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Constitutional Law -- Tax Sales: Notice to Interested Parties

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Constitutional Law—Tax Sales: Notice to Interested Parties

When a taxpayer fails to pay his property taxes, the taxing authority may have the power to sell the property to recover the delinquent taxes. The taxing authority generally begins the process by placing a tax lien on the property. Such a tax lien may then be sold to a private purchaser or kept by the taxing authority. In either case, the property owner has a redemption period during which he can redeem his property by paying the taxes owed. If the property owner does not redeem his property within the redemption period, the tax lien may be foreclosed and the property owner's interest permanently lost.[1] Since tax sales may deprive owners of their property, the tax sale process must comply with due process requirements under the fifth and fourteenth amendments to the United States Constitution[2] as well as the due process requirements of most state constitutions.[3] Among the requirements of due process for the affected party are notice of the proceeding against him and the chance to be

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1. North Carolina's tax sale statute is typical. Failure to pay property taxes may result in an original tax lien vesting in a taxing authority, under N.C. GEN. STAT. § 105-355(a) (1979), which may be kept by the taxing authority, or alternatively, the taxing authority may sell the lien. *Id.* § 105-369 (Cum. Supp. 1983). To foreclose a lien, a private purchaser must proceed under *id.* § 105-374 (1979 & Cum. Supp. 1983). This type of foreclosure proceeds as a judicial action. The lienor files a complaint against the following:

> The listing taxpayer and spouse (if any), the current owner, all other taxing units having tax liens, all other lienholders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property . . . .

Id. § 105-374(c) (1979). Each is to be made a party and served with summons. *Id.* Further, filing of the complaint is *lis pendens*, and thus serves

> as notice of the pendency of the foreclosure action, and every person whose interest in the real property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be bound by all proceedings taken in the foreclosure action after the filing of the complaint in the same manner as if those persons had been made parties to the action.

Id. § 105-374(d). After a judgment of sale, *id.* § 105-374(k), the sale is held "at the courthouse door." *Id.* § 105-374(m).

The taxing authority may use this procedure, or may use the alternative procedure, the "in rem method of foreclosure," *id.* § 105-375 (1979 & Cum. Supp. 1983). The intent of this section, declared on the face of the statute, is to provide "as an alternative to G.S. 105-374, a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all persons, for the requirements of local governments in this State." *Id.* § 105-375(a) (1979). Rather than file a complaint, a taxing authority is empowered to file a certificate disclosing the tax delinquency information with the clerk of the superior court. *Id.* § 105-375(b) (Cum. Supp. 1983). This docketing then "shall constitute a valid judgment against the real property described therein." *Id.* § 105-375(d) (1979). Any time after six months and before two years from the indexing of the judgment, execution will be issued at the request of the tax collector, and the real property will be sold by the sheriff, with certain exceptions not relevant here. *See id.* § 105-375(i) (Cum. Supp. 1983).

2. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."). *Id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

The Supreme Court has held that tax sales are not per se unconstitutional, even if they do not provide the same notice as in a law suit (*i.e.*, a summons). "It involves no violation of due process of law, when it is executed according to customary forms and established usages." Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 239 (1890).

3. *See, e.g.*, N.C. CONST. art. I, § 19 ("No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land.").

heard.[4] The form that this notice must take is a matter of statute, varying from publication and posting to personal service.[5] The United States Supreme Court, when faced with the question of what constitutes adequate notice under the federal constitution, has consistently disfavored publication. Until recently, however, the Supreme Court had not ruled on the acceptability of publication notice to mortgagees in tax sales. In *Mennonite Board of Missions v. Adams*[6] the Court held that, when a mortgagee is to be deprived of his recorded interest in a tax sale, publication notice alone does not meet the requirements of due process.

In *Adams* plaintiff (MBM) sold property in 1973[7] to a purchaser who then mortgaged the property back to MBM. Under the terms of the mortgage, the purchaser-mortgagor was to pay the property taxes. In 1974 the purchaser-mortgagor stopped paying her property taxes, although she continued to make mortgage payments to MBM.[8] The county notified the mortgagor of her tax delinquency and of a procedure to sell her property for nonpayment of taxes. This notice of tax sale, which was required by the Indiana tax sale statute,[9] was sent to the mortgagor in 1977. The county, in compliance with the statute, also posted and had published notice of the tax sale. With his high bid, defendant Adams bought the property at the tax sale on August 8, 1977. A two year redemption period followed the tax sale, during which either mortgagor or mortgagee could have reclaimed the property by paying the county treasurer the total amount of taxes and assessments that the tax purchaser had paid, with interest.[10]

Neither party to the mortgage redeemed the property. Adams received a tax deed at the end of the redemption period.[11] The county auditor again sent notice to the mortgagor—in compliance with the redemption statute—that she

4. "The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citation omitted) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

A different tack was taken by a federal court in Illinois in upholding the constitutionality of that state's tax sale statute on the basis that owners have the chance to redeem their property. Balthazar v. Mari, Ltd., 301 F. Supp. 103 (N.D Ill. 1969).

5. New Jersey, for example, now requires personal service on a landowner against whose property a taxing authority intends to institute an in rem foreclosure action. N.J. STAT. ANN. § 54:5-104.42 (West Supp. 1983). Oregon, on the other hand, expressly codifies the legal presumption that a landowner should always be aware of all legal proceedings that could affect his land, and requires only publication. OR. REV. STAT. § 312.040 (1983). North Carolina requires personal service in a tax foreclosure only if it is in the nature of a judicial sale, but a taxing authority can avoid the rigors of a judicial proceeding by using the alternative in rem tax foreclosure. *See supra* note 1.

