IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

AARCO OIL AND GAS COMPANY, ET AL.	**APPELLANTS**
VERSUS	**NO. 2008-CA-01219**
EOG RESOURCES, INC., ET AL.	**APPELLEES**

APPEAL FROM THE CHANCERY COURT OF COVINGTON COUNTY

BRIEF OF APPELLEES, FAIRCHILD-WINDHAM EXPLORATION COMPANY, WILEY FAIRCHILD FAMILY TRUST, BARBER MINERALS, INC., AND WILLIAM WALLACE ALLRED

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

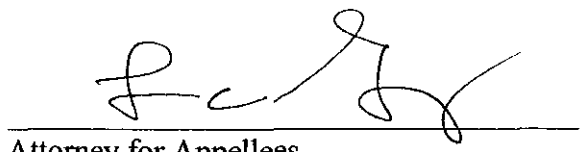
1. John M. Fairchild, Appellee;
2. Michael B. Moore, Appellee;
3. Lynn S. Jones, Appellee;
4. William Wallace Allred, Appellee;
5. Wiley Fairchild Family Trust, Appellee;
6. Fairchild-Windham Exploration Company, LLC, Appellee;
7. Barber Minerals, Inc., Appellee;
8. EOG Resources, Inc., Appellee;
9. Belhaven Productions, LLC, Appellant;
10. Little River Drilling, LLC, Appellant;
11. Fielding L. Cocke, Appellant;
12. Camille Cocke Patton, Appellant;
13. Tamara C. Jenkins, Appellant;
14. Aarco Oil and Gas Co., Appellant;
15. Harrell Energy Corp., Appellant;
16. Glenn G. Mortimer, III, Appellant;
17. Dorchester Royalty, Appellant;

18. Wheless Investment Company, Appellant;

20. J.T. Trotter, Executor of the Estate of Joseph Sydney Wheless, Jr., and the Estate of Ada Nance Wheless, Appellant;

21. Paige Holloway, Successor Trustee of the Paige Holloway Trotter GST Exemption Trust, Appellant;

22. Compass Bank, Trustee of the Barbara Trotter Collins GST Exemption Trust, Appellant.



Attorney for Appellees

STATEMENT OF ORAL ARGUMENT

In the final analysis, this case is quite simple. The appellees have clear title to the mineral interests in dispute. However, the appellees realize the briefs may make the case seem more complex than it really is. In this situation, oral argument may be helpful to the Court, and the appellees respectfully request such oral argument.

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STATEMENT OF THE ISSUES

These appellees do not agree with the statement of issues set forth in the two separate briefs of appellants. The statements of issues in those briefs unnecessarily complicate this case and confuse the reasoning necessary to analyze the issues. Rather, we see the issues on this appeal as:

1. Did the chancery court properly rule that the tax assessment and subsequent tax sale through which the appellees own their mineral interests, fully comply with the Mississippi statutes governing assessments, equalization, and sales of delinquent taxes?

2. Was any constitutional challenge to the statutory procedures properly raised in the court below?

3. Assuming the constitutional issues were raised properly and are before this Court for review, is there anything constitutionally deficient about the Mississippi statutory scheme?

STATEMENT OF THE CASE

Proceedings in the Court below

This appeal comes to this Court from a grant of summary judgment in favor of the counter-claimants in a title dispute over mineral interests created in the early 1940s.

The original plaintiffs were Belhaven Productions, LLC and Little River Drilling, LLC.

On EOG's motion, other purported mineral claimants who allegedly leased their mineral interests to Belhaven and Little River were also joined as plaintiffs. Those groups of plaintiffs include those appellants who filed the second appellants' brief in this case, and a number of plaintiffs who have simply filed joinders in those two briefs.

Two additional purported claimants, Sugarberry Oil & Gas Corporation and Katy Pipeline were joined, but they announced to the chancery court that they desired to dismiss any claim

because they did not want to bear the expense of contesting the title, and they are not parties to this appeal. (R.1804-1809)

The two appellants' briefs in this case identify EOG as the principal defendant/counter-claimant, but the truth is that the individual mineral owners filing this brief have the most at stake in this suit. These include Fairchild-Windham Exploration Company and Wiley Fairchild Family Trust, who own the largest part of the mineral interests at stake, and Barber Minerals and Wallace Allred, who also own significant interests. Some, but not all, of these parties' interests have been leased to EOG, and we will refer to this group of appellees collectively as "The Fairchild Group."

After all of the parties were identified and joined, the Fairchild Group and EOG moved for summary judgment on their counterclaims. Their position is straightforward. The Fairchild Group's title is facially valid, that is, an examination of the land deed records on file in the chancery clerk's office in Covington County demonstrates they have clear title to the mineral interests involved and they have had this clear title since 1942.

The numerous parties make this litigation appear complex but the case is actually simple. The Fairchild Group acquired their minerals from purchasers at tax sales in 1942. (R.550, 551, 552) The tax sale purchasers sold the land[1] and reserved the minerals, later selling the mineral interests to the Fairchild Group members. (R.552; see also Appendix A to this brief.)

