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Constitutional Law - Due Process - Notice by Publication is Constitutionally Inadequate in Tax Sale Proceeding

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CONSTITUTIONAL LAW—DUE PROCESS—NOTICE BY PUBLICATION IS CONSTITUTIONALLY INADEQUATE IN A TAX SALE PROCEEDING

When petitioners[1] failed to pay city property taxes totalling $35.82, the statutorily created tax lien on their land was foreclosed and the property was offered for sale at a public auction to pay the delinquent tax.[2] In accordance with the applicable statutes,[3] notice of the tax sale was published in a newspaper, but petitioners never received notice of this proceeding.[4] At the tax sale, there was no private purchase offer and the property was bid off to the state. The state then failed to give petitioners notice of their post-sale right to redeem their property upon payment of the delinquent taxes. The redemption period lapsed and absolute title vested in the state.[5] When petitioners finally learned of the tax foreclosure proceedings, they sought to quiet title against the state, claiming that the state had failed to give them adequate notice and thus had deprived them of their property without due process of law. The circuit court found that the applicable statutes, allowing for notice by newspaper publication, provided constitutionally adequate notice and dismissed the complaint. The court of appeals affirmed.[6] On appeal *held,* reversed and remanded. Due process requires that an owner of a significant interest in real property be given adequate notice of hearing before his property is sold for the nonpayment of property tax. Notice of such rights by newspaper publication is constitutionally inadequate. *Dow v. State,* 396 Mich. 192, 240 N.W.2d 450 (1976).

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1. Petitioners were Smith, title holder, and Rose and Carl Dow, land contract purchasers of Smith's improved parcel of real property.

2. Dow v. State, 396 Mich. 192, 195, 240 N.W.2d 450, 451 (1976).

3. MICH. COMP. LAWS ANN. §§ 211.63, 211.66 (1968). *Accord,* Thompson v. Auditor General, 261 Mich. 624, 658, 247 N.W. 360, 371 (1933).

4. It is not surprising that the petitioners were not aware of the published notice as they were neither in possession of the property nor residents of the City of Sparta where the notice was published. Dow v. State, 366 Mich. 192, 198, 240 N.W.2d 450, 453 (1976).

5. *See* MICH. COMP. LAWS ANN. § 211.67 (1967).

6. Dow v. State, 46 Mich. App. 101, 207 N.W.2d 441 (1973).

Taxing real property has provided a tax base since ancient times[7] and is the most widespread method of raising revenue for local governments.[8] Despite growing criticism,[9] the property tax is likely to continue.[10] All fifty states and the District of Columbia levy taxes on real property.[11] Collection of unpaid and overdue taxes is accomplished by creation of a statutory lien on the taxed property, foreclosure of that lien, and eventually sale of the property. In twenty jurisdictions, the state may foreclose the lien and sell the property after providing the owner with only notice by publication.[12] The tax foreclosure process in Michigan was typical of the procedures followed in states permitting notice by publication.

The collection of real property taxes in Michign is governed by the General Property Tax Act of 1893[13] (Property Tax Act), except where contravened by local city charter or special state act.[14] A basic familiarity with the tax foreclosure scheme is important in analyzing the sufficiency of notice provided under the Property Tax Act. Under the Act, local treasurers assess and collect all current real property taxes levied by the city, village, township, or county. A local treasury officer prepares an assessment roll containing property owners' names,[15] legal descriptions of their property,[16] and estimated valuations.[17] This assessment roll is submitted to a local board of review for finalization at which time an owner may contest

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7. Lynn, *Property-Tax Development*, in PROPERTY TAXATION USA 8 (R. Lindholm ed. 1967). Land taxes were common in ancient Egypt and India and were levied in Athens in 596 B.C. *Id.*

8. Zimmerman, *Tax Planning for Land Use Control*, 5 URBAN LAW, 639, 646 (1973).

9. For a discussion of the criticisms, including its regressive nature and contribution to urban problems and some suggested alternatives, see *id.*, and Sternlieb & Burchell, *Residential Property Tax Delinquency: A Forerunner of Residential Abandonment*, 1 REAL ESTATE L.J. 256 (1973).

10. For example, in 1972 the voters of Michigan in a statewide referendum turned down a constitutional amendment which would have replaced the property tax with a graduated income tax. *See* Ann Arbor News, Nov. 8, 1972, § A at 2.

11. For a listing see Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 n.1 (1975) [hereinafter *Tax Sale Proceedings*].

12. *Id.* at 1507 n.4. Michigan is listed as the twenty-first jurisdiction but the principal case removes it from the list. *Id.*

13. MICH. COMP. LAWS ANN. §§ 211.1-.157 (1967).

14. *Id.* § 211.107, provides that the state Property Tax Act applies to cities and villages only when it is not inconsistent with their respective charters.