6. 103 S. Ct. 2706 (1983).

7. *Id.* at 2708.

8. *Id.* at 2709.

9. IND. CODE ANN. § 6-1.1-24-1 (Burns 1984) provides for the yearly sale of real property on which tax payments are delinquent for fifteen months. The tax assessor must send notice by certified mail of the sale to the owner at his last known address. *Id.* § 6-1.1-24-4.

10. *Id.* §§ 6-1.1-25-1 to -4. The tax sale purchaser thus would receive his investment back.

11. Mennonite Bd. of Missions, Inc. v. Adams, 427 N.E.2d 686, 687 (Ind. Ct. App. 1981), *rev'd*, 103 S. Ct. 2706 (1983).

had thirty days to redeem her property before a deed would issue to the tax purchaser.[12] Again, no notice was sent to MBM, the mortgagee. MBM did not know of the tax sale until the redemption period had run and Adams had received his tax deed. The mortgagor had continued to make mortgage payments to MBM during the redemption period and first informed MBM of the problem almost a week after Adams received his deed.[13]

Adams sued for quiet title on November 1, 1979.[14] The mortgagor did not contest the suit, and the trial court granted summary judgment for Adams. Quiet title for Adams extinguished MBM's lien on the property.[15] MBM challenged the judgment in the Indiana Court of Appeals on the constitutional grounds that it had been deprived of its property interest without due process, and that the tax sale statute's discrimination in favor of property owners denied equal protection to mortgagees.[16] The court of appeals affirmed the judgment for Adams, relying on state law precedent.[17] The court also felt compelled by the presumption that interested parties know the law, and therefore know when their interest is threatened by operation of law.[18] As for MBM's equal protection argument, the court found that discrimination be-

12. IND. CODE ANN. § 6-1.1-25-6 (Burns 1984). The records of the Elkhart county auditor's office show that timely certified mail notice was sent of the 1977 tax sale and expiration of the redemption period in 1979, but that the mortgagor never picked up either mailing. Brief for Appellant at 11 n.8, *Adams*, 103 S. Ct. 2706 (1983).

13. The brief for MBM also suggested "that the prospects of a Mennonite reading a legal notice is [sic] slim at best," noting that "Mennonites seldom become involved in litigation because of their religious beliefs." MBM would thus be less calculated than others to be apprised of a tax sale by publication. Brief for Appellant at 56-57, *Adams*, 103 S. Ct. 2706.

14. MBM had no standing to contest the quiet title suit. Indiana law permitted only defenses of the owner that attacked the alleged failure to pay the tax, that showed the tax had been levied wrongly, or that established that the owner had properly redeemed the property. IND. CODE ANN. § 6-1.1-25-16 (Burns 1984).

15. *Id.* The Indiana Court of Appeals explained: "Under IC 6-1.1-25-4, the execution of the tax deed vests in the grantee a fee simple absolute estate free and clear of all liens. The quiet title action may be instituted to finalize that action, but the tax deed becomes absolute after one year. IC 6-1.1-25-17." *Adams*, 427 N.E.2d at 687 n.4.

North Carolina also imposes a one-year statute of limitations on actions challenging a tax foreclosure. N.C. GEN. STAT. § 105-377 (1979).

16. *Adams*, 427 N.E.2d at 687.

17. *See* First Savs. & Loan Ass'n of Cent. Ind. v. Furnish, 367 N.E.2d 596 (Ind. Ct. App. 1977). In *Furnish* the court of appeals refused to apply Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), to tax lien sales. *See infra* notes 21-22 and accompanying text. As one commentator lamented,

> Unfortunately, the court of appeals failed to consider the obvious fact that tax sales are generally known to be conducted in a careless, haphazard manner which does not produce a fair price for the property. Lack of notice to interested parties more than likely is one of the reasons for low prices at tax sales.

Townsend, *Survey of Recent Developments in Indiana Law: Secured Transactions and Creditors' Rights*, 12 IND. L. REV. 289, 294 (1978).

18. This presumption, which may be most easily referred to as the "caretaker" concept of land ownership, may be traced to the distinction between in personam and in rem actions first expounded by the Supreme Court in Pennoyer v. Neff, 95 U.S. 714 (1877). As the Court stated in Mullane v. Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950): "[T]he state may indulge the assumption that [the property owner] . . . has left some caretaker under a duty to let him know that it is being jeopardized." For a thorough analysis of this theory and other points relevant to notice in tax sales, see Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 (1975).

tween homeowner and mortgage holder was justified.[19]

The United States Supreme Court granted certiorari to consider the question whether the notice provided to MBM under the Indiana tax sale statute met the due process requirements of the fourteenth amendment. The Court held the manner of notice unconstitutional and remanded the case.[20] The Court held that due process required notice under the standard first set down in *Mullane v. Central Hanover Bank and Trust Co*.[21] In *Mullane* the Court had held that, before a process that deprives interested parties of property is instituted, those parties must receive notice "reasonably calculated" to bring the impending process to their attention.[22] Applying *Mullane* to the facts in *Adams*, the Court found that "since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale."[23] The Court reasoned that publication notice serves primarily to inform potential tax purchasers of an upcoming tax sale, but fails to inform those who already have an interest in the property, since they are unlikely to read published notices of tax sales. Nor could a mortgagee rely on his mortgagor for notice if the two are not in privity,[24] and the owner has "failed to take steps necessary to preserve his own property interest."[25] While recognizing that "sophisticated creditors" could monitor newspapers and other sources of published notice, the Court pointed out that some mortgagees might not be so sophisticated or knowledgeable; further, "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional

19. The court noted three considerations: (1) the legislature's concern for the mortgagor-homeowner, as evidenced in the "financial and protective traditions of this society"; (2) the underlying purpose of tax sales (*i.e.*, to collect delinquent taxes); and (3) the expectation that mortgagees, most of whom are in the business of lending money, have taken steps to protect their monetary interests. *Adams*, 427 N.E.2d at 689-90.

