judicial procedure whereby title to a severed estate might pass to the surface owner when the estate could not be developed because the owner was missing or unknown.[2] Six months before Kentucky's statute became effective, the United States Supreme Court upheld a similar Indiana statute in *Texaco, Inc. v. Short*.[3] Although *Short* provided much needed validity to this type of legislation,[4] its application to the Kentucky statute is somewhat

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[1] KY. REV. STAT. ANN. §§ 353.460-.476 (Michie/Bobbs-Merrill 1983) [hereinafter KRS with all cites being to Michie/Bobbs-Merrill]. For a discussion of statutes already enacted in other states see Outerbridge, *Missing and Unknown Mineral Owners*, 25 ROCKY MTN. MIN. L. INST. § 20-1, §§ 20-27 to 45 (1979) (listing and discussing "dormant mineral statutes" which provide for the extinction of severed mineral interests unless preserved through use or other action); *id.* at §§ 20-46 to 56 (listing and discussing those statutes providing for court appointment of trustees empowered to lease the interest for the benefit of the missing or unknown mineral owner). For further distinction between "dormant mineral statutes" and trustee type statutes, compare the statutory scheme detailed *infra* notes 10-12 and accompanying text with *infra* notes 23-27 and accompanying text.

[2] *See infra* note 23.

[3] 454 U.S. 516 (1982).

[4] By the time *Short* was decided, these relatively new statutes had been the subject of so many successful constitutional attacks that their validity was seriously in question. *See* Wheelock v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978) (finding the statute invalid insofar as it applied retroactively); Contos v. Herbst, 278 N.W.2d 732 (Minn. 1979) (holding that the statute was partially unconstitutional due to inadequate notice provisions failing to provide an opportunity for a pre-forfeiture hearing); Wilson v. Bishop, 82 Ill. 2d 364, 412 N.E.2d 522 (1980) (similarly denying validity due to lack of notice and opportunity to be heard); Chicago and Northwestern Transp. Co. v. Pederson, 40 Wis. 2d 566, 259 N.W.2d 316 (1977) (finding an unreasonable exercise of police power in giving the forfeited rights to the surface owner in addition to failing for lack of notice and opportunity to be heard). *But see* Van Slotten v. Larsen, 410 Mich. 21,

limited due to differences between the Kentucky and Indiana statutes.[5]

The most important implication of *Short* with respect to the Kentucky statute is that the notice provisions of *Mullane v. Central Hanover Bank & Trust Co.*[6] apply to the statute's operation.[7] Therefore, the validity of proceedings under the Kentucky statute extends only as far as the validity of the notice system it employs.[8]

This Comment addresses the implications of the *Short* decision for Kentucky's statute, analyzes the statute's notice provisions, and provides suggestions for improving the statute against potential constitutional challenges.

I. THE INDIANA STATUTE AND *Texaco, Inc. v. Short*

In 1971 Indiana passed a statute providing that severed mineral interests which had been unused for 20 years would automatically lapse and revert to the current surface owner unless the mineral owner preserved the interest by filing a statement of claim in the local county recorder's office.[9] The statute also

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299 N.W.2d 704 (1980) (analogizing the statute to recording statutes and marketable title acts and holding the statute constitutional against challenges that the statute: 1) was an unconstitutional impairment of contract; 2) was violative of the prohibition against property deprivation without due process of law; 3) created an arbitrary and unreasonably conclusive presumption of abandonment; 4) provided no opportunity for notice or hearing prior to vesting title in the surface owner; and 5) was a violation of the equal protection clause because it treated oil and gas interests differently than hard minerals).

[5] The version approved in *Short* was the "dormant mineral statute", detailed *infra* notes 9-11, whereas Kentucky's statute was the "trustee" version detailed *infra* notes 23-27.

[6] 339 U.S. 306 (1950).

[7] *Short*, 454 U.S. at 535, 535 n.28.