15. *Id.* § 211.24 (1968). If the owner is unknown, property may be assessed as "owner unknown."

16. *Id.* § 211.25 (Supp. 1977-78).

17. *Id.* § 211.27.

his assessment.[18] The finalized tax roll is then returned by the board of review to the local treasurer and a lien attaches on the property on December 1.[19] On or before the following December 31, known as "tax day,"[20] the taxpayer of record is to be notified by mail of the tax due.[21] The applicable statute provides, however, that "failure to send or receive notice shall not in any way prejudice the right to collect or enforce payment of any tax."[22] The taxpayer has until March 1 of the following year to pay the assessed tax.[23] After March 1, the municipality or township sends a list of unpaid taxes to the county for collection.[24] If the taxes remain unpaid for more than one year, the property may be sold at public auction.[25]

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18. *Id.* § 211.29 (1967). Under this provision, notice of board of review meetings are given by publication in local newspapers or by posting. Review of a finalized assessment is available through the State Tax Commission. *Id.* § 211.152 (Supp. 1978-79). For a discussion of the assessment review process see Krawood, *Michigan's Need for a Tax Court and the Inadequacy of Appeal Procedures Provided by the General Property Tax Law,* 11 WAYNE L. REV. 508 (1965).

19. MICH. COMP. LAWS ANN. § 211.40 (1968).

20. *Id.* § 211.2 (Supp. 1977-78).

21. *Id.* § 211.44 (Supp. 1978-79).

22. *Id. But cf.* Fisher v. Muller, 53 Mich. App. 110, 125, 218 N.W.2d 821, 830 (1974), in which the court held that when the local treasurer had notice of the owner's mailing address and failed to notify the owner of an assessment increase, due process bars the county from enforcing the increased assessment at the foreclosure proceeding. That court noted, however, that the state is not precluded under section 211.44 from later giving proper notice and collecting previously owed taxes.

23. MICH. COMP. LAWS ANN. § 211.45 (1967), which provides that for taxes unpaid as of Jan. 10:

> For the purpose of collecting the taxes remaining unpaid on the tenth day of January, the said treasurer shall, thereafter during that month, call personally upon each person liable to pay such taxes, if a resident of such township, or at his usual place of residence or business therein, and demand payment of the taxes charged against him. If such person is not a resident of the township, but resided within the county, or an adjoining county, and his residence is known to the treasurer, he shall make such demand either personally or by mail. In cases of companies or corporations demand may be made at the principal or other office of such company or corporation, or by mail directed to such corporation or company or its principal officer at its usual place of business. In cities where some special provision is made for demand or collection of taxes, the collector or treasurer shall comply with such special provision, otherwise be bound by the provisions of this act. If demand is sent by mail, the amount of the tax shall be stated and the place and time where and when it may be paid.

24. *Id.* § 211.55 (Supp. 1978-79).

25. *Id.* § 211.60. The sale occurs on the first Tuesday in May in the third year following the year in which the taxes were assessed and became due. The 1975 May sale was postponed until October 7, 1975, in order to allow legislators time to consider reforms in the tax sale process. *Id.* § 211.70(a) (Supp. 1978-79).

In Detroit, however, realty is subject to tax sale only for delinquent county

Prior to sale, the state must foreclose its statutory lien on the property by obtaining judgment in an in rem proceeding.[26] The proceedings are commenced when the state treasurer files a petition in the circuit court in the county where the property is located.[27] Jurisdiction is complete upon notice by publication.[28] The notice of hearing on the petition need only contain the complaint, a legal description of the property, and the amount of taxes and penalties due.[29] Upon filing the petition, the county treasurer must mail notice of the proceedings to the last known address of the person to whom the taxes were assessed.[30] The applicable statute provides, however, that "[f]ailure to receive or serve the notice shall not invalidate the proceedings."[31] If the taxpayer fails to appear at the hearing, a default judgment is issued and the circuit court judge orders that the property be sold to pay the delinquent tax.[32]

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taxes. The City Charter requires the city treasurer to foreclose by civil suit. DETROIT CITY CHARTER § 8-403(6).

26. MICH. COMP. LAWS ANN. § 211.61 (Supp. 1978-79); International Typographical Union v. Macomb County, 306 Mich. 562, 576, 11 N.W.2d 242, 248 (1943).

27. MICH. COMP. LAWS ANN. § 211.61 (Supp. 1978-79).

28. *Id.* § 211.66 sets forth the publication procedure which requires, *inter alia*, that the petition be published once a week for three consecutive weeks. Although this provision provides in pertinent part:

> The publication of the order and petition aforesaid shall be equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon and on the sale of the lands under the decree, and shall give the court jurisdiction to hear such petition, determine all questions arising thereon, and to decree a sale of such lands for the payment of all taxes, interest and charges thereon;

the constitutionality, under due process clause analysis, is highly suspect. The instant court has stated:

> We hold that the Due Process Clause requires that an owner of a significant interest in property be given proper notice and an opportunity for a hearing at which he or she may contest the state's claim that it may take the property for nonpayment of taxes and that newspaper publication is not constitutionally adequate notice of such right.