Appellants must be corrected when they anoint themselves with the title "the mineral owners" in their briefs, when they boldly assert that "the record chain of title supports appellants interests in the two tracts," and when they mischaracterize the chancery court's grant of summary

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[1]The current owners and inhabitants of the surface claim through the same tax sales. There is no indication their possession has been disturbed or challenged in any way

judgment as "conveying ownership of the minerals in the two tracts" to the Fairchild Group. The truth is that any competent title abstractor, examining the land deed records of Covington County, would conclude that the appellees, not these appellants, have valid title. This is why the chancery court granted summary judgment. It is unnecessary to discuss the chain of title in detail, but we have included as an appendix to this brief a description of the chain showing good title in the appellees. The chancery court properly noted that it was not necessary to examine all of the title documents in depth, because resolution of the motion for summary judgment in the lower court and resolution of this appeal, depend only upon the validity of the tax assessment and resulting sale. (R.1811) If those two steps are valid, the appellants, the self-proclaimed "mineral owners," have no title at all.

Facts

Plaintiffs' complaints challenge the validity of the tax sale by claiming that there was an improper assessment of the mineral interests and, they contend, this invalid assessment renders the subsequent tax sale invalid. To understand this challenge, it is necessary to examine how taxation of mineral interests was handled in the 1940s, because that was different from the modern taxing scheme.

Today nonproducing mineral interests that are owned separately from the land surface, such as the ones in question, are exempt from *ad valorem* taxation. Mississippi Code §27-31-71, et seq. (Rev. 2006) which was enacted in 1946, provides a taxing scheme for severed nonproducing mineral interests through the sale of documentary stamps. Owners of severed mineral interests pay a one-time documentary stamp fee. Documentary stamps are purchased at a statutory rate, affixed to the deed, lease, or other document which creates a severed mineral interest, and thereafter those severed nonproducing mineral interests are free from taxes.

Mississippi Code §27-31-79, -81. The 1946 Act also provides for the exemption of mineral interests severed from the surface estate prior to the Act's passage, see §27-31-75. If the documentary stamps are not purchased, the owner of the mineral interest remains liable for payment of the documentary stamp fees and penalties, but the severed mineral interests are not sold to collect the delinquency as land is sold to collect delinquent *ad valorem* taxes.

It was different before 1946. In those days severed mineral interests were subject to separate assessment and taxation. An owner of a severed mineral interest was charged with the duty of identifying his severed mineral interest to the tax assessor and having the taxes separately assessed on that interest. Miss. Code Ann. §3146 (1930). Thereafter, if he did not pay the taxes, the severed mineral interest could be sold like any other real estate. Importantly for this case, if the owner of the severed mineral interest did not have his severed interest separately assessed and taxed, then that interest was deemed to be, for taxing purposes, part of the surface, and a sale of the surface for unpaid taxes on the land carried with it title to the underlying and unassessed mineral interest. See *Clement v. Burns*, 373 So.2d 790 (Miss. 1979).

That is what occurred here. The owners of the land sold the minerals separately to individuals who failed to have their mineral interests separately assessed and taxed. (R.540, 541) Unfortunately for the mineral owners, the surface owners neglected to pay taxes on the land, and when those lands were sold for taxes, the purchasers at the tax sale acquired not just the surface, but the unassessed minerals as well.

All the plaintiffs in this case claim through the original owners of the severed mineral interests which were not separately assessed or taxed. For them to prevail in this case, they have to somehow establish the invalidity of the tax sale through which the Fairchild Group claims.

In the complaint, (R.9) all amendments to the complaint (R.41,148), in the responses to the counterclaims (R.144, 249, 255, 260, 426), and in the responses to the Fairchild Groups' and EOG's motions for summary judgment (R.852,1595), the plaintiffs doggedly stuck to the theory that the tax sales were invalid because the land itself did not appear on the assessment roll. The truth is the land did not appear on the original 1940 tax roll, but it was added to the roll for 1941. (R.570, 571) Plaintiffs initially did not acknowledge the existence of this addition, but it clearly exists. Once the supplemental assessment was identified and all of the underlying statutory procedures and requirements were analyzed and found to be in order, the chancery court's decision was an easy one. The land deed records mandated a decision in favor of the Fairchild Group and EOG.

By our count, the Chancery Court docket shows that the plaintiffs filed a total of twenty-two pleadings or motion papers before they ever mentioned any sort of constitutional issue, and even then the constitutional issue was simply asserted as an affirmative defense, almost as an afterthought in their last pleading filed just five days before the hearing on the motion for summary judgment. (R.1648) The same day they filed a "supplement" to their responses to EOG's and Fairchild's motions for summary judgment mentioning the constitutional issue. (R.1595) But at the hearing they barely mentioned the constitutional issue at all. It is almost as though the constitutional issue were simply a "throw in," and they devoted their principal arguments to challenging the assessment of the land in other ways.