20. *Adams*, 103 S. Ct. at 2712.

21. 339 U.S. 306 (1950).

22. *Id.* at 314. The Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . .

Id.

23. *Adams*, 103 S. Ct. at 2711.

24. An Illinois court agreed that mortgagees are to be included among the persons to be notified of tax sales, but it excluded those mortgagees whose mortgages were not in the chain of title because they were given before the acquisition of record title. Landis v. Miles Homes Inc., 1 Ill. App. 3d 331, 273 N.E.2d 153 (1971). This is a more difficult situation than the example of lack of privity; presumably privity would not matter in *Adams* as long as the mortgage was recorded. But if the mortgage is not in the chain of title, the *Adams* dissent's observation becomes relevant, that the tax assessor's "burden is not limited to mailing notice. Rather, the State must have someone check the records and ascertain with respect to each delinquent taxpayer whether there is a mortgage, perhaps whether the mortgage has been paid off, and whether there is a dependable address." *Adams*, 103 S. Ct. at 2715 (O'Connor, J., dissenting). The limits of reasonable ascertainability may be reached when a mortgage is not in the chain of title *and* there is no privity between owner and mortgagee.

25. *Adams*, 103 S. Ct. at 2711.

obligation."[26]

The Court stated the rule of *Adams* in broad language: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practices, if its name and address are reasonably ascertainable."[27] This language indicates that the rule of actual notice for due process should apply not only to mortgagees but also to holders of mineral or water rights, or of any other recorded interests.[28] More significantly, the *Adams* rule should apply to the most obvious interested party: the owner. The extent to which the Supreme Court intended *Adams* to require actual notice to owners before loss of property in a tax sale, however, is unclear.

A dissent by three Justices strongly criticized the breadth of the Court's rule in *Adams*, finding the rule "squarely at odds" with the approach to sufficiency of notice given in *Mullane*.[29] "The plain language of *Mullane* is clear," said the dissenting Justices, "that the Court expressly refused to reject constructive notice as *per se* insufficient."[30] According to the dissent, the *Mullane* test of reasonableness is not a formula, but rather a balancing of the state's interest against the individual's fourteenth amendment interest. In *Adams* the dissent would have found that the state's vital interest in collecting property taxes outweighed MBM's mortgage interest, especially since "the Board could have safeguarded its interest with a minimum amount of effort."[31] In the dissent's view, the Court did not merely extend *Mullane* and its descendant notice cases; it rejected them.

The starting point for evaluating the *Adams* decision in the context of due process law must be *Mullane*, the 1950 case in which the Supreme Court first attacked the sufficiency of notice by publication.[32] In *Mullane* the bank proceeded to settle certain trust accounts. Rather than mail notice of this settlement to the beneficiaries, the bank relied on publication of the settlement in newspapers. The Court held:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably cal-

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26. *Id.* at 2712.

27. *Id.*

28. *See, e.g.*, Pickens v. Adams, 7 Ill. 2d 283, 131 N.E.2d 38 (1955) (usual tax redemption law applies to mineral estates); Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972) (owners of mineral interests in land required to take note of taxing statutes and disposition of their interests). This note will refer only to mortgagees, but much of the analysis also applies to owners of other interests in property.

29. *Adams*, 103 S. Ct. at 2713 (O'Connor, J., dissenting).

30. *Id.* at 2714 (O'Connor, J., dissenting).

31. *Id.* at 2716 (O'Connor, J., dissenting).

32. *Mullane* also indicated that the Court was ready to discount the importance of the "historic antithesis" between in rem and in personam actions. Noting that the distinction was rooted in classifications drawn by Roman law, the Court said it did "not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis." The interests of the state would be sufficient to allow it "to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." *Mullane*, 330 U.S. at 312-13.

> culated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.[33]

The bank regularly mailed beneficiaries statements of the trust accounts at issue, and the Court found it reasonable and practical for the bank trustees to include notice of proposed settlement in one of the regular statement mailings. The trustees could not simply rely on publishing notice of the settlement in newspapers: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper. . . ."[34] Merely going through the motions of giving notice to the world would not suffice if it was reasonable to give actual notice. The *Mullane* Court did not go as far as to deny the constitutionality of notice by publication in all circumstances. The Court noted that if a procedure provided "due regard for the practicalities and particularities of the case,"[35] the constitutional requirements of due process would be met by publication notice.[36]

The Supreme Court applied the *Mullane* rule in two subsequent condemnation cases and found notice by publication insufficient to satisfy due process requirements in that context. In *Walker v. City of Hutchinson*[37] the Court disallowed the city's condemnation of a piece of land after the city had provided the owner only publication notice. The Court noted: "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property."[38] In a later condemnation case, *Schroeder v. City of New York*,[39] the city published in newspapers notice of a proposed waterway alteration and also posted notice near, but not on, the complaining landowner's property. The Court also found this form of notice insufficient under *Mullane*: "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."[40]

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33. *Id.* at 314.

34. *Id.* at 315.