[8] *See* Davis v. Schimmel, 252 Ark. 1201, 482 S.W.2d 785 (1972). In *Davis*, the court stated:

> Due process requires, at a minimum, that one be given a meaningful opportunity for a hearing, appropriate to the nature of the case and preceded by notice, before he is deprived of any significant property interest, except where some valid overriding state interest justifies postponing the hearing until after the event.

Id. at 789. *See also* Board of Levee Comm'rs v. Johnson, 178 Ky. 287, 199 S.W. 8 (1917).

[9] IND. CODE ANN. §§ 32-5-11-1 to 8 (Burns 1980) provides:

32-5-11-1 [46-1808]. Lapse of mineral interest—Prevention.—Any interest

provided that an owner of ten or more mineral interests in the

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in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. 32-5-11-2 [46-1809]. Mineral Interest—Definition.—A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. 32-5-11-3 [46-1810]. Use of mineral interests—Definition.—A mineral interest shall be deemed to be used where there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument. 32-5-11-4 [46-1811]. Statement of claim—Filing—Requirements.—The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. 32-5-11-5 [46-1812]. Extinguishment of mineral interest—Exceptions.—Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) Made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section four [32-5-11-4] preserve other mineral interests, in said county, but the filing of statements of claim as herein required, and;

(3) Failed to preserve such interest through inadvertence, and;

(4) Filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed.

same county as the threatened interest would not forfeit the interest if he had made diligent efforts to preserve all such interests but had inadvertently failed to preserve the interest in question.[10] The Indiana system did not employ a judicial proceeding but merely provided for automatic termination of the interest upon failure to comply with the terms of the statute.[11]

In *Texaco, Inc. v. Short*,[12] the United States Supreme Court considered two cases resulting from the operation of the Indiana statute.[13] In both cases the owners of the forfeited mineral

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> 32-5-11-6 [46-1813]. Successor in interest—Notice Requirements—Prima facie evidence.—Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. 32-5-11-7 [46-1814]. Statement of claim—Filing—Recorder's duty.—Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. 32-5-11-8 [46-1815]. Waiver of chapter's provisions—Time limit.—The provisions of this chapter may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1].

Id.

[10] *See* IND. CODE ANN. § 32-5-11-5, *supra* note 9.

[11] *See* IND. CODE ANN. § 32-5-11-1, *supra* note 9.

[12] 454 U.S. 516 (1982).

[13] *Id.* at 521. The Supreme Court of Indiana had previously consolidated the two cases on appeal. In Comment, *Retroactive Land Statutes - Indiana's Dormant Mineral Act Declared Constitutional*, 85 W. VA. L. REV. 783 (1982-83) (authored by Deborah McHenry Woodguin), a brief explanation of the facts of these cases was provided:

> In the first case, the appellants included parties who claimed ownership of fractional mineral interests that had been severed in 1942 and 1944 and

interests argued that the lack of notice prior to the lapse of their mineral rights effected a taking of private property without just compensation, thereby depriving them of property without due process of law.[14] The Court stated that the due process claim in reality constituted two arguments: (1) that the State of Indiana did not adequately notify the mineral owner of the requirements of the new statute, and (2) that a mineral interest may not be extinguished unless the surface owner gives the mineral owner advance notice that such interest is about to expire.[15] Addressing the first argument, the Court held that a legislature need do no more than enact and publish the law and afford the citizenry a reasonable opportunity to familiarize itself with the terms of the new law.[16] The Court noted that "[i]t is well established that persons owning property within a State are charged with knowl-

> their oil and gas lessees whose leases were entered into in 1976 and 1977. Under the terms of the Indiana Mineral Lapse Act, the appellants' mineral interests had statutorily lapsed in 1973 when the two year grace period expired since the mineral interest had not been used as defined by the Act. In April 1977 the surface owner published a notice of lapse of mineral interest in an Indiana newspaper circulated in the county where the disputed mineral interest was located. Additionally, the surface owner mailed notices to all the appellants except the oil and gas lessees. The surface owner also filed an action seeking a declaratory judgment that the rights of the mineral owners had lapsed.
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> In the second action the mineral estate had been created in 1954. The mineral estate owners did not "use" the property until 1976 when a coal lease was executed with appellant Consolidated Coal Co. Because the mineral estate owners had not filed a statement of claim in the office of the county recorder, a statutory lapse occurred in March 1974. In 1977 the appellees gave notice of the lapse by newspaper publication and letter. The resulting lawsuit was brought by all parties in order to resolve the conflicting claims to the mineral interests.