396 Mich. at 196, 240 N.W.2d at 452.

Thus, personal service via publication is constitutionally insufficient to foreclose on a property tax lien. Although the instant court, in dicta, states that "[a] judicial hearing is not required." 396 Mich. at 211, 240 N.W.2d at 460, MICH. COMP. LAWS ANN. § 211.66 (1968) does provide for a circuit court forum to hear objections as to the foreclosure proceeding. Proper notice of this opportunity to be heard must be given and at the least "ordinary mail notice" is required. 396 Mich. at 212, 240 N.W.2d at 460.

29. *Id.* Legal Record Publishing Co. v. Auditor General, 281 Mich. 578, 581, 275 N.W. 498, 499 (1937).

30. MICH. COMP. LAWS ANN. § 211.61(a) (Supp. 1978-79).

31. *Id.*

32. *Id.* § 211.66 (1967).

After sale whether the property is purchased by a private party or reverts to the state, the county treasurer must notify any person with a recorded interest in the land of his statutory right to redeem his property.[33] This notice must be mailed at least 120 days before the end of the statutory twelve-month redemption period. But again, the failure to serve or receive this notice does not invalidate the foreclosure proceedings.[34] If no private party purchases the property, the land is bid off to the state.[35] Unless the property owner has redeemed before the end of the redemption period, title vests absolutely in the state.[36] At the time the principal case was decided, the state had no statutory duty to notify land owners of their redemption rights. The 1976 amendments to the General Property Tax Act, however, now require the state: 1) during a second redemption period following the vesting of title in the state to have an agent visit each parcel deeded to the state and personally serve notice of the right to redeem upon the person occupying the land;[37] 2) upon expiration of this redemption period, to provide notice to all owners of a significant interest in any land which is valued at over $1,000, of a hearing to show cause why the tax sale or state deed should be cancelled.[38] In addition, the property may be redeemed up to thirty days after the hearing upon payment of additional penalties.[39]

The procedure is different if a private party purchases the property at the tax sale. At the end of the redemption period,

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33. *Id.* § 211.73(c), -.74 (Supp. 1978-79).

34. MICH. COMP. LAWS ANN. § 211.73(c) (Supp. 1978-79). This section provides, in pertinent part that:

> Failure to receive or serve the notice or a defect in the notice shall not invalidate the proceedings taken under the auditor general's petition and the decree of the circuit court, in foreclosure and sale of the lands for taxes.

See also Dow v. State, 396 Mich. 192, 197, 240 N.W.2d 450, 452 (1976).

35. MICH. COMP. LAWS ANN. § 211.67 (1967).

36. *Id.* § 211.67(a) (1967). *Cf.* Montgomery Real Estate Co. v. Dept. of Natural Resources, 46 Mich. App. 696, 208 N.W.2d 617 (1973) (absolute title to property bid off to the state vests upon expiration of the one-year redemption period, not when the state treasurer deeds the land to the state).

37. MICH. COMP. LAWS ANN. §211.131(c)(5) (Supp. 1978-79). This section also provides that "[i]f unable to personally serve the notice, the notice shall be placed in a conspicuous manner on the premises." *Id.*

38. *Id.* § 211.131(e) (Supp. 1978-79). This section applies only to lands deeded to the state for delinquent taxes on or after May 4, 1976. *Id.*

39. *Id.* § 211.131(e)(3). Under this section, the person seeking redemption must pay the delinquent taxes, interest, fees and an additional penalty of 50% of the unpaid tax upon which the foreclosure was made. *Id.*

the purchaser acquires a tax deed to the property.[40] Unlike land foreclosed upon and deeded to the state prior to May, 1976, the purchaser does not gain indefeasible title or the right of possession automatically at the end of the one-year redemption period. To do so, he must obtain a writ of assistance from the state which will not be issued until six months after a showing that the purchaser has made personal service upon all persons "having any estate in such lands or any interest therein . . . or any person in the actual possession of the lands at the time of such purchase" advising them of their right to redeem.[41] Thus, if a private party purchases the property, he cannot obtain indefeasible title for at least eighteen months after the tax sale and only after giving the owner actual notice of his redemption right.