35. *Id.* at 314.

36. Justice O'Connor's strong dissent in *Adams* stresses the balancing approach required to fit the particularities of the situation:

> Whether a particular method of notice is reasonable depends on the outcome of the balance between the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.' . . . It is the primary responsibility of the State to strike this balance, and we will upset this process only when the State strikes the balance in an irrational manner.

Adams, 103 S. Ct. at 2713 (O'Connor, J., dissenting) (quoting *Mullane*, 339 U.S. at 314). Justice O'Connor argues that the totality of the situation favors an assumption that one whose property interest might be threatened should make the effort to safeguard that interest; the state has a "vital interest" in collecting property taxes "in whatever reasonable manner that it chooses." *Id.* at 2715.

37. 352 U.S. 112 (1956).

38. *Id.* at 116.

39. 371 U.S. 208 (1962).

40. *Id.* at 212-13.

In both tax sales and condemnations property is taken. Therefore, it is logical that both kinds of actions must meet the requirements of due process. The two actions differ, however, in one essential: condemnation follows from a unique government decision; tax sales follow from the taxpayer's failure to meet a regular obligation. A property owner does not expect a condemnation proceeding, so he should not be expected to watch newspapers for announcements of condemnations affecting his land. Tax sales, on the other hand, result from delinquency in meeting a regular requirement, payment of property taxes. As the dissent in *Adams* argues, the regularity of the tax duty puts the taxpayer on notice that he risks losing his property if he fails to pay his tax.[41] Putting aside for the moment the validity of this theory as it applies to owners, it clearly does not apply to interested but unknowing parties—for instance, mortgagees like MBM—who do not know that taxes have fallen in arrears. Since such parties have property interests protected by the Constitution, it would seem that *Adams* at least provides a clear case rule: If the mortgagee's name and address are reasonably ascertainable, he must be provided actual notice before he can be deprived of his interest in a tax sale proceeding. The remainder of this note will point out, however, that *Adams* is not the last word on the sufficiency of notice under due process in a tax sale for either mortgagees or owners.

Adams specifically held unconstitutional the provision of the Indiana tax sale statute that permitted a tax purchaser to perfect title in property bought at a tax sale without requiring actual notice to a mortgagee of record.[42] "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."[43] The Court based this ruling squarely on *Mullane*. Publication serves primarily to inform potential purchasers of a tax sale and is not "reasonably calculated" to inform the mortgagee of his impending loss. Nor is publication a reasonable means of notifying a mortagee of a tax sale when mail service is available.[44]

The Indiana tax sale statute required, before a tax sale, notice by certified

41. *Adams*, 103 S. Ct. at 2716 (O'Connor, J., dissenting).

42. *Id.* at 2712. Indiana only required that the owner of the property be given notice of the tax sale by mail service, IND. CODE ANN. § 6-1.1-24-4 (Burns 1984), and an opportunity to redeem. *Id.* § 6-1.1-25-6(c).

43. *Adams*, 103 S. Ct. at 2711.

44. *Id.* It must be assumed that the Court is not indulging in irony when it refers to "the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed." *Id.* at 2711 n.4 (quoting Grannis v. Ordean, 234 U.S. 385, 397-98 (1914)). Indeed, one may have full faith in the efficiency of mail service in our country and nonetheless question whether the Court expects too much of it. In Greene v. Lindsey, 456 U.S. 444 (1982), the Court referred to mail service as "an inexpensive and efficient mechanism," which was more reliable than the procedure of posting notice on a tenant's door in a housing project. *Id.* at 455. Notices posted on doors, the Court noted, were sometimes removed by children or other tenants. *Id.* at 453. The dissent in *Greene*—again by Justice O'Connor—criticized the "total absence of any evidence in the record regarding the speed and reliability of the mails," *id.* at 456 (O'Connor, J., dissenting), and pointed out that delivered mail is often subject to tampering and theft, *id.* at 460 (O'Connor, J., dissenting).

mail to the tax property's owner.[45] After the tax sale, the statute required notice to the owner of his right to redeem the property.[46] As in twenty-one other states,[47] publication was the only form of notice that Indiana required to other parties, including mortgagees. Presumably *Adams* will control cases arising in those states in which a tax sale could ultimately perfect title in the purchaser and the mortgagee could lose his interest without any actual notice.[48]

The force of this conclusion, however, is reduced by the Court's failure to reach the constitutionality of a significant post-*Adams* change in the Indiana tax sale statute. In 1980 Indiana added a provision that provided for notice by certified mail to mortgagees who annually requested such notice of the tax assessor and paid a nominal fee to cover the costs of such notice.[49] Since the events in *Adams* occurred under the older provisions, the Court explicitly refrained from ruling on the constitutionality of notice by request.[50] At least eight states currently provide for notice by mailing to mortgagees if the mortgagees request such notice in advance of any potential tax sale.[51] In light of

45. IND. CODE ANN. § 6-1.1-24-4 (Burns 1984) (to last known address at least 21 days before sale date).

46. *Id.* § 6-1.1-25-6 (30 to 60 days before execution of tax deed).