Id. at 785-86.

[14] *Short*, 454 U.S. at 522. These arguments were based on the fourteenth amendment to the United States Constitution. *Id.* The owners also contended that the Indiana statute constituted an impairment of contracts in violation of article I, section 10 of the United States Constitution. The owners further claimed that the exception granted to owners of multiple interests denied them equal protection of the law. *Id.* After holding the Indiana statute valid in all other respects, the United States Supreme Court turned to the argument that the statute extinguished the appellants' property rights without adequate notice. *Id.* at 530-531.

[15] *Id.* at 531.

[16] *Id.* at 532.

edge of relevant statutory provisions affecting the control or disposition of such property."[17]

The Court then turned to the argument that the notice provisions of *Mullane v. Central Hanover Bank & Trust Co.*[18] applied to the lapse situation covered by the statute; i.e., that the mineral owners were entitled to reasonable notice from the surface owners that the twenty-year period of non-use was about to expire.[19] The Court's resolution turned on the distinction "between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur."[20] Although the Court held that *Mullane* did not apply to the self-executing feature of the Indiana statute,[21] it stated that *Mullane* would apply to a judicial proceeding.[22] That statement strongly suggests that the notice provisions of *Mullane* would apply to the operation of Kentucky's statute.

II. THE KENTUCKY STATUTE

The Kentucky statute provides that "the circuit court . . . shall have the power to declare a trust [in the severed mineral interest], appoint a trustee for the unknown or missing owners and authorize the trustee to sell, execute and deliver a valid lease

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[17] *Id.* The Court also referenced a quote from North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925):

> All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are not constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it.

Id. at 283 n.2.

[18] 339 U.S. 306, 314 (1950). ("[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[19] *Short*, 454 U.S. at 534-35.

[20] *Id.* at 533.

[21] *Id.* at 535.

[22] *Id.*

thereon. . . ."[23] If the severed mineral interests are produced

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[23] KRS § 353.464 (1983). Section 353.464 provides:

When court may declare trust and appoint trustee; persons authorized to institute proceedings.

(1) If the title to any severed mineral interest is vested in an unknown or missing owner and it appears that the development of the minerals will be advantageous to the owner, the circuit court of the county in which the minerals or the major portion thereof lies shall have the power to declare a trust therein, appoint a trustee for the unknown or missing owners and authorize the trustee to sell, execute and deliver a valid lease thereon on terms and conditions customary in the area for the minerals covered thereby and similarly situated. The lease shall continue in full force and effect after the termination of the trust unless the lease has previously expired by its own terms.

(2) Proceedings for the appointment of a trustee may be instituted by any person:

(a) Vested in fee simple with the surface estate overlying the particular minerals sought to be developed;

(b) Vested in fee simple with an undivided interest in the particular mineral sought to be developed;

(c) Vested in fee simple with the entire interest in the particular minerals sought to be developed under lands immediately adjacent and contiguous to those lands under which the same minerals are vested in unknown or missing owners; (d) Vested with a valid and subsisting mineral lease, the lessor of which is a person defined under either paragraph (b) or (c) of this subsection.

Id. See also KRS § 353.460 (1983), which defines an "unknown or missing owner" as:

any person vested with a severed mineral interest and whose present identity or location cannot be determined from the records of the county in which the land is located or by diligent inquiry in the vicinity of the owner's last known place of residence, and shall include his unknown heirs, successors and assigns.