In summary, the Michigan General Property Tax Act provides that jurisdiction over the assessed property for the purpose of foreclosing upon a tax lien is obtained through notice by newspaper publication. The Act further provides that the owner of record be given mail notice of the levy of the property tax on his land and the hearing on the foreclosure of the tax lien. However, the Act excuses any failure by the state to provide such notice. Prior to May, 1976, only when the property was purchased by a private party did the owner have to be given actual notice before irretrievably losing his property. Thus, if a property owner failed to pay his property tax for whatever reason, the state acquired indefeasible title without ever notifying him that the tax was levied or that proceedings were commenced to deprive him of his property. The recent amendments to the Property Tax Act now require only that the state take affirmative steps to notify interested persons after the tax sale, when added interest, fees and penalties have accrued.[42]

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40. *Id.* § 211.72 (1967). During the one-year period of redemption following the sale, the owner may redeem title to his property by paying the price paid at sale plus interest of 1% per month. *Id.* § 211.74 (1967).

41. MICH. COMP. LAWS ANN. §§ 211.171, -.142 (1967); Dow v. State, 396 Mich. 192, 197, 240 N.W.2d 450, 452 (1976). After the one-year redemption period, the owner may redeem during the six-month period after the private purchaser has filed for a writ of assistance and notified the owner of his right to redeem. During the latter period, the owner may regain title by paying 50% of the sale price, the cost of notice and a $5.00 fee.

42. See note 37 & accompanying text *supra.*

The sufficiency of notice by publication in tax foreclosure proceedings came under due process attack as early as the turn of the century. In *Leigh v. Green*[43] and *Longyear v. Toolan*,[44] the United States Supreme Court upheld the constitutionality of statutes in Nebraska and Michigan, respectively, which allowed notice of tax foreclosure proceedings by publication. What were to become two primary justifications for notice by publication were enunciated in *Leigh* and *Longyear*: (1) the in rem nature of the foreclosure proceeding[45] and (2) the caretaker theory.[46] Traditionally, differing standards of notice were required for actions in rem and in personam. When in personam jurisdiction was still based on the "presence" of the defendant, it was impossible for the state court to gain in personam jurisdiction over non-residents regarding claims against their instate property. The need to settle these property claims led to the concept of an in rem proceeding.[47] In an in rem proceeding, the action is against the property, not the owner. The fact that the property is located within a state gives that state's courts jurisdication to determine anyone's interest in that property, regardless of their residence. Since prior to the passage of long arm statutes, the nonresident property owner, being outside the jurisdiction, could not be served,[48] constructive notice by publication within the jurisdiction where the property existed was considered sufficient.[49]

The caretaker theory provided further justification of notice by publication to nonresident property owners. Under this theory, the property owner is deemed to know when his regular, annual taxes are delinquent and what consequences may follow.[50] The property owner is under a duty to read local public records and newspapers regarding any pending

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43. 193 U.S. 79 (1904).
44. 209 U.S. 414 (1908).
45. For a discussion of the history of the in rem classification see Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257 (1957).
46. For a historical analysis of the caretaker theory, see, *Tax Sale Proceedings, supra* note 10.
47. *See* Arndt v. Griggs, 134 U.S. 316 (1890); Pennoyer v. Neff, 95 U.S. 714 (1878).
48. Pennoyer v. Neff, 95 U.S. 714 (1878).
49. Huling v. Kaw Valley Ry., 130 U.S. 559 (1889); Ballard v. Hunter, 204 U.S. 241 (1907).
50. Longyear v. Toolan, 209 U.S. 414, 418 (1907); Leigh v. Green, 193 U.S. 79, 92 (1904).

proceeding affecting his property and to arrange for some method to become aware of any entry upon the land for the purpose of seizure.[51] Though the caretaker theory justification was originally developed to gain jurisdiction over nonresidents, its principles were soon applied to resident owners as well. In fact, the plaintiffs in *Leigh* and *Longyear,* where the United States Supreme Court found that notice by publication met the requirements of due process, were known resident property owners. The Court found that the in rem nature of the tax sale proceedings, the state's interest in collecting taxes, and the duty of the land owner to know the consequences of nonpayment were sufficient to justify the challenged statutory procedures.[52]

In later years, the United States Supreme Court developed constitutional doctrine permitting a state to acquire in personam jurisdiction over a defendant who had sufficient contacts with the state,[53] including ownership of property. Although the *Leigh-Longyear* justifications for published notice thereby were undercut, the foreclosure action was still viewed as an in rem action and notice by publication continued to be used. Then, in 1950, the decision in *Mullane v. Central Hanover Bank & Trust Co.*[54] radically changed the constitutional standards of adequate notice required in an in rem proceeding. In *Mullane,* the Court declared unconstitutional a New York statute which authorized the trustee of a common trust fund to give notice by publication of impending judicial settlement of the accounts.[55] The Court held that to satisfy the requirements of due process, notice must be made in a manner reasonably calculated to reach the interested parties.[56] Where the names and addresses of the interested parties are known, or can be easily ascertained, mail notice, at a minimum, is required.[57] The Court rejected the argument that due process requirements are governed by the classification of proceedings as in personam or in rem.[58] While

