Missouri Law Review

Volume 49
Issue 2 *Spring 1984*

Article 8

Spring 1984

Due Process Notice Required for Real Estate Tax Sales

Vicki A. Dempsey

DUE PROCESS NOTICE REQUIRED FOR REAL ESTATE TAX SALES

Mennonite Board of Missions v. Adams[1]

Every year, local authorities are faced with collecting deliquent real estate taxes. A variety of methods have been adopted to accomplishing the task. Some states provide for judicial foreclosure.[2] A few states allow a choice between judicial and non-judicial proceedings.[3] The majority have some form of non-judicial power of sale proceeding.[4]

The type of notice given in conjunction with these tax sales varies widely from state to state. Depending on the statutory provisions, a tax collector may only have to publish notice of sale in a local newspaper.[5] Some tax collectors may only be required to mail a notice of delinquency to the taxpayer, stating that the property is subject to sale, without giving information as to the time, place, or date of the sale.[6] A tax collector may have the duty to send certified or registered mail notice of time, date, and place of sale to the taxpayer.[7] Failure to send this notice may have no effect on the validity of the sale.[8] Finally, some statutes require the tax collector to send notice not only to the owner/taxpayer, but to mortgagees and lienholders as well,[9] though some stat-

---

1. 103 S. Ct. 2706 (1983).

2. *See, e.g.*, ALA. CODE §§ 40-10-1 to -8 1975); MINN. STAT. §§ 279.01-.37 (1968 & Supp. 1984); OHIO REV. CODE ANN. § 5721.18 (Page Supp. 1982); OR. REV. STAT. §§ 312.005-.990 (1983). This process entails sending a summons to the taxpayer, and holding a hearing before a judge, which often results in a default judgment and a court-ordered sale of the property.

3. *See, e.g.*, DEL. CODE ANN. tit. 9, §§ 8701-8779 (1974); MASS. GEN. LAWS ANN. ch. 60, § 35 (West 1973); NEV. REV. STAT. §§ 361.565-.730 (1983); N.Y. REAL. PROP. TAX LAW § 1110-1116 (McKinney 1972).

4. The variations are many. In a few states, the tax sale purchaser is given a tax deed, and if no redemption takes place within a given time period, usually one to three years, the deed automatically becomes enforceable. *See, e.g.*, HAWAII REV. STAT. § 246-60 (1976); LA. REV. STAT. ANN. § 47:2183 (West 1982). In other states, the purchaser receives only a tax certificate and must take affirmative action to seek a tax deed after a period of redemption has elapsed. *See, e.g.*, FLA. STAT. ANN. § 197.241 (West Supp. 1983); MD. ANN. CODE art. 81, §§ 100-106 (1980 & Supp. 1983).

5. *See, e.g.*, MO. REV. STAT. § 140.170.1 (1978):

> The county collector shall cause a copy of the list of delinquent lands and lots to be printed in some newspaper of general circulation published in the county, for three consecutive weeks, one insertion weekly, before the sale, the last insertion to be at least fifteen days prior to the fourth Monday in August.

6. *See, e.g.*, COLO. REV. STAT. § 39-11-101 (1982).

7. *See, e.g.*, ARIZ. REV. STAT. § 42-1835 (1980).

8. *See, e.g.*, KY. REV. STAT. § 134.440(1) (1982).

9. *See, e.g.*, VT. STAT. ANN. tit. 32, § 5252(4) (1981).

utes require the mortgagee or interested party to have requested this notice in advance.[10]

This hodgepodge of laws has been in constitutional doubt for some years at the state level.[11] In *Mennonite Board of Missions v. Adams*,[12] the United States Supreme Court finally addressed the issue of what notice is constitutionally required in connection with tax sales. In *Mennonite*, the Court held that notice of a tax sale by publication and posting was inadequate for mortgagees.[13] As a result, the current Missouri statutes[14] and those of many states may no longer meet due process requirements under the fourteenth amend-

---

10. *See, e.g.*, IND. CODE ANN. §§ 6-1.1—24-4.2(a) (Burns Supp. 1984).

11. *See generally* Legg, *Tax Sales and the Constitution*, 20 OKLA. L. REV. 365 (1967); Note, *Due Process: The Constitutional Requirement of Notice in Tax Sale Proceedings*, 30 ARK. L. REV. 73 (1976); Comment, *Constitutional Law—In Rem Tax Foreclosures—Due Process Requires Notice by Mail When Name and Address of Taxpayer are Easily Ascertainable*, 9 RUT.-CAM. L. REV. 565 (1978); Note, *Due Process in Tax Sales in New York: The Insufficiency of Notice by Publication*, 25 SYRACUSE L. REV. 769 (1974); Note, *Constitutional Law—Due Process—Notice by Publication in Tax Sale Cases*, 44 TENN. L. REV. 159 (1976); Note, *Constitutional Law—Due Process—Notice by Publication is Constitutionally Inadequate in a Tax Sale Proceeding*, 24 WAYNE L. REV. 1463 (1978); Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 (1975).

12. 103 S. Ct. 2706 (1983).

13. *Id.* at 2709.