At the recessed hearing a month later the attorneys for the plaintiffs referred vaguely to constitutional issues, due process, and other concepts, and handed the court a copy of *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706. (R.1854-1855) Immediately prior to

the judge's signing the judgment which is appealed from in this case, they asked him to consider the effect of the *Mennonite* decision (Transcript p. 94-98 (pages in this part of the record do not appear to be properly numbered)) and the handwritten addition to the typed judgment makes it clear that the Chancellor was unimpressed by the lately raised constitutional issue.

At no time did the appellants comply with M.R.C.P. 24(d), which requires that notice be given to the Attorney General when a litigant seeks to have a state statute declared unconstitutional.

SUMMARY OF THE ARGUMENT

I. The Chancery Court properly ruled that the tax assessment challenged in this case fully complied with all Mississippi statutes.

The land deed records show a valid title in the Fairchild Group members. They acquired their titles through purchasers at tax sales in 1942.

The record before the Chancery Court on the motions for summary judgment showed the lands listed in the 1941 tax assessment roll of Covington County.

The tax assessor and collector of Covington County completely documented every transaction required by the taxing statutes in effect at the time.

On the other hand, the appellants' predecessors in title acquired severed mineral interests prior to the tax sales. However, they failed to report their severed mineral interests to the tax assessor as required by Miss. Code Ann. §3146 (1930). Therefore their interests were not separately assessed and taxed, but were rather assessed and taxed with the surface estate. Therefore, the tax sale of the surface carried with it the sale of the underlying severed but unassessed mineral interests. See *Stern v. Parker*, 200 Miss. 27, 25 So.2d 787 (Miss. 1946), and *Clement v. Burns*, 373 So.2d 790 (Miss. 1979). The title issue is simple, not complex.

II. No constitutional issue was properly raised by the plaintiffs in their pleadings or motion papers, nor did they give notice to the Attorney General of Mississippi pursuant to M.R.C.P. 24(d)

Two things must be done to properly raise a constitutional challenge to a statute of this state.

First, the constitutional issue must be specifically pleaded in a pleading or motion paper and thoroughly argued and briefed to the lower court. Here the issue was technically raised in a last minute pleading and supplement to the motion papers, but it was not argued with any sort of significance or importance to the Chancery Court, but simply mentioned in a passing reference. Such a procedure does not comply with the requirement that a constitutional issue be specifically and purposely raised and brought to the trial court's attention for ruling. See *Smith v. Fluor Corporation*, 514 So.2d 1227, 1232 (Miss. 1987), *Martin v. Lowery*, 912 So.2d 461 (Miss. 2005), and *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988).

The second requirement to raise a constitutional issue in the trial courts of this state is compliance with M.R.C.P. 24(d), which requires that in an effort to have a state statute declared unconstitutional, notice must be given to the Attorney General of the State of Mississippi so that he may intervene and be heard on the issue of constitutionality of the state statute. Here no notice was given to the Attorney General nor was Rule 24(d) complied with in any respect. See *Arceo v. Tolliver*, 949 So.2d 691 (Miss. 2006).

III. The Mississippi ad valorem assessment process and procedures for conducting sales of delinquent taxes are constitutional.

Mullane v. Central Hanover Bank & Trust Co., et al., 339 U.S. 306, 70 S.Ct. 652, and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, hold that personal notice

must be given to identifiable owners of property interests whose interest is affected by state action, such as a tax sale, but each of those cases specifically exempts from their holding the circumstance where owners of interests are unknown to the state officials or where their addresses cannot be located with reasonable effort.

In this case the appellants' predecessors were identified by name in mineral deeds, but there was no indication given of their addresses and no way that the Covington County Tax Assessor could have mailed any notice to them.

Miss. Code Ann. §3146 (1930) put the burden upon owners of mineral interests to have their interests reported to the tax assessor for taxation. This way their severed nonproducing mineral interests would be treated as separate property and taxed separately from the surface. However, when they failed to comply with Miss. Code Ann. §3146 (1930) and to report their severed interests to the tax assessor, their interests remained taxable with the surface of the land. *Clement v. Burns, supra.*

The tax assessor gave personal notice to the land owners of pending sales of the land for delinquent taxes and noted on the public record that the returned receipt of registered letters to those land owners was duly received and docketed. If the mineral owners had reported their severed interests to the tax assessor and had them separately assessed and taxed, they would have received personal notice of the pending tax sale of the mineral interest just as the surface owners did. See Miss. Code Ann. §3258 (1930) Their failure to comply with §3146, not some perceived constitutional infirmity of Mississippi's tax assessment procedures, is the reason for their not receiving personal notice of the tax sales of their mineral interests.

ARGUMENT

I. The Chancery Court properly ruled that the tax assessment challenged in this case fully complied with all Mississippi statutes.

In all the pleadings and motion papers in the Chancery Court, the appellants' consistent challenge to the Fairchild Group's title was that there was no proper assessment of the mineral interests prior to the tax sale through which the appellees claim. The Chancery Court, after examining all of the land deed records and other documents on file in the public records of Covington County, determined that the minerals which were sold for taxes were properly and legally assessed under all of the Mississippi statutes pertaining to such assessments at the time.