47. ALA. CODE § 40-10-12 (1975); ARIZ. REV. STAT. ANN. § 42-388 (1980); ARK. STAT. ANN. § 84-1103 (Supp. 1981); COLO. REV. STAT. § 39-11-102 (1982); DEL. CODE ANN. tit. 9, §§ 8724, 8772 (1974 & Supp. 1982); D.C. CODE ANN. § 47-1301 (Supp. 1983); KY. REV. STAT. § 134.440 (1982); LA. REV. STAT. ANN. § 47-2180 (West Supp. 1984); MD. ANN. CODE art. 81, §§ 75, 120 (1957 & Supp. 1983); MO. ANN. STAT. § 140.170 (Vernon Supp. 1984); NEB. REV. STAT. § 77-1804 (1981); NEV. REV. STAT. § 361.565 (1983); N.M. STAT. ANN. § 7-38-66 (1983); N.Y. REAL PROP. TAX LAW §§ 1002, 1014 (McKinney 1972 & Supp. 1983-1984); OHIO REV. CODE ANN. § 5721.03 (Page Supp. 1982); OKLA. STAT. tit. 68, § 24312 (Supp. 1983-1984); TENN. CODE ANN. §§ 67-5-2502, -2514 (1983); TEX. TAX CODE ANN. § 34.01 (Vernon 1979); UTAH CODE ANN. § 59-10-29 (Supp. 1983); VA. CODE § 58.1117.1 (Supp. 1983); WASH. REV. CODE ANN. § 84.64.030 (1983-1984).

In at least one state, Missouri, consideration of *Adams* has led to a finding of unconstitutionality in the tax sale statute's notice provision. In Lohr v. Cobur Corp., 654 S.W.2d 883 (Mo. 1983) the state supreme court ruled that a deed of trust beneficiary's interest in property would not be cut off by a tax sale when the beneficiary had received only publication notice. As Justice Blackmar observed in a concurring opinion, "To say that [*Adams*] poses problems is to speak mildly." *Id.* at 887 (Blackmar, J., concurring).

48. *Adams* had the immediate effect of causing the Supreme Court to vacate judgments in cases from Pennsylvania and Nevada. In First Pa. Bank, N.A. v. Lancaster County Tax Claim Bureau, 44 Pa. Commw. 301, 404 A.2d 709 (1979), *appeal dismissed*, 498 Pa. 122, 445 A.2d 97 (1982), *vacated and remanded*, 103 S. Ct. 3528 (1983), the Pennsylvania courts had upheld the constitutionality of the state's tax sale procedure. The Nevada case, Continental Co. v. Moseley, 98 Nev. 476, 653 P.2d 158 (1982), *vacated and remanded*, 103 S. Ct. 3530 (1983), did not involve a tax sale, but rather notice to creditors with claims against a decedent's estate. Nevada law required only publication notice to creditors, which the plaintiff argued violated due process requirements. The expansion of the *Adams* rule to cover cases arising in probate indicates that the case has applicability well beyond the confines of tax sale law. *See also* Federal Deposit Ins. Corp. v. Morrison, 568 F. Supp. 1240 (N.D. Ala. 1983) (applying *Adams* to foreclosure of mortgage by a federal agency). If a state's tax sale law does require notice to mortgagees, and such notice is not given, his lien will survive the tax sale and remain a lien on the property now owned by the tax purchaser. *See, e.g.*, Santa Cruz v. State, 223 Miss. 617, 78 So. 2d 900 (1955) (failure to give notice to lienor if required may make sale void as to him though otherwise valid as to owner).

49. IND. CODE ANN. § 6-1.1-25-4.2 (Burns 1984).

50. *Adams*, 103 S. Ct. at 2708 n.2.

51. *See* ALASKA STAT. § 29.53.260 (1972); FLA. STAT. § 197-072(2) (Supp. 1982); HAWAII REV. STAT. §§ 246-57, -58 (1976); IDAHO CODE § 63-1126B(4)(c) (Supp. 1981); MASS. ANN. LAWS

the decision in *Adams* that holds publication alone to be insufficient notice, it is not unrealistic to assume that some of the publication-only states will adopt request-notice provisions such as those now in the Indiana tax sale statute.

Adoption of such statutory provisions, however, would not banish the kind of due process problem raised in *Adams*. It is arguable that adding request-notice provisions to state tax sale statutes will satisfy the broad rule that any interested party must receive actual notice of a tax sale if his name and address are reasonably ascertainable. Request-notice statutes in effect put the mortgagee in the position of the taxpayer under the doctrine that regularity of tax assessments is notice in itself. The difference is that the taxpayer receives his assessment by operation of the tax law, while the mortgagee in a request-notice jurisdiction must actively arrange for notification of a tax sale affecting his interest. Putting such a burden on the mortgagee creates a minimal supplemental burden on the tax assessor. Although the tax collector must now send out more notifications before a tax sale, at least the number of such notifications will likely be limited[52] by the number of people who request the notice,

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ch. 60, § 38 (Law. Co-op. 1978); N.C. GEN. STAT. § 105-375(c) (Cum. Supp. 1983); N.D. CENT. CODE § 57-27 02 (1983) (for notice of redemption); OR. REV. STAT. §§ 312.140, .150 (1983).

N.C. GEN. STAT. § 105-375(c) (Cum. Supp. 1983) provides as follows:

> The tax collector filing the certificate . . . shall, at least 30 days prior to docketing the judgment, send a registered or certified letter, return receipt requested, to the listing taxpayer at his last known address, and to all lienholders of record who have filed with the office of the tax collector of the taxing unit or units in which the real property subject to his lien is located a request that he be notified of the docketing of a judgment under the procedure set forth in this section, stating that the judgment will be docketed and that execution will be issued thereon in the manner provided by law. . . . The request from the lienholder shall be made on a form supplied by the tax collector and shall describe the real property, indicate whose name it is listed in for taxation, and state the name and mailing address of the lienholder. If within 10 days following the mailing of said letters of notice, a return receipt has not been received by the tax collector indicating receipt of the letter, then the tax collector shall have a notice published in a newspaper of general circulation in said county once a week for two consecutive weeks directed to, and naming, all unnotified lienholders and the listing taxpayer that a judgment will be docketed against the listing taxpayer. The notice shall contain the proposed date of such docketing, that execution will issue thereon as provided by law, a brief description of the real property affected, and notice that the lien may be paid off prior to judgment being entered.