51. Longyear v. Toolan, 209 U.S. 414, 418 (1907).
52. Longyear v. Toolan, 209 U.S. 414 (1907); Leigh v. Green 193 U.S. 79, 92 (1904). *See also* Muirhead v. Sands, 111 Mich. 487, 69 N.W. 826 (1897).
53. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
54. 339 U.S. 306 (1950).
55. *Id.*
56. *Id.* 314.
57. *Id.* 318.
58. *Id.* 312. Note this same analysis in *Leigh* but with a contrary result on the adequacy of notice by publication. Leigh v. Green, 193 U.S. 79, 90 (1904).

recognizing that published notice is a mere gesture that does not afford interested parties any actual notice,[59] the Court did discuss situations where notice by publication may be valid. These exceptions include situations where the identity of the interested party is unknown[60] or where the published notice is supplemented by another action, such as the physical seizure of the property, which could be expected to inform the interested party of the pending proceedings affecting the property.[61] Thus, the *Mullane* Court indicated that published notice may be constitutionally valid only in the few situations when it is supplemented by other notice-giving activities.[62] The caretaker theory, which put an affirmative duty on known parties to review newspapers and public records for proceedings concerning their interests, retained little validity under the *Mullane* Court's due process analysis.

While the property at issue in *Mullane* was personalty, the United States Supreme Court applied *Mullane* to proceedings concerning realty in subsequent cases. In *Covey v. Somers,*[63] the Court held that notice by publication to a known mental incompetent of real property tax sale proceedings violated due process requirements. In *Walker v. City of Hutchinson*[64] and *Schroeder v. City of New York,*[65] the Court found notice by publication in condemnation proceedings constitutionally inadequate. However, many state courts[66] have limited *Mullane* to its facts and have upheld notice by publication where the debt owed was the annual levy of real estate taxes which the owner could have reasonably anticipated. In *Golden v.*

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59. 339 U.S. 306, 315 (1950).
60. *Id.* 317.
61. *Id.* 316.
62. *Id.* (dictum).
63. 351 U.S. 141 (1956). For a discussion of this case see 55 MICH. L. REV. 287 (1956).
64. 352 U.S. 112 (1956). In light of *Walker*, the United States Supreme Court remanded a case involving the adequacy of notice by publication in the administrative levy of paving assessments. Wisconsin Electric Power Co. v. Milwaukee, 352 U.S. 948 (1956) (per curiam). On remand, the Supreme Court of Wisconsin held the notice inadequate under *Mullane* standards. 275 Wis. 121, 81 N.W.2d 298 (1957).
65. 371 U.S. 208 (1962).
66. *See, e.g.,* Botens v. Aronauer, 32 N.Y.2d 243, 298 N.E.2d 73, 344 N.Y.S.2d 892 (1973), *appeal dismissed,* 414 U.S. 1059 (1973). *Contra,* Johnson v. Mock, 19 Ariz. App. 283, 506 P.2d 1068 (1973). For a discussion of this case see 30 ARK. L. REV. 73 (1976).

Auditor General,[67] the Supreme Court of Michigan used the caretaker theory to hold that notice by publication was constitutionally adequate where the debt owed was the annual property tax assessment. In distinguishing this situation from *Mullane* and its progeny, *Golden* found that a property owner must be deemed to know that his regular, annual taxes are due and that nonpayment will result in foreclosure.[68] This knowledge of the consequences creates a duty upon the property owner to be "on the lookout" for published notice or to read the local public records.[69] *Golden* did not refer to the language in *Mullane* stating that notice by publication may be adequate only when the identity of the owner cannot be ascertained or when it is supplemented by other notice-giving actions, such as the physical seizure of the property.[70] Thus, in *Golden,* the Supreme Court of Michigan continued to rely upon a pre-*Mullane* justification of notice by publication even after the United States Supreme Court found notice by publication to be, in many cases, the equivalent of no notice at all.[71]

Following the Michigan supreme court's decision in *Golden,* the United States Supreme Court expanded due process protections in the debtor/creditor context by requiring that persons with a significant interest in property[72] be given notice and an opportunity to be heard prior to the seizure of their property for delinquent payment. In *Fuentes v. Shevin,*[73] the Court held that a debtor had the right to adequate notice and the opportunity to be heard prior to the issuance of a writ permitting the seizure of property for default on consumer goods installment contracts. In *Fuentes* and other recent con-

67. 373 Mich. 664, 131 N.W.2d 55 (1964). For a discussion of *Golden* see Stanley & Tunstall, *State and Local Taxation,* 12 WAYNE L. REV. 160, 170-71 (1965).

68. 373 Mich. 664, 672, 131 N.W.2d 55, 59 (1964).