Id. See also KRS § 353.466 (1983), which provides:

Persons to be joined as defendents; verified petition showing effort to locate owners; advertisement and lis pendens notice, contents; trustee ad litem.

(1) The person seeking to impress a trust upon a severed mineral interest for the purpose of leasing and developing same shall join as defendants to the action all those persons having record title thereto who are unknown or missing and the unknown heirs, successors and assigns all of such persons. The persons named as defendants and who are the unknown or missing owners as defined herein, shall stand for and represent full title and the whole interest of the unknown or missing owners in the severed mineral interest or estate interest therein. All parties not in being who might have some contingent or future interest therein, and all persons whether in being or not in being, having any interest, present, future or contingent, in the severed mineral interests sought to be leased, shall be fully bound by the proceedings hereunder.

(2) There shall be filed a verified petition specifically setting forth the

commercially, and the owners remain missing or unknown for seven years from the date of first production, the trustee is to "file a motion with the court naming the then present surface owners as additional parties and requiring the surface owners to appear and present proof . . . that they are vested with fee simple title to the surface estate."[24] If the court finds that the owners have fee simple title to the surface, it shall order "the trustee to convey to the surface owners by recordable instrument the unknown or missing owners' interest in the severed mineral

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> efforts to locate and identify the unknown or missing owners of the interests to be leased and such other information known to the petitioner which might be helpful in identifying or locating the present owner thereof. There shall be attached to the petition as an exhibit thereto a certified copy of the instrument creating the original severance and such additional instruments as are necessary to show the vesting of title to the minerals in the last record owner thereof. The petitioner shall establish to the satisfaction of the court that a diligent effort has been made to identify and locate the present owners of said interests.
>
> (3) Service of process shall be as provided by the Kentucky Rules of Civil Procedure and there shall be filed a lis pendens notice in the county clerk's office of the county wherein the mineral estate or the larger portion thereof lies. Immediately upon the filing of the petition, the petitioner shall advertise as provided in KRS Chapter 424. Both the advertisement and the lis pendens notice shall contain the names of all of the parties and their last known addresses, the date and recording data of the original deed or other conveyance which created the mineral severance, an adequate description of the land as contained therein, the source of title of the last known owners of the severed mineral interests and a statement that the action is brought for the purpose of impressing a trust authorizing the execution and delivery of a valid and present mineral lease for development of the particular minerals described in the petition. The court, in its discretion, may order advertisement elsewhere or by additional means if there is reason to believe that additional advertisement might result in identifying and locating the unknown or missing owners.
>
> (4) The court shall appoint a trustee ad litem, who shall be a licensed, practicing attorney, to represent the unknown or missing owners and their unknown heirs, successors and assigns. The trustee ad litem shall review the petition and file an answer and such other pleadings as are necessary and proper to represent fairly the interest of the unknown or missing owners. It shall be the duty of the trustee ad litem to make an independent inquiry and search for the purpose of identifying and locating the unknown or missing owners and he shall report to the court the results of the investigation. The court shall allow the trustee ad litem a reasonable fee for his services to be taxed as costs.

Id.

[24] KRS § 353.470(1) (1983).

interests, which conveyance shall be approved by endorsement by the court on the face thereof."[25] The trustee is also directed to pay the surface owner any funds "which have accrued to the credit of the severed mineral interests. . . ."[26]

Under the statute, an action may be commenced by any person by filing a petition if the person is:

> (a) Vested in fee simple with the surface estate overlying the particular minerals sought to be developed; (b) Vested in fee simple with an undivided interest in the particular mineral sought to be developed; (c) Vested in fee simple with the entire interest in the particular minerals sought to be developed under lands immediately adjacent and contiguous to those lands under which the same minerals are vested in unknown or missing owners; [or] (d) Vested with a valid and subsisting mineral lease, the lessor of which is a person defined under either paragraph (b) or (c) of this subsection.[27]