The land and the minerals in question had been lost for non-payment of taxes several years earlier and were owned by the State. As late as 1940, the tax assessor identified the land in question on the land roll, but showed that it was owned by the State and had no assessed value. (R.566) This listing complied with the statute in effect at the time, Miss. Code Ann. §3148 (1930):

> Lands assessed by the state tax commission shall be listed, but without value, on the rolls by the assessor for the purpose of completing the descriptions of all lands in the county, but for no other purpose.

In 1940, however, individuals purchased the tracts of land by two separate forfeited tax land patents. (R.539, 563) and, as required by statute, Miss. Code Ann. §3155 (1930), the tax assessor added each of these parcels of land to the tax assessment roll for 1941. (R.570-571)

Under the 1930 Code, land was not re-assessed each year. Rather, it was assessed only in even numbered years. See Miss. Code Ann. §3144 (1930) No part of the land in question, either the surface or the minerals, was assessed on the 1940 Covington County tax assessment roll.

However, the 1930 Code recognized that transactions such as the one involved in this appeal might occur. That is, after the assessment roll was prepared, the lands in question were conveyed by the State to individuals. In this instance, the statutes instructed the taxing officials of each county to see that these lands were added to the assessment roll for the ensuing year, and that is what happened in this case. See Miss. Code Ann. §3155 (1930) The lands were conveyed by the state land commissioner to R.J. Graves and J.D. Nobles on November 2, 1940, and the tax collector added those lands to the assessment roll for the year 1941 by a supplemental assessment appearing at the conclusion of the 1940 tax assessment roll. (R.570-571) When the Board of Supervisors met in 1941 to equalize the personal property rolls, there was no duty on the Board of Supervisors to make up a new land assessment roll for 1941 or to equalize the roll. However, the Board minutes indicate that the Board of Supervisors not only approved the personal property assessment roll for 1941, but they also made reference to approval of the real property roll for 1941. It is apparent that the Board of Supervisors had paid attention to the statutory directive that lands sold by the state after preparation of the 1940 assessment roll be added to the roll for 1941. (R.1783)

The two purchasers of the land in question immediately sold all of the mineral interests to predecessors in title of the appellants in this case, (R.540, 541), probably because those oil and gas speculators were the instigators of the transactions in the first instance. However, those speculators did not report their separate mineral properties to the tax assessor as required by Miss. Code Ann. §3146 (1930), so the severed mineral interests were not separately assessed and not separately taxed.

The assessment of the land thus encompassed the minerals, because the owners of those separately-owned minerals had not reported their acquisition as required by statute. Their failure to report these separate estates resulted in their not paying any taxes on their mineral interests, denying

Covington County of tax revenues that otherwise would have been collected.

When no taxes were paid, the land encompassing the mineral interests involved in this case was thus duly and properly sold for the 1941 taxes in 1942, those tax sales matured in the purchasers, and a proper clerk's deed was issued to the Fairchild Group's predecessors in title. (R.550, 574)

In the court below the appellants' challenge to the Fairchild Group's title was based on a contention that the land and minerals were not assessed at all, but the submission to the Chancellor of the 1941 assessment laid this factual contention to rest. (R.570-571) Thereafter the plaintiffs really had no cogent theory why the Fairchild Group's or EOG's motions for summary judgment should not be granted.

On appeal, however, they advance several novel arguments, none of which are raised in the pleadings or motion papers in the record.

First, Belhaven and Little River say in Section 2 of their brief (pages 11 and 12) that there was no notice and equalization of the 1941 assessment prior to the 1942 tax sales. They claim in this part of their brief that the Board was required to adopt an order giving notice of the 1941 assessment, but that "no such order appears in the minutes of Board's meetings with regard to real property assessments." (Appellants' brief, page 12).

The Board order from the July, 1941, meeting refers to both the real and personal assessment rolls. It states in material part:

> [T]he Board affirmatively finds and adjudicates that J.C. Cranford, the Tax Assessor of Covington County, Mississippi, has completed and filed the 1941 real and personal assessment rolls of Covington County, Mississippi;..." (emphasis added) (R.1783)

This minute entry deals primarily with personal property assessment rolls for 1941, but it also clearly refers to the real property assessment roll as well as the personal property roll. The minute

entry also reflects proper publication of both the personal and real property rolls.

The important thing, however, is that it was not necessary for the Board to prepare an assessment roll for 1941 or to equalize the assessments that year. Under the procedures in effect at that time, Miss. Code Ann. §3144 (1930), the Board was required only to make up a real property assessment roll in even numbered years. The assessment roll for 1940 served also as the assessment roll for land taxes for 1941. See Miss. Code Ann. §3144 (1930) The only exception, which is the exception that is important in this case, is that lands that had been conveyed from the State of Mississippi to individuals after preparation of the 1940 roll, were by statute to have been added for 1941. See Miss. Code Ann. §§3144, 3145 (1930) No new roll was made, only an addition to the 1940 assessment roll, and that is why in the record of this case the lands in question are noted in a supplemental assessment prepared by the tax collector during 1941. His entries make it clear that prior to the Board meeting for July, 1941, he carefully noted all transactions indicating conveyances from the State to individuals in Covington County after the 1940 assessment roll was prepared and added those properties to the assessment roll for 1941 taxes. (R. 570-571)

All of the argument contained in Little River and Belhaven's brief at pages 11 through 14 is flatly contradicted by the records that were before the Court on the motion for summary judgment and which establish without any genuine issue of fact that the land in question was added to the tax roll in 1941 by the tax assessor and that the Board of Supervisors approved the amended tax roll and assessed the land for 1941 taxes.