69. *Id.* at 672, 131 N.W.2d at 59.

70. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950).

71. Walker v. City of Hutchinson, 352 U.S. 112, 117 (1956).

72. These "significant interests" included: wages, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970); possessory rights to consumer goods under an installment contract, Fuentes v. Shevin, 407 U.S. 67 (1972).

73. 407 U.S. 67 (1972); *accord,* Inter City Motor Sales v. Szymanski, 42 Mich. App. 112, 201 N.W.2d 378 (1972).

sumer cases[74] involving the requirements of due process, the Court referred to *Mullane* and *Schroeder* in determining that the right to be heard within the meaning of procedural due process[75] requires that interested parties be properly informed of any pending proceedings.

Against this background, the instant court held that procedural due process requires an owner of a significant interest in real property to be given notice of the state's foreclosure petition and a meaningful opportunity for a hearing at which he may challenge the state's claim that property taxes remain unpaid without legal justification.[76] In coming to this conclusion, the instant court followed the reasoning set forth in *Mullane* and in its expanded applications prior to and following *Golden*. Instead of applying the caretaker theory as used in *Golden*, the instant court found the expansion of due process protections since *Golden* sufficient to satisfy any questions concerning the continued validity of that theory.[77]

The instant court's death knell for the caretaker theory is clearly supported by the post-*Mullane* procedural due process cases. The caretaker theory has been justified[78] on the grounds that after the property owner fails to pay his taxes, he should be "on the lookout" for the pending proceedings affecting his property.[79] Such a theory assumes that the owner is delinquent. This assumption is inconsistent, however, with one of the purposes of the hearing: to establish whether or not taxes are in fact delinquent. The fact that the taxpayer may anticipate the consequences of nonpayment does not justify giving meaningless notice of a hearing since it is not constitu-

74. *See, e.g.*, Snaidach v. Family Finance Corp., 395 U.S. 337, 339 (1969).
75. Fuentes v. Shevin, 407 U.S. 67, 82 (1972).
76. 396 Mich. 192, 196, 240 N.W.2d 450, 452 (1976). Prior to determining what procedural protections are due, the instant court had to find that the due process clauses of the United States and Michigan Constitutions were applicable. U.S. CONST. amend. XIV; MICH. CONST., art. I § 17. To make out a violation of procedural due process, a party must be deprived of a significant property interest. In the principal case, this requirement was met since the plaintiffs were deprived of their rights of redemption by the foreclosure proceedings. 396 Mich. at 206, 240 N.W.2d at 457. Additionally, the due process clause is only a limitation upon state action. The instant court, after an analysis of the state action findings in the *Snaidach* line of cases, found state action in the principal case because the state was the moving party in the foreclosure proceedings. *Id.* at 202, 240 N.W.2d at 455.
77. 396 Mich. 192, 209, 240 N.W.2d 450, 458-59 (1976).
78. Golden v. Auditor General, 373 Mich. 664, 672, 131 N.W.2d 55, 59 (1964).
79. *Id.*

tionally permissible to presume the nonpayment. The Court in *Fuentes v. Shevin* held that due process does not permit the presumption that the debtor is in default in justifying prejudgment seizure of property.[80] The installment sales contract in *Fuentes* is similar to the annual assessment of the property tax since the installment purchaser, like the property owner, knows that nonpayment may lead to taking of the property. Thus, *Fuentes* undermines the *Golden* rationale that notice by publication is permissible because the property owner is presumed to be delinquent and is aware of this fact. A decision inconsistent with the reasoning in *Fuentes* would result in a situation where debtors defaulting on personal property installment contracts would have greater procedural due process protections than owners of real property.[81] That inequitable result was avoided by the instant court's holding that notice by publication is constitutionally inadequate.[82]

Realizing that the requirements of procedural due process are determined by a balancing of the interests of the creditor and the debtor,[83] the question naturally arises whether a debtor is entitled to fewer rights if his creditor is the state instead of a private individual. It has been argued that the state's interest in collecting revenue cannot legitimately be compared to the interest of a private party in collecting a debt and, therefore, the debtor in the former instance cannot complain that notice was provided by publication.[84] Such a conclusion seems unwarranted. First, the United States Supreme Court has held consistently that the state's interest in administrative

80. 407 U.S. 67, 87 (1972).

81. Dow v. State, 46 Mich. App. 101, 114, 207 N.W.2d 441, 447 (1973) (Gillis, J., dissenting), *quoted in* Dow v. State, 396 Mich. 192, 209-10, 240 N.W.2d 450, 458-59 (1976).