Because the Kentucky statute employs a judicial action commenced by the filing of a petition,[28] the notice provisions of *Mullane* clearly apply to the statute's operation. In *Short* the United States Supreme Court stated that "[t]he due process standards of *Mullane* apply to an 'adjudication' that is 'to be accorded finality.' "[29] This means that an action will not be binding under the Kentucky statute unless the person against whom the outcome is asserted has had notice of the proceedings and an opportunity to be heard.[30] Notice is not required under the Indiana statute since it provides for automatic termination of the interest without an adjudication upon failure to comply with the statute's provisions.[31]

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[25] *Id.*

[26] KRS § 353.470(2) (1983).

[27] KRS § 353.464(2) (1983).

[28] *Compare* the Kentucky scheme outlined at *supra* notes 27-31 and accompanying text *with* the Indiana statute set out at *supra* notes 10-12 and accompanying text.

[29] *Short*, 454 U.S. at 534.

[30] *See generally, e.g.*, Pielemier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383, 395-415 (1983) (discussing general principles, protected interests, and the ability to assert due process protection).

[31] *See supra* notes 20 and 21 and accompanying text.

III. NOTICE REQUIREMENTS AND THE KENTUCKY STATUTE

Having resolved that the notice requirements of *Mullane* apply to the operation of the Kentucky statute,[32] a proper approach for analyzing the statute in light of those requirements is needed. Such an analysis involves delineating the requirements of constitutionally adequate notice, and examining the Kentucky statute and its notice scheme for characteristics relevant to determining the statute's validity. Finally, the constitutional guidelines should be applied to those characteristics particular to the statute and its notice scheme.

The first requirement of constitutionally adequate notice is that the notice scheme be adequate as required by law, and not simply provided by procedures developed on a case-by-case basis.[33] That is, constitutionally valid notice must be mandated—not merely made possible—by the Kentucky statute and the procedural rules it employs.[34] Secondly, since the decision in *Shaffer v. Heitner*,[35] all assertions of jurisdiction must be judged by the due process standards previously applicable to cases involving *in personam* jurisdiction.[36] Third, procedural mechanisms which suffice for parties not reasonably ascertainable are completely inadequate as to known parties with known places of residence.[37] Where the identity and whereabouts of a person holding a claim is known, nothing short of mailed notice will suffice as to that person.[38] The final important proposition in a notice system analysis is that owners and mortgagees identified in publicly recorded mortgages are entitled to notice of proceedings affecting their real estate interests.[39]

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[32] *See supra* notes 28-30 and accompanying text.

[33] Wuchter v. Pizutti, 276 U.S. 13, 18-24 (1928). *See also* Leathers, *Rethinking Jurisdiction and Notice in Kentucky*, 71 KY. L.J. 755, 779 (1982-83).

[34] Leathers, *supra* note 33, at 779.

[35] 453 U.S. 186 (1977).

[36] *Id.* at 212 (rejecting the distinction among actions *in rem*, *quasi in rem* and *in personam* as a valid distinction for structuring notice schemes).

[37] *Id.*

[38] *Id.*

[39] Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983). In *Mennonite*, the United States Supreme Court addressed the issue of whether constructive notice to a mortgagee having a recorded interest is constitutionally adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes. *Id.* at 792. The Court held that

An analysis of the Kentucky statute for characteristics relevant in determining its constitutional adequacy begins with an overview of the nature of titles to mineral estates. Mineral estates frequently have been sold in fractional amounts severed from the corresponding surface estate. This often results in fragmented ownership of a single tract.[40] Severed estates are fragmented further over time because of testate and intestate succession, interim ownership by corporations which have dissolved, informal partitions, etc.[41] Because of the fractional nature of mineral ownership, the possibility exists that the identity or whereabouts of one chain of ownership might become lost over time, while other claims of ownership in the same estate might remain identifiable with reasonable inquiry.[42]