Even if there were some ministerial act that was not technically followed by the tax assessor or the Board of Supervisors, nonetheless Miss. Code Ann. §3172 (1930) would cure such ministerial deficiency: "Assessments must be approved by an order of the board of supervisors entered on the

minutes; but the failure to make and enter such order shall not vitiate the assessment if it shall appear that the assessment was made according to law."

Section 3172 cures any technical defect that the appellees can point to in the assessment process. It is clear that the two tracts of land in question were in fact added on to the tax assessment roll. Thus the assessment was valid under §3172. See *McNatt v. Hyman*, 38 So.2d 107 (Miss. 1948); *Yazoo Delta Investment Company v. Suddeth*, 70 Miss. 416, 12 So. 246 (1893).

Section 5 of Little River and Belhaven's brief on page 16 sets forth another perplexing argument, and that appears to be that the listing of the land as owned by the state on the 1940 assessment roll means that the land was assessed for taxation. Once assessed, these appellants seem to say, their land could not be back assessed.

The problem in this argument is that Miss. Code Ann. §3148 (1930) provides in part:

> Lands assessed by the state tax commission shall be listed, but without value, on the rolls by the assessor for the purpose of completing the descriptions of all lands in the county, but for no other purpose.

The tax assessor did exactly what the statute required. He listed the lands as owned by the State and assigned no value or assessment to them. (R. 566) Then when the lands were purchased from the State later that year, he saw that the lands were added to the assessment roll for 1941, as §3154 and §3155 require ("All lands...purchased from the state...shall thereafter be assessed and dealt with as the property of individuals... .") (R. 570-571) Section 5 of Little River and Belhaven's brief is a complaint about a process that exactly complies with the statutory scheme.

To summarize, the taxing authorities of Covington County complied with the 1930 Code sections. When the land was purchased from the State, it was added to the assessment roll for the year 1941, as the statute mandates. By contrast, when the plaintiffs' predecessors in title acquired

the minerals separately from the land, they failed to report their acquisition to the tax assessor, so the severed mineral interests were not assessed separately. When the surface owners failed to pay the land taxes, the properties were sold for delinquent taxes, and these tax sales carried the mineral interests with them, as those interests had not been separately assessed. *Clement v. Burns, supra.* The Fairchild Group's predecessors in title legally acquired clear title to the mineral interests in dispute in this appeal. There is simply no merit to any of the appellants' contentions that the Covington County officials somehow failed to comply with the 1930 Code's tax assessment and collection mandates.

II. No constitutional issue was properly raised by the plaintiffs in their pleadings or motion papers, nor did they give notice to the Attorney General of Mississippi pursuant to M.R.C.P. 24(d)

A litigant wishing to raise a constitutional challenge to a state statute in a trial court of this state must do two things. First, he must specifically set forth the constitutional issue in either a pleading or a motion. Second, he must comply with M.R.C.P. 24(d) and notify the Attorney General of the State of Mississippi so that the Attorney General may intervene in the case and be heard on the question of constitutionality. The appellants complied with neither of these two requirements in the Chancery Court.

The Rule 24(d) argument is easier. That rules states in relevant part:

> In any action....for declaratory relief brought pursuant to Rule 57 in which a declaration or adjudication of the unconstitutionality of any statute of the State of Mississippi is among the relief requested, the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an opportunity to intervene and argue the question of constitutionality.

This rule makes sense. Not all litigants have the same interest as the citizens of

Mississippi as a whole. If a party seeks to have a statute declared unconstitutional or, as in this case, an entire statutory scheme upon which a large part of the revenue of the state is based, then it is logical that the chief legal officer of the state be involved in the case to see that the constitutional issue is argued on behalf of the best interests of the citizens of the state.

The "constitutional" issue here, taken to its logical limits, would declare that the tax assessment scheme of the State of Mississippi is invalid because personal notice of assessment of real estate taxes is not mailed or delivered to every individual land owner before property is assessed for taxation. Such a declaration of unconstitutionality would alter the procedure for assessing real property throughout the state, affecting every county and municipal tax assessor and adding extra duties and expense on every local government across the state. The appellants seek to declare unconstitutional tax statutes over eighty years old. The Attorney General of the State of Mississippi needs to be heard in a case that would throw out Mississippi's tax assessment scheme and open untold numbers of long-standing titles to new and opportunistic challenges.