82. The instant court's rejection of the caretaker theory is also consistent with a broad view of the *Mullane* Court's holding that notice by publication may be adequate only when the identity of the debtor cannot be ascertained or when it is supplemented by another notice giving action such as seizure of the property. 339 U.S. 306, 316 (1950). Since there is no seizure under the tax sale proceedings, the caretaker theory does not come within the exceptions discussed in *Mullane*. For a contrary conclusion see Note, *Due Process of Law and Notice by Publication*, 32 IND. L.J. 469, 477 (1957).

83. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). This balancing test has been articulated by the Court in Boddie v. Connecticut as "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." 401 U..S 371, 378 (1971). For a more recent statement of the test, see Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

84. Dow v. State, 46 Mich. App. 101, 108-09, 207 N.W.2d 441, 444 (1973).

convenience did not outweigh a citizen's right to notice and a hearing prior to the withdrawal of a protected property right.[85] Second, in prior cases, the importance of the creditor's interest merely affected the time when notice and a hearing were provided, not whether actual notice should be given at all.[86] Finally, even assuming that a severe administrative burden would justify the resort to notice by publication, it is difficult to see how the requirement of notice by mail would create such a burden. The state has compiled the names and addresses of most of the owners of the properties on the tax roll, and the cost of mailing a form letter would not be significantly greater than renting space in a local newspaper.[87]

As noted by several commentators,[88] other courts may have been fearful of declaring published notice statutes unconstitutional because of the upsetting affect such a ruling might have on tax deeds. This is an appropriate concern, especially considering the ever increasing marketability of these deeds.[89] A court may easily prevent such a result by applying its ruling prospectively,[90] or limiting its ruling to property still in the

85. Goldberg v. Kelly, 397 U.S. 254 (1970) (state's administrative needs did not outweigh welfare recipient's rights to notice and hearing before the withdrawal of welfare benefits). In *Walker v. City of Hutchinson,* the Court stated "[t]here is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard." 352 U.S. 112, 117 (1956). Summary seizures of property by the government have been allowed, however, when needed to protect a vital interest. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

86. Fuentes v. Shevin, 407 U.S. 67 (1972).

87. *See* Dow v. State, 396 Mich. 192, 208-09, 240 N.W.2d 450, 459 (1976). One of the 1976 amendments provides for the development of the "delinquent property tax administration fund" as a method of financing the cost of notice required of the state and counties. MICH. COMP. LAWS ANN. § 211.59 (Supp. 1977).

88. See note 8 *supra*; Note, *Due Process in Tax Sales in New York: The Insufficiency of Notice by Publication,* 25 SYRACUSE L. REV. 769, 785 (1974).

89. *See, Land Title Standards Revised,* 55 MICH. STATE BAR J. 724 (1976). For a discussion of tax title status in other jurisdictions see Legg, *Tax Sales and the Constitution,* 20 OKLA. L. REV. 365 (1967); Scott, *Marketability of Tax Titles in Missouri,* 20 U.K.C.L. REV. 153 (1951). One commentator has suggested that the increased marketability of tax titles is due to legislative enactments providing for inexpensive and clearly deliniated procedures for foreclosure plus subsequent case law upholding such statutes. Langsdorf, *Urban Decay, Property Tax Delinquency: A Solution in St. Louis,* 5 URBAN LAW. 729, 738-41 (1973).

90. On the issue of prospective application of constitutional decisions, the United States Supreme Court has stated:

> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later over-

possession of the state or the original tax sale purchaser.[91] However, the instant court provided no such qualification to its decision. As a result, the effect of the principal case on Michigan's tax deeds is unclear, particularly after third party rights have intervened. Further litigation will be necessary to clarify the status of Michigan tax deeds.[92]

The requirement of adequate notice should be extended to all provisions of the Michigan Property Tax Act. Further, once the state has required notice of that right to be mailed to interested parties, it should be written in a form that clearly informs those parties of that right.[93] Both the lack of notice and the inadequacy of the notice creates undue hardship for the property owner affected by the tax foreclosure proceedings. In the instant case, the residential property was taken for taxes owed totaling $35.82.[94] Certainly, equity re-

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> ruled, are law none the less for immediate transactions. Indeed, there are cases intimating, too broadly (cf. *Tidal Oil Co. v. Flanagan, supra*), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them it if pleases, whenever injustice or hardship will thereby be averted.

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932) (citations omitted).

91. In situations where the state or the original tax sale purchaser has sold the property to a third party, one commentator has stated that "*Dow v. State* is distinguishable upon its facts . . . because there the state had not sold the lands, and no rights of a third party were involved." *Land Title Standards Revised, supra* note 89, at 732. *Compare* the principal case, *with* Blunt v. Auditor General, 324 Mich. 675, 37 N.W.2d 671 (1949) and Dean v. Department of Natural Resources, 61 Mich. App. 669, 233 N.W.2d 135 (1975), *rev'd*, 399 Mich. 84, 247 N.W.2d 876 (1976).