The Kentucky statute recognizes the existence of known owners by providing that:

> [a]ny owner whose identity and whereabouts is known, or can be ascertained by diligent inquiry, or is discovered as a result of the action brought hereunder; . . . may intervene as a matter of right at any time prior to the entry of judgment approving the trustee's lease, for the purpose of establishing his title to the severed mineral interests. . . .[43]

By implication, it appears that after the approval of the trustee's lease, known owners are foreclosed from establishing their title to the severed interest. This assertion is bolstered by the provi-

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such notice was not reasonably calculated to apprise him of the pendency of the suit. *Id.* at 800. The Court further stated:

> [w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane.*

Id. at 798. Although *Mennonite* clearly applies to mortgagees, its application to lienholders, judgment creditors, tenants, and other recorded "interests" is uncertain. *See* Comment, *Mennonite Board of Missions v. Adams: Insufficient Notice Under the New York In Rem Statutes*, 33 BUFFALO L. REV. 389, 391 (1984).

[40] *C.f.* Note, *Severed Mineral Interests, A Problem Without a Solution?*, 46 N.D.L. REV. 451 (1969-70).

[41] Outerbridge, *supra* note 1.

[42] The Kentucky statute recognizes this; while the statute is directed towards unknown owners, it provides that owners may intervene.

[43] KRS § 353.468(4) (1983).

sion of the statute which states that "[a]ll persons whether in being or not in being, having any interest, . . . in the severed mineral interest sought to be leased, shall be bound by the proceedings hereunder."[44]

The portion of Kentucky's statute which contains its notice system provides that:

> Service of process shall be as provided by the Kentucky Rules of Civil Procedure and there shall be filed a lis pendens notice in the county clerk's office of the county wherein the mineral estate or the larger portion thereof lies. Immediately upon the filing of the petition, the petitioner shall advertise as provided in KRS Chapter 424.[45]

The end result of a successful suit under the Kentucky statute will be a conveyance of title to the interest of the unknown or missing owners to the surface owner, with the court's endorsement on the face of the conveyance.[46] Although the interests conveyed may have been defective in the hands of the missing or unknown owners,[47] the possibility exists that these defects will be given judicial approval without being subjected to the test of the adversarial system.[48] This results because while the known owners may have grounds to challenge the title of the missing or unknown owners,[49] there is no requirement that the known owners be given notice of the proceedings.[50] Even though these potential litigants are given no notice and, therefore, no opportunity to be heard, they are purportedly bound by the judgment.[51]

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[44] KRS § 353.466(1) (1983).

[45] KRS § 353.466(3) (1983).

[46] *See supra* note 24.

[47] For examples of types of challenges to conveyances of mineral interests, see Sellars v. Ohio Valley Trust Co., 248 S.W.2d 897 (Ky. 1952); Terrill v. Kentucky Block Cannel Coal Co., 290 Ky. 35, 160 S.W.2d 326 (Ky. 1942); Kentucky Natural Gas Corp. v. Carter, 303 Ky. 559, 198 S.W.2d 311 (Ky. 1946); Von Goerlitz v. Turner, 150 P.2d 278 (C.A. Cal. 1944).

[48] *See supra* note 47.

[49] *Id.*

[50] *Id.*

[51] The statute states that "all persons whether in being or not in being, having any interest . . . in the severed mineral interests sought to be leased, shall be bound by the proceedings." KRS § 353.466(1) (1983) (set out in full at *supra* note 24).