See Washington, *Forty Acres, No Mule: A Survey of Land Laws and How They Affect Blacks in Two Southeastern States*, 5 N.C. CENT. L.J. 36 (1973). The author concludes that "[t]he procedure as outlined in N.C. GEN. STAT. § 105-375 reeks of unconstitutionality." *Id.* at 58.

52. Some New York cases offer illustrations of the hazards facing those who fail to register with the tax collector. Although New York has no state statute providing for request of notice, the New York City code does have such a provision. In Tobias v. College Towne Homes, 110 Misc. 2d 287, 442 N.Y.S.2d 380 (1981), plaintiff was the assignee of a lien from the Federal Deposit Insurance Corporation (FDIC), which had taken it as receiver for a failed bank. The FDIC had failed to register with the tax collector under the request-notice section of the city code, so the assignee was not entitled to notice.

> Because of this failure to register its interests in the property, the FDIC was clearly not entitled to have tax bills or notice of foreclosure action mailed to it.
>
> To hold otherwise would not only be in contravention of the statutory provisions, but it would also place a wholly unreasonable and impractical burden upon the City to give written notice of a tax foreclosure to interested persons who are unknown and unidentified to the City's finance administator.

Id. at 291, 442 N.Y.S.2d at 384 (citations omitted). In Lily Dale Assembly, Inc. v. County of Chautauqua, 72 A.D.2d 950, 422 N.Y.S.2d 239 (1979), plaintiff had been record owner of a piece

and in any case the tax collector need search no further than the face of the request to ascertain who is to receive notice. But, however attractive the request-notice statutes may appear to taxing authorities, the statutes are likely to prove only a stopgap in meeting the requirements of due process for mortgagees of a tax sale property. The Supreme Court is unlikely to sympathize with the complaints of tax assessors that any requirement of research in the recorder's office would impose too great a burden on them. In *Adams* the Court clearly demanded that tax officials check for recorded mortgages; constructive notice will be acceptable only when the mortgagee is not "reasonably identifiable."[53] A more compelling basis for arguing that request-notice statutes will not satisfy due process requirements after *Adams* is that the *Adams* Court was clearly concerned with protecting the interests of parties who are less knowledgeable about complex transactions.[54] Sophisticated mortgagees undoubtedly would take any steps necessary to ensure receiving notice of an impending tax sale but the "least sophisticated creditor"[55] is likely to remain unaware that he can and should request such a safeguard.[56] This reasoning suggests that the limited protection provided by the request-notice statute does not satisfy the *Mullane-Adams* due process requirements. Knowledgeable or not, every mortgagee is entitled to notice "reasonably calculated" to reach him, provided his name and address are available in the public records.

The facts of *Adams* portray the fundamental distinction between owners and mortgagees of property for purposes of the notice required by due process. Mennonite Board of Missions, the mortgagee, did not know that taxes were falling in arrears on the mortgaged property; MBM had no notice from the tax

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of land for 65 years, but he was not listed on the tax assessment rolls. The appellate division ruled that the assessor had no duty to make a "diligent inquiry," *id.* at 952, 422 N.Y.S.2d at 241, into the identity of the property owners in order to sell the land for taxes.

Even duly registering on the tax rolls may not suffice in New York. In Brock v. Holmes, 49 A.D.2d 1011, 373 N.Y.S.2d 924 (1975), the taxpayer and his son had the exact same name, and the appellate division ruled that the defendant tax collector had complied with requirements of notice to a listing taxpayer by sending notice of a tax sale to the name and address on his records.

> If the notice failed to reach plaintiff it was because of his indiscriminate use of the identical name of the plaintiff by his son who was living in the same village. By doing so, plaintiff must be held to have assumed the risk that an otherwise reasonable service, and one that had provided actual notice to him of a prior default, could go astray and be received by his son.

Id. at 1012, 373 N.Y.S.2d at 925.

53. *Adams*, 103 S. Ct. at 2711.

54. *Id.* at 2712. The Indiana court of appeals reasoned that MBM "freely chose to enter an area of sophisticated financial investment and thereby necessarily chose to incur the risk inherent therein. The State cannot reasonably be expected to assume the risk of its citizens' business ventures." *Adams*, 427 N.E.2d at 690 n.9. It might be noted that the MBM is a nonprofit, charitable organization. Tax purchaser Adams, on the other hand, if not sophisticated, was certainly experienced. Two months before the Indiana court of appeals ruling in the MBM case, Adams won an appeals court decision in another case in which the owner had insufficiently pleaded lack of notice. By not placing the notice failure in issue, the owner had not preserved his exception. Lenard v. Adams, 425 N.E.2d 211 (Ind. Ct. App. 1981).

55. *Adams*, 103 S. Ct. at 2712.