92. In Wright v. Constructive Land Co., Civil No. 74-038072 (Cir. Ct., Wayne County, Mich., 1974), plaintiffs, in a class action, claimed that the notice of the redemption right that property owners receive from private tax sale purchasers is inadequate and does not provide the interested parties with any real notice. Summary judgment was granted for the defendants, but the Michigan Court of Appeals reversed and remanded in light of the principal case. Wright v. Constructive Land Co., (Mich. Ct. App., Aug. 27, 1976) (per curiam).

More recently, the Michigan Court of Appeals held that a property owner who did not receive mail notice of the tax foreclosure proceedings was deprived of property without due process of law. Though the county had sent a certified letter to the plaintiff after the sale which was returned by the post office, the court applied the due process standards set forth in the principal case, and held that presale notice to the occupant of the property is required. The court also affirmed the trial court's order that the property be reconveyed to the plaintiff upon payment to the defendant of expenses incurred in managing the property. Fladger v. Detroit Non-Profit Housing Corp., Civil No. 25642 (Mich. Ct. App., Nov. 29, 1976) (unpublished opinion).

93. *See* Wright v. Constructive Land Co., Civil No. 74-038072 (Cir. Ct., Wayne County, Mich. 1974).

94. 396 Mich. 192, 195, 240 N.W.2d 450, 452 (1976).

quires the state to give clear and simple mail notice to interested parties.

Since the instant court's decision, the Michigan state legislature has amended the Property Tax Act to require, among other things, that mail notice of the tax sale and the right of redemption be sent to all persons of record with an interest in the land as well as to the occupant of the land.[95] These provisions state, however, that failure to receive or serve this notice does not invalidate the foreclosure proceedings.[96] Under the holding of the principal case, this qualifiying provision is constitutionally suspect. Certainly, if notice by publication is inadequate, the failure to serve any notice at all is insufficient under due process standards.[97]

The foreclosure proceeding is the end product of a real property tax statutory scheme that is confusing and provides for rights with which few persons are familiar.[98] Fortunately, some of the undue hardships created may be alleviated by recent state legislative amendments[99] which would place an affirmative duty upon the state to contact delinquent taxpayers, inform them of their rights and obligations and assist them if they are suffering from financial hardship or a lack of understanding of the procedures.[100] With respect to tax sale

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95. MICH. COMP. LAWS ANN. §§ 211.61(a), .73(c) (Supp. 1977).

96. *Id.* Both of these sections provide in pertinent part that "[f]ailure to receive or serve the notice or a defect in the notice shall not invalidate the proceedings under the auditor general's petition and the decree of the circuit court, in foreclosure and sale of the lands for taxes."

97. As noted by the instant court:

> [I]t would satisfy constitutional requirements if the state were to adopt a procedure providing for (i) ordinary mail notice before sale to the person to whom tax bills have been sent and to 'occupant' . . . .

396 Mich. 192, 212, 240 N.W.2d 450, 460 (1976). See also note 28 & accompanying text *supra*.

98. An example of this is the poverty exemption under the Michigan General Property Tax Act, MICH. COMP. LAWS ANN. § 211.7 (1968). Under the statute a property owner must apply for the exemption before his taxes become delinquent. Few property owners, however, ever become aware of this provision. For example, in 1974, in the city of Detroit, only 170 persons applied for the poverty exemption. McIntosh, *The Michigan Property Tax Dilemma* (1975) (unpublished paper on file at the WAYNE LAW REV. office). As an example of the hardship such procedures create, see an article entitled *$15,685 Tax Deals Worth $3.4 Million*, The Detroit News, October 31, 1974, § A at 3, describing how one corporate tax lien buyer acquired 345 parcels of inner-city realty: "[a]fter legally acquiring ownership of the properties, the company has threatened to evict the occupants, many of whom are old, poor and apparently unaware of the complicated proceedings under which their homes were taken."

99. See notes 37-39 & accompanying text *supra*.

100. A 1976 amendment requires that when proof of notice on an improved residential parcel is filed:

> The county clerk shall forward a copy of the proof of notice to the county

proceedings the instant court's decision provides a long overdue finding that notice by publication is inadequate under constitutional due process standards. The fact that such notice has been permitted to continue so long is not so much a showing of its logic or doctrinal strength as it is a reflection of the unwillingness of the courts to change long held precedent. The state legislature should respond to this decision by further reforming Michigan's Property Tax Act before other provisions fall under similar constitutional attacks.

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department of social services, which shall make an attempt to contact the owner and occupant of the property to determine if the owner or occupant is in need of assistance or protection of the court.

MICH. COMP. LAWS ANN. § 211.140(a) (Supp. 1977). A report of the findings by the county must be filed with the court, but "[f]ailure to contact the owner or occupant or to file a report shall not invalidate the proceedings." *Id.*