Whether this scheme can withstand a constitutional challenge under *Mullane* is questionable. In *Mullane*, the United States Supreme Court stated that:

> '[t]he fundamental requisite of due process of law is the opportunity to be heard.' [citation omitted]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . .
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[52]

The Kentucky statute purports to vest title in the owner of the surface overlying the mineral estate without requiring any form of notice other than the filing of a lis pendens and publication.[53] In cases where the plaintiff knows of the existence and whereabouts of parties having potential challenges to the interest of the unknown or missing owners, publication will not suffice.[54] *Mullane* requires that "[t]he means employed [to effect notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[55] This requirement eliminates constructive notice in cases where the plaintiff knows the identity or whereabouts of parties holding claims to the estate.[56] Nothing short of personal notice mailed to the known owners will be constitutionally adequate under *Mullane* when the surface owner knows that such known owners possess claims against the interests of the unknown or missing mineral owners.[57]

Kentucky's statute and the procedures it employs do not require that known owners be given personal notice, even when the surface owner knows the proceedings may result in a judg-

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[52] *Mullane*, 339 U.S. at 314 (citations omitted).

[53] KRS §§ 353.460-.476 (1983) (set out in part at *supra* note 24).

[54] *Mullane*, 339 U.S. at 315.

[55] *Id.*

[56] *See id.*

[57] *See* Leathers, *supra* note 33.

ment detrimental to the known owner's interests.[58] While the statute gives known owners the option to intervene as a matter of right,[59] the statute gives them no assurance of ever learning of the action.[60] Therefore, the value of that option is negligible.

The value of the option to intervene can be improved by the same amendment to the Kentucky statute which would bring it into compliance with *Mullane*. In order to accomplish these objectives, the following sentence should be inserted immediately after the first sentence of KRS 353.466(3): "Personal service shall be given to any known owner which the petitioner or the surface owner knows, or reasonably should know, to have claims in the mineral interest which will be affected by the outcome of the proceedings." By requiring that known owners with potential claims receive notice of the proceedings, this sentence would eliminate the possibility of such claims being adjudicated without due process of law. The sentence would also satisfy the requirement of *Wuchter v. Pizutti*[61] that the system be adequate as required by law.[62]

The due process clause also requires personal notice in cases where there are known mortgagees of the interest in question.[63] The United States Supreme Court has held that constructive notice to mortgagees identified in the public records is ineffective; nothing short of personal service will suffice as to them.[64] Therefore, proceedings under the Kentucky statute must give notice to any known or "reasonably ascertainable" mortgagees. The previously proposed amendment to the statute should be expanded to include such mortgagees.[65] The addition should now read, "Personal service shall be given to any known or reason-

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[58] KRS §§ 353.460-.476 (1983) (set out in part at *supra* note 23). *See also* KY. R. CIV. P. 4.05 [hereinafter CR].

[59] *See supra* note 43.

[60] *See supra* note 58.

[61] 276 U.S. 13 (1928).

[62] *Id.* at 18-24.

[63] Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983).

[64] *Id.* The Court stated: "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable." *Id.* at 800.

[65] *See* discussion of proposed amendment *supra* text accompanying notes 60-62.

ably ascertainable owner or mortgagee which the petitioner or surface owner knows, or reasonably should know, to have claims in the mineral interest which will be affected by the outcome of the proceedings."

Having noted those situations which might call for personal service, the analysis now turns to the notice aimed at those to whom personal service will not be available. The relevant provisions in the Kentucky Rules of Civil Procedure provide that:

> [i]f a party sought to be summoned is: . . . (e) an individual whose name or place of residence is unknown to the plaintiff; the clerk shall forthwith, subject to the provisions of Rule 4.06, make an order upon the complaint warning the party to appear and defend the action within 50 days.[66]

Upon executing the order to appear and defend, the clerk is to appoint a practicing attorney of the court to: (1) serve as attorney for the defendant,[67] and (2) "make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him. . . ."[68] This system is known as notice through warning order attorney and is the type of notice used in eminent domain proceedings, judicial challenges to escheatment, and quiet title actions.[69]

Although Rule 4.05 is the accepted mode of notice for cases brought under the Kentucky statute and those of the types listed above, the Rule provides no alternative means of notification for cases where notice by mail fails.[70] Such a system cannot survive the *Mullane* test, for there the Court stated that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[71] Clearly, an individual actually desiring to inform the absentee would at least publish if all else failed.[72]