56. Even an institutional, for-profit lender may fail to request notice. Thus, in Guaranty Mortgage Corp. v. Town of Burlington, 385 Mass. 411, 432 N.E.2d 480 (1982), a mortgage company had not taken advantage of the request notice provision, *see supra note* 51, but the tax sale was upheld despite the fact that the company did not receive notice.

assessor.[57] The mortgagor, however, did have notice from the tax assessor, as the Indiana tax sale statute required. In a significant number of other states, it is possible to conduct a tax sale to cut off an owner's right of redemption without any notice to the owner beyond publication.[58] As noted above, the regularity of the tax duty places the owner on notice that he may lose his property if he fails to pay the tax.[59] The Supreme Court has not yet squarely faced the question whether notice by publication in tax sales meets the due process test for property owners.[60] The issue has arisen in at least three cases appealed to the Supreme Court without resolution. An appeal from a West Virginia case was dismissed,[61] and the decision in an Oklahoma case was vacated on other grounds.[62] The appeal from a New York case, *Botens v. Aronauer*[63] offered a particularly egregious example of publication's failure to put an owner threatened by a tax sale on notice. In *Botens* a surviving joint tenant had requested the tax collector to send to her all future bills and other correspondence, and she had given the collector her address. Despite these precautions, the collector found an outstanding tax debt on the property and sent a redemption bill to the deceased joint tenant. This bill was returned to the collector's office, and no further action was taken on it. Moreover, although both the property and the joint tenants were located in a city of thirty thousand with its own widely read newspaper, the collector placed notice of the tax sale in two newspapers in a small village twenty miles away. Each of these news-

57. *Adams*, 103 S. Ct. at 2709.

58. In 1975 21 states allowed a tax sale to be conducted to final cutoff without actual notice to the owner. Note, *supra* note 18, at 1506. Today, the number of states has decreased slightly, mostly because of judicial decisions. *See infra* notes 67-69.

59. *See* Note, *supra* note 18, at 1511-13.

60. The Court has faced a due process challenge of a tax sale. It reversed a lower court ruling that had upheld a tax sale when the property owner was incompetent. The tax assessor knew the owner was incompetent, yet took no steps to appoint a committee for her until after the foreclosure judgment. Covey v. Town of Somers, 351 U.S. 141 (1956).

61. Pearson v. Dodd, 221 S.E.2d 171 (W. Va. 1975), *appeal dismissed*, 429 U.S. 396 (1976). The owner of an oil and gas interest, which was unrecorded after the 1937 purchase from the owner's son, lost it through a tax sale. The state supreme court upheld the tax sale statute, W. VA. CODE § 11A-4-12 (1983), under which an owner has the right of redemption for only 18 months after a tax sale. Thereafter, the owner can only petition for redemption.

62. Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), *vacated on other grounds*, 414 U.S. 100 (1974). Defendant Paschall owned a 15/16 mineral interest in land. Neither surface nor mineral owners paid the property taxes on the land in 1952; the following year the state bought the tax lien (original sale) and later sold the lien to Paschall's cross-defendant (resale). Plaintiff Christie-Stewart, Inc., leased the oil and gas rights from both codefendants and sued for quiet title to the lease and royalty rights. The Oklahoma court ruled against Paschall, holding that every Oklahoman with an interest in land was charged with knowing that he owed taxes and that land might be sold for failure to pay tax. Further, Paschall was charged with notice of the time and place where the property would be sold. *Id.* at 1267. *Mullane* would have applied, the court said, if the purchaser had applied for a treasurer's certificate deed, because the timing of such an application would be strictly up to the purchaser.

> In Resales the County Treasurer gives notice by publication (to owners who already statutorily know the time and place of the sale) that the land will be sold at the time and place specified by statute unless the taxes are paid. Thus the publication notice of the Resale is supplemental to other action which had conveyed a warning to the owners of interests in the land; a traditional and acceptable use of publication.

Id. at 1268.

63. 38 A.D.2d 969, 331 N.Y.S.2d 816 (1972), *aff'd*, 32 N.Y.2d 243, 298 N.E.2d 73, 344 N.Y.S.2d 892, *appeal dismissed*, 414 U.S. 1059 (1973).

papers had a circulation of less than two hundred.[64] The New York courts upheld the sale. Even though the owner knew nothing of the sale until she had lost her property, the sale had conformed with the requirements of the state tax sale statute. The United States Supreme Court dismissed the appeal,[65] thus avoiding an opportunity to apply *Mullane* to a case in which notice by publication had almost certainly not been "reasonably certain to inform" the affected party.[66]

A few state courts have ventured where the Supreme Court would not. The highest courts of Michigan,[67] Hawaii,[68] and New Jersey[69] have ruled portions of their state tax sale statutes unconstitutional when the statute required no more than publication notice to a property owner before a tax sale became final. Each case was decided on the basis of *Mullane*.[70] Should *Mullane* apply to owners as well as mortgagees of property when a tax sale is to be held, or a tax deed issued? *Adams*, with its broad reference to proceedings "which will adversely affect the liberty or property interests of *any* party,"[71] should be read

64. The opinion of the trial court, Botens v. Aronauer, 66 Misc. 2d 5, 319 N.Y.S.2d 698 (1971), *aff'd*, 38 A.D.2d 969, 331 N.Y.S.2d 816 (1972), *aff'd*, 32 N.Y.2d 243, 298 N.E.2d 73, 344 N.Y.S.2d 892, *appeal dismissed*, 414 U.S. 1059 (1973), explains the choice of newspapers. County law required publication of legal notices in two newspapers representing the principal political parties of the county supervisors. The choice of two small village newspapers on the basis of political partisanship simply conformed to the law.

65. Botens v. Aronauer, 414 U.S. 1059 (1973) (lack of a substantial federal question).

66. *Mullane*, 339 U.S. at 315.