In *Arceo v. Tolliver*, 949 So.2d 691 (Miss. 2006), the court refused to consider any constitutional issue where the Attorney General was not notified under Rule 24(d). As the Court noted:

> [N]o notice challenging the constitutionality of the statute was given to the Attorney General as required by law [citations omitted]. In sum, the issue of the constitutionality of [the statute] is not before us. 949 So.2d at 696

Arceo was not the first time the Rule 24(d) requirement was observed by this Court. In *McDonald v. McDonald*, 850 So.2d 1182 (Miss. 2002), the Court noted:

> When a state statue's constitutionality is challenged, a party must

> give notice to the Attorney General. M.R.C.P. 24(d). It is reversible error for a court to declare a statute unconstitutional without the Rule 24 notice.

In *Martin v. Lowery*, 912 So.2d 461 (Miss. 2005), the Court stated:

> Furthermore, when a statute's constitutionality is challenged, the Attorney General must be notified and provided an opportunity to respond. 912 So. 2d at 465.

The court in *Martin v. Lowery* further noted that the constitutional issue "is procedurally barred" if no notice is given to the Attorney General that the issue has been raised. 912 So. 2d at 466, ¶11.

The requirement of notice to the Attorney General has been further upheld by this court in *State v. Watkins*, 676 So.2d 247, 250 (Miss. 1996), *Cockrell v. Pearl River Valley Water Supply Dist.*, 865 So.2d 357, 360 (Miss. 2004), *Barnes v. Singing River Hosp. Sys.*, 733 So.2d 199, 202-203 (Miss. 1999), and *Pickens v. Donaldson*, 748 So.2d 684, 691-692 (Miss. 1999).

The Rule 24(d) requirement was relaxed in one decision of this Court, *City of Starkville v. 4-County Electric Power Association*, 909 So.2d 1094 (Miss. 2005), but in that case the Attorney General of the State of Mississippi in fact participated in the proceedings before this Court, apparently by consent, and submitted a brief. More to the point, the constitutional challenge in that case was soundly rejected by this Court. *City of Starkville* is a rare exception to the general rule recognized in the cases cited above, and we suggest this is not a proper case for deviation from the practical and mandatory requirement of M.R.C.P. 24(d).

Furthermore, the appellants did not raise the constitutional challenge properly in their pleadings or motion papers.

"The law has been well settled that the constitutionality of a statute will not be considered

unless the point is specifically pleaded." *Smith v. Fluor Corporation*, 514 So.2d 1227, 1232 (Miss. 1987).

This point was further amplified in *Martin v. Lowery, supra*, where the court stated:

> A statutes' constitutionality will not be considered unless it has been specifically pleaded [citations omitted]. A specifically pleaded issue is one that has been raised in a proper motion before the court. 912 So.2d at 464-465 ¶8.

If this case were in the trial courts of the federal system and an effort were being made to challenge Mississippi's statutory taxing scheme on federal constitutional grounds, a federal court would likewise require the specific assertion of the precise constitutional provision in issue. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988), quoting *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988), ("a generic reference to the 14th Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights..."). The *Crenshaw* court also quoted from *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981), ("[a]t a minimum...there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law.")

Appellants' briefs in this court, especially that filed by the Wheless Group, make lengthy and specific arguments against the constitutionality of this State's system for *ad valorem* assessment and enforcement of tax collection through the process of tax sales. For reasons discussed in the next section of this brief, those constitutional arguments are unfounded. The important point is that these arguments were not raised to the extent required by *Martin v.*

Lowery in any motion in the court below.

Plaintiffs technically raised the constitutional issue in their pleadings, a last minute amendment to the answers to the counterclaims filed six days before the motion hearing (R. 1648) and in a "supplement" to their responses to EOG's and the Fairchild Group's motions for summary judgment. (R. 1595) However, they did not brief the issue separately and there is not even a mention of any constitutional issue in the record of the case in the twenty-one pleadings filed by the plaintiffs preceding their last minute filings.

The chancellor held a lengthy oral argument on the motions for summary judgment on May 21, 2008, and the plaintiffs did not raise the constitutional issue to the extent that they now raise it before this Court. In fact, at one point in the hearing they seemed to almost abandon any challenge on constitutional grounds:

> THE COURT: ...the statutes are unconstitutional?
> MR. STEWART: No, sir. I want to say that the way it is being interpreted here is that it is unconstitutional. (R. 1854)

When it became apparent that the chancery court was inclined to grant the motions for summary judgment (R. 1884), the plaintiffs' attorneys asked for a postponement so they could have an opportunity to examine records at the State Tax Commission to see if there was any piece of evidence there that might bear upon the motions for summary judgment. The chancellor granted their request and reset the matter for final oral argument on June 26. (R. 1884-1886) A few days before this June 26 resetting, the plaintiffs' attorneys by letter (R. 1764) informed the chancellor that no evidence had been gleaned from the records of the State Tax Commission. The plaintiffs' attorney included in his letter a reference to *Mennonite Board of Missions v.*

Adams, 462 U.S. 791, 103 S.Ct. 2706, and included a copy of the case for the judge to review. At the hearing on June 26 the judge made a quick read of *Mennonite*, saw that it did not apply, and affirmed his previously announced ruling. (Transcript p. 99)

The above procedure is not the way to specifically raise a constitutional challenge to the *ad valorem* taxing scheme of this state. It is true that the plaintiffs' attorneys technically mentioned the constitutional issue in their letters to the chancellor and in a last-minute supplement to their response to the motion. They also handed a copy of *Mennonite* to the court. But these veiled references were certainly not in compliance with the specific pleading requirement of *Martin v. Lowery* and the numerous cases cited therein. The constitutional challenge raised by these appellants is insubstantial and ill founded. But because the issue has not been adequately pleaded and because no notice was given to the Attorney General as required by M.R.C.P. 24(d), there is no need for this Court to even consider the issue.