Perhaps the drafters of the Kentucky Act were aware of this defect in Rule 4.05 when they wrote the statute, for it requires

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[66] CR 4.05.
[67] CR 4.07(1).
[68] *Id.*
[69] Leathers, *supra* note 33, at 780-82.
[70] *Id.*
[71] *Mullane*, 339 U.S. at 315.
[72] Leathers, *supra* note 33.

the petitioner to advertise immediately upon the filing of the petition.[73] The statute also requires the immediate filing of a lis pendens as a further attempt to notify the missing or unknown owners.[74] The court is also empowered to "[o]rder advertisement elsewhere or by additional means if there is reason to believe that additional advertisement might result in identifying and locating the unknown or missing owners."[75] This provision is especially important since at this stage of the proceedings the court has the information in the petition "[s]etting forth the efforts to locate and identify the unknown or missing owners."[76] The combination of the above described mechanisms leads one to conclude that the scheme is "[s]uch as one desirous of actually informing [the missing or unknown owners] might reasonably adopt to accomplish it."[77]

The statute is constitutional as it applies to the unknown owners. Although the Kentucky Rules of Civil Procedure are defective in not providing for notice by publication once notice by mail fails,[78] the statute compensates for this defect by requiring publication in all cases.[79]

In addition to the above detailed provisions related to finding missing or unknown owners, the statute provides two additional protections to those owners once the proceedings begin. First, the court must appoint a trustee ad litem who is to review the petition, file an answer, and "make an independent inquiry and search for the purpose of identifying and locating the unknown or missing owners and he shall report to the court the results of the investigation."[80] Second, during the period of the administration of the trust, the trustee can be authorized upon motion "to expend an amount not to exceed ten percent (10%) of the funds collected by the trustee [from the proceeds of the leases] for the purpose of instituting a search for the unknown or missing owners."[81]

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[73] KRS § 353.466(3) (1983) detailed in full at *supra* note 23.

[74] *Id.*

[75] *Id.*

[76] KRS § 353.466(2).

[77] *Mullane*, 339 U.S. at 315.

[78] *See supra* notes 70-71 and accompanying text.

[79] *See supra* note 73 and accompanying text.

[80] KRS § 353.466(4) (1983) (detailed in full at *supra* note 23).

[81] KRS § 353.468(5) (1983).

These additional protections, while not directly impacting upon the constitutionality of the statute's notice provisions, do show the legislature's concern for protecting the missing or unknown owner's property interest. When coupled with the seven year waiting period, the statute provides such owners with every reasonable opportunity to be located and/or come forward to present their claim.

CONCLUSION

The decision in *Texaco, Inc. v. Short*[82] gives validity to statutes aimed at curing ownership defects in otherwise developable mineral estates. For Kentucky's statute, *Short* requires proceedings which comply with the notice provisions of *Mullane v. Central Hanover Bank & Trust, Co.*;[83] thus, *Short* incorporates the notice defects existing outside the substantive provisions of the law. Any defect existing in the Kentucky Rules of Civil Procedure, alone or when viewed in conjunction with the implementing statute, imperils a judgment under the statute. As the Kentucky statute and procedural rules now read, they are suspect to challenge under the *Mullane* rationale because they do not require personal notice to known or reasonably ascertainable persons against whom the outcome of the proceedings is conceivably detrimental. As the statute and its notice provisions relate to unknown or missing owners, there is no defect under a *Mullane* analysis.

To improve the Kentucky statute against claims that it does not afford the known owners or mortgagees due process of law, KRS 353.466(3) should be amended by requiring personal service to those persons having an interest in the mineral estate who may be affected by the litigation. This would assure that such owners or mortgagees have an opportunity to assert their claims or right to intervene in the proceedings, and foreclose them from claiming that their interests were affected without due process of law.

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[82] 454 U.S. 516 (1982).

[83] 339 U.S. 306 (1950).