67. Dow v. State, 396 Mich. 192, 240 N.W.2d 450 (1976). Neither the Dows nor the Smiths, the Dows' landlords, were given notice of the tax sale. Mrs. Smith was sent notice of redemption, but she took no action on it, and did not advise her husband. The court held that since the Smiths' property interest was readily identifiable, they were entitled to have the state provide them with notice of the tax sale's pendency. The court also held that if the Dows' interests were recorded, or if the assessor or treasurer was aware of their interests, they were also entitled to have notice of the tax sale. *Dow* is noted in Note, *Notice by Publication is Constitutionally Inadequate in a Tax Sale Proceeding*, 24 WAYNE L. REV. 1463 (1978).

68. Klinger v. Kepano, 635 P.2d 938 (Hawaii 1981). The original patentee of a piece of land died and left it to his issue. The land was sold for failure to pay regular property taxes in 1962. The tax purchaser sold the land in 1971 to plaintiffs Klingers. When the Klingers first visited the property in 1974, they found the original owners still inhabiting it, and filed an ejectment suit in 1975. The court held that failure to notify the original owner's heirs, who were listed in the tax department, was a denial of due process and invalidated the tax sale. The court indicated that, under *Mullane*, even if the tax office had listed no other information about the owners than that the owner was a decedent's estate, further inquiry would have been required.

69. Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909 (1977). New Jersey's In Rem Tax Foreclosure Act, N.J. STAT. ANN. § 54:5-104.29 to -104.71 (West Supp. 1983), required only publication and posting. *Id.* § 54:5-104.42. The corporate property owner received letters from the tax collector warning that it was in arrears on its property taxes, but not that a tax sale was pending. In holding the tax sale invalid, the court said that after *Mullane* "it is clear that newspaper publication would suffice only where it is not reasonably possible or practicable to give more adequate notice." *Township of Montville*, 74 N.J. at 17, 376 A.2d at 917. The statute was amended by 1979 N.J. Laws, ch. 414. Beginning in 1980, service was required in addition to publication and posting.

70. *Mullane* was also the basis of the decision in Laz v. Southwestern Land Co., 97 Ariz. 69, 397 P.2d 52 (1964) (en banc). The tax purchaser notified, as required under the tax sale statute, the owner, but not the mortgagee, that he intended to file for a tax deed. The purchaser argued to the court that the tax sale was an in rem procedure, and therefore he could rely on publication notice. The court ruled the in rem argument invalidated by *Mullane*. Moreover, the purchaser could not claim that the mortgagee's name and address were not readily ascertainable, since he had joined the mortgagee in a quiet title action and served process on him.

71. *Adams*, 103 S. Ct. at 2712.

as requiring actual notice to owners as well as mortgagees. It is difficult to imagine the Court encouraging taxing authorities to favor mortgagees over owners; at least the owners should be entitled to equal protection. As the Indiana Court of Appeals noted in justifying preferential treatment for owners, "traditionally, the law has ensconsed the rights of homeowners in the safety of significant procedural protections."[72]

A more difficult question is whether the regularity of tax bills puts the owner of property on notice that failure to pay will lead to a tax sale. Put another way, is it reasonable to expect the taxpayer to know that the government will sell his property, worth thousands of dollars, for delinquent taxes of perhaps a few hundred dollars? A 1975 article on this subject offers the most logical answer:

> The only basis for the presumption that the delinquent taxpayer knows what will happen is the general legal fiction that "everyone knows the law." In reality, this is a rather dubious assumption. Since landowners will have had prior experience with the annual assessment of taxes on their property, it is safe to assume that they will know that taxes are due each year on their land. But, since most owners pay their taxes every year, they will not have had prior experience with the tax sale system; it is doubtful that they will know the consequences of missing a tax payment.[73]

In other words, the presumption of notice to owners based on their regular receipt of a property tax bill should not obviate, under the due process rules set out in *Mullane* and *Adams*, the need to provide actual notice to owners threatened by a tax sale.

In sum, the effect of a tax sale is usually harsh for those who lose their property interest, because in most instances the property is sold to pay an amount of back taxes far lower than the value of the property.[74] This disparity will result no matter what kind of notice interested parties receive, if they take no steps to save their property. Accepting, however, the necessity of tax sales as means of both enforcement and collection, any taking of land for satisfaction of a tax debt should comply with the requirements of due process set forth in *Mullane*. *Mullane*'s rejection of publication notice reflected the Court's awareness that publication simply did not serve the modern property owner with the adequate warning that he might need to take steps to protect his property from potential loss. *Adams* reflected the Court's continuing concern that notice by publication alone often amounts to no notice at all. The decision

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72. *Adams*, 427 N.E.2d at 689-90.

73. Note, *supra* note 18, at 1511-12.

74. A typical example is Wager v. Lind, 389 F. Supp. 213 (S.D.N.Y. 1975), in which plaintiff's house and lot, valued at $15,000, were sold for $174, the amount of the tax delinquency. The judge in *Wager* distinguished *Botens* on the grounds that in that case, the owner at least knew the procedure for tax redemption; in *Wager*, a "sharp-eyed buyer" had taken advantage of the inexperience of a "widow of modest background." The judge ruled that a substantial federal question had been presented, and called for the seating of a three-judge court. Unfortunately, there was no further reported action on what might have been the most direct route to a Supreme Court decision on the need for notice to owners in tax sales.

should serve notice on taxing authorities that those with an interest in property must have a fair chance to protect that interest, and to do so, they must have reasonable notice of a tax sale.

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