III. The Mississippi ad valorem assessment process and procedures for conducting sales of delinquent taxes are constitutional

If this Court is inclined to gloss over the appellants' failure to properly raise the constitutional issues as described in the preceding section, the Court should nevertheless affirm that there is nothing unconstitutional about Mississippi's tax assessment scheme or its procedures for conducting sales of land to collect delinquent taxes.

Belhaven and Little River discuss this constitutional issue at Page 15, Section 4 of their brief, and the Wheless appellants devote their entire brief to arguing the constitutional issue.

Simplified, their argument is that *Mullane v. Central Hanover Bank & Trust Co., et al.*, 339 U.S. 306, 70 S.Ct. 652, and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103

S.Ct. 2706, invalidate two aspects of the process for assessment and taxation of severed mineral interests under the 1930 Code, first, the procedure for including such interests on the *ad valorem* assessment rolls, and second, the procedure for selling those interests along with the land when the taxes are not paid.

The appellants failed to mention an important qualification of both *Mullane* and *Mennonite*. While it is true the United States Supreme Court ruled in those cases that personal notice of state action had to be given where the identities and addresses of the person affected are known to the state officials, neither of those cases imposes a requirement on state officials to search out and identify potentially affected persons whose identities or addresses are unknown.

Mullane specifically holds that published notice to unknown beneficiaries is constitutional:

> [We] overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

339 U.S. 318, 70 S.Ct. 660.

Mullane would seem to approve notice by publication as was given in this case; that is, the notice of publication of the entire assessment roll by the county.

The *Mullane* court noted that, "Where the names and post office addresses of those affected by a proceeding are at hand," notice by publication is not proper. In that case the trustee who was involved had "on its books the names and addresses of the income beneficiaries" whose interests were affected. There the court noted that due process under the 14th Amendment required that personal notice be given at least by mail to the persons whose interests were

affected by the action in that case. However, the court also noted:

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.

339. U.S. 306, 317, 70 S.Ct. 658.

The same is true of the Supreme Court's holding in *Mennonite*:

> When 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.

462 U.S. at 798, 103 S.Ct. at 2711.

Mennonite concerned a mortgagee whose collateral was subject to tax payable by another. The mortgagee needed to have notice in order to protect his lien on property subject to sale for taxes due to the inaction of the landowner. Our case is different. Plaintiffs here could have protected their property interests simply by having those interests separately assessed, and in that way their property interest would no longer have been dependent on the actions of the owners of the surface estates. Further, by failing to have their mineral interests separately assessed, the owners of those separate interests were avoiding payment of taxes on the property rights they owned. They cannot have their cake (avoiding taxes) and eat it too (avoiding consequence of failing to pay taxes).

In a footnote, the *Mennonite* court clarified the limits of its ruling:

> We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and

> whereabouts of a mortgagee whose identity is not in the public record.

fn.4, 462 U.S. at 798, 103 S.Ct. At 2711.

In this particular case the deeds to Aaron Cohen and J.S. Wheless, two of the appellants' predecessors in title (R. 540, 541), do not contain any information concerning the state where they reside, the town where they reside, or any other data that would have enabled the tax assessor to give them written notice of anything. We now are told that each of them resided in Texas, but this fact was missing from any Covington County public records, so far as we can tell, in 1941 or 1942, and not even their state of residence is stated in their deeds. Two other mineral owners, Pugh and Lewis, are identified as residents of Hinds County, but no other information is given. (R. 564-565) Both *Mullane* and *Mennonite* recognize that it is not practical to require public officials to "undertake extraordinary efforts to discover the identity and whereabouts" of person who may be affected by the actions of the state. See 42 U.S. 798, 103 s.ct. 2711, F.N.4.

The reasons Messrs. Wheless, Cohen, Pugh and Lewis did not get notice of their tax assessment is because it was they, not Covington County officials, who failed to follow the law. Miss. Code Ann. §3146 (1930) states that the owner of a separately created mineral estate must report that mineral interest to the tax assessor:

> All interests in real estate herein enumerated shall be returned to the tax assessor within the same time and in the same manner as the owners of land are now required by law to list lands for assessment and taxation and under like penalties.

Stern v. Parker, 200 Miss. 27, 25 So.2d 787 (Miss. 1946), is an earlier case like this one; i.e., owners of separate mineral interests neglected to have their minerals separately assessed.

The Court there noted that there was an "equal duty of appellants to see that their estate was assessed and taxed correctly...," the same as in this case. The Court went on to hold, "[T]he omission was their fault, and they, and not the state or its patentee, should suffer." 25 So.2d at 790.

Under Miss. Code Ann. §3146 (1930), the burden was upon Messrs. Wheless, Cohen, Pugh and Lewis to inform the tax assessor that they had acquired severed and nonproducing mineral interests so that their mineral interests could be separately assessed and taxed. Since they failed to do this, Miss. Code Ann. §3146 (1930) provided that their mineral interests were subject to assessment along with the surface. They could have prevented this by complying with Miss. Code Ann. §3146 (1930) and reporting their separately owned mineral interests to the assessor. They did not.

Neither *Mullane* nor *Mennonite* imposes upon local officials the duty to search out identities and addresses of persons who are unknown to them, especially where state law requires those persons themselves to report their taxable property to taxing authorities. The fault here lies with Messrs. Wheless, Cohen, Pugh and Lewis, not with the Covington County Tax Assessor.

The tax assessor knew the six forties of land involved had been purchased from the State, because he had been notified by the State Land Commission (see Miss. Code Ann. §3153 (1930)) of the purchase.

The tax collector knew that taxes on the 240 acres were not paid. He gave personal notice by registered mail to the owners and he noted their receipt of the registered letters on the tax sale record. (R. 549)

Neither the assessor nor the tax collector, would have known, however, that these oil and gas speculators had bought severed minerals unless he had conducted a title search through all county land records to identify such interests -- an onerous task to impose on a county official.

Once Messrs. Wheless, Cohen, Pugh and Lewis failed to comply with Miss. Code Ann. §3146 (1930), they had to rely upon the owners of the surface to pay the real estate taxes. When those taxes became delinquent, the record of this case positively reflects that actual notice was mailed to the surface owners of the land. The notation "owners notified" appears on the record of the tax sale, and the date of mailing and return of registered mail receipts were noted in each instance. (R. 549) Thus the records of Covington County, which were before the chancery court in the Fairchild Group's motion for summary judgment, contain positive documentation that actual notice was sent by registered mail to the owners of the land and that they received that registered mail.

Notice to the land owners meets every requirement dictated by *Mullane* or *Mennonite*. The land owners received actual notice of the tax sales, and Messrs. Wheless, Cohen, Pugh, and Lewis would have received the same notice had they reported the ownership of their separate mineral estates to the tax assessors as required by Miss. Code Ann. §3146 (1930). When they did not, they, not the officials of Covington County, dictated that the notice of the tax sales went to the surface owners rather than to themselves personally.

In summary, neither *Mullane* or *Mennonite* apply here. The identity of the owners of the separate mineral estates and their whereabouts or addresses were unknown and unascertainable from the pubic records. Had the owners of these minerals complied with Miss. Code Ann. §3146 (1930), the Covington County Tax Assessor would have assessed their mineral interests, taxed

them and then, if they failed to pay their taxes, given them personal notice of any tax sale. Due to their failure to comply with the assessment statutes, however, they caused themselves not to receive the type of notice appellants claim they were entitled to.

The specific situation we have here, assessment of separately owned mineral interests, would rarely occur since 1946, because severed nonproducing mineral interests today are taxed by means of the documentary stamp process and are not subject to separate assessment and sale for delinquent taxes. However, the appellants' claim that personal notice is mandatory for assessment of minerals, would logically apply, if at all, across the board to all real estate. If this Court were to hold that personal notice must be given of all real property assessments, the courthouse doors of this state will be flung open to untold numbers of lawsuits challenging any title based on a tax sale.

Tax assessors in Mississippi's eighty-two counties are not required to give personal notice to every land owner that the owner's land is assessed for taxes. Instead, the obligation is the other way around. Land owners are required to notify tax assessors of the land they own so that it may be properly assessed. See Miss. Code §3145 (1930) State law requires that tax assessment rolls be available for inspection by any interested member of the public every year between the first Monday of July and the first Monday in August. See Miss. Code Ann. §3162 Every landowner in Mississippi knows he must pay taxes on his land. Before 1946, all mineral owners knew that their mineral interests were subject to taxation. Messrs. Wheless, Cohen, Pugh and Lewis should have reported their separately owned mineral estates to the tax assessor, and then they could have paid their taxes like other Mississippi property owners.

The Chancery Court properly ruled that the assessment scheme set forth in Miss. Code

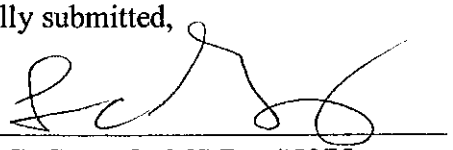
Ann. §3144 (1930) *et seq.* and the subsequent tax sales complied not only with the statutory scheme but also that *Mennonite* does not invalidate those schemes in any way.

Even if this Court elects to address the constitutional issue, the decision of the Chancery Court should be affirmed.

CONCLUSION

For the reasons stated above, this case should be affirmed by this Court and the final judgment of the Chancery Court of Covington County should be recognized as an order confirming clear title in the appellees to the mineral interests in dispute and canceling all claims of the appellants. If for any reason the appeal is not affirmed, then the case should be remanded to the Chancery Court for further proceedings.

Respectfully submitted,



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