14. Collection of delinquent real estate taxes in Missouri currently falls under one of three sets of statutes. The oldest and most widely applicable law is known as the Jones-Munger Act, MO. REV. STAT. §§ 140.010-.720 (1978). This law provides for a non-judicial power of sale and it requires only notice by publication. *See* note 5 *supra*.

Chartered class one counties (defined in MO. REV. STAT. § 48.020 (Supp. 1983)) as having assessed valuation of three hundred million dollars) may elect to use the Land Tax Collection Law, MO. REV. STAT. §§ 141.210-.810 (1978 & Supp. 1983). Currently this law is used only in Jackson County. St. Louis County used to apply Chapter 141, but elected to switch back to the Jones-Munger Act some years ago after deciding judicial foreclosure was too expensive and time consuming. Telephone interview with Thomas W. Wehrle, Attorney for the County of St. Louis (Nov. 18, 1983). The City of St. Louis is governed by the Municipal Land Reutilization Law, MO. REV. STAT. §§ 92.700-.920 (1978 & Supp. 1983).

Sections 92.760.1 and 141.440 are unlike the Jones-Munger Act in that they require a judicial sale and mailed notice to persons named in the petition as being the last-known taxpayers. Originally, both statutes contained the caveat that the failure to mail the notice did not invalidate the proceeding. MO. REV. STAT. § 92.760.1 (1978) (repealed 1982); *id.* § 141.440 (repealed 1982). In 1982, an amendment to § 131.440 mandated mailed notice to the last-known owner of record. 1982 Mo. Laws 319. In fact, if the notice is returned to the collector as undeliverable, other than for the reason the addressee simply refused to accept the certified mail, the collector must search the records to try to ascertain the successor owner. Moreover, § 141.540 was amended to give the collector the option to send certified mail to the mortgagee or security holder. 1982 Mo. Laws 321. These amendments likely are the result of Garzee v. Sauro, 639 S.W.2d 830 (Mo. 1982). *See* notes 57-59 and accompanying text *infra*. For discussion on the history of delinquent tax legislation, see M. GILL, REAL PROPERTY LAW IN MISSOURI 1165-68 (1949).

ment.[15] *Mennonite* raises at least four questions: (1) whether notice to owners, where not already required by statute, is now necessary; (2) what notice to other interested parties is required; (3) the rights and remedies of purchasers at tax sales; and (4) whether the decision will be applied retroactively.

Mennonite Board of Missions (MBM) took back a mortgage[16] on property in Indiana to secure a $14,000 loan. The mortgagor was responsible for paying all of the property taxes, but without MBM's knowledge, failed to do so.[17] In 1977, the county initiated proceedings to sell the mortgagor's property for non-payment of taxes as provided for by Indiana law.[18] This included posting notice in the county courthouse, publishing notice once each week for three consecutive weeks,[19] and sending notice by certified mail to the last-known address of the property owner.[20] Until 1980, Indiana law did not provide for notice by mail or personal service to mortgagees.[21]

On August 8, 1977, the property was sold to Richard Adams for $1,165.75. Following the sale, the mortgagor continued to make monthly payments to MBM. It was not until August 16, 1979 that MBM learned that the property had been sold. By then, the redemption period of two years had run, and the mortgagor still owed MBM $8,237.19.[22] In November, 1979, Adams filed suit in an Indiana state court to quiet title to the property. The trial court sustained Adams' motion for summary judgment despite MBM's contention that it had not received constitutionally adequate notice of the tax sale or the opportunity to redeem.[23] The Indiana Court of Appeals affirmed.[24]

The United States Supreme Court's six to three decision was controlled by *Mullane v. Central Hanover Bank & Trust Co.*,[25] which held that prior to

---

15. U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

16. While *Mennonite* dealt with a real estate mortgage, it will be assumed for purposes of this Note that deeds of trust on real property would be treated in a like manner. *See* Lohr v. Cobur Corp., 654 S.W.2d 883, 887 (Mo. 1983) (en banc) (Blackmar, J., concurring). *See generally* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 1.6 (1979).

17. 103 S. Ct. at 2708.

18. *Id.* at 2709. The county proceeded under IND. CODE ANN. §§ 6-1.1-24.1 to -12 (Burns 1978) (amended 1980).

19. 103 S. Ct. at 2709; *see* IND. CODE ANN. § 6-1.1-24-3 (Burns 1978) (amended 1980).

20. 103 S. Ct. at 2709; *see* IND. CODE ANN. § 6-1.1-24-4 (Burns 1978). A mortgagee has no title to the mortgaged property under Indiana law, so he is not considered an "owner" for purposes of this section. *See* First Sav. & Loan Ass'n v. Furnish, 174 Ind. App. 265, 271, 367 N.E.2d 596, 600 (1977).

21. IND. CODE ANN. § 6-1.1-24-4.2 (Burns 1978) (amended 1980).

22. 103 S. Ct. at 2709.

23. *Id.* Redemption rights exist for two years after the sale. *See* IND. CODE ANN.§ 6-1.1-25-4 (1978).

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

25. 339 U.S. 306 (1950).

an action that will affect a property interest protected by the due process clause of the fourteenth amendment, a state must provide "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."[26] The *Mennonite* Court concluded that a mortgagee has a legally protected property interest that is significantly affected by a tax sale.[27] Notice by publication, posted notice, and mailed notice to the property owner were not adequate to meet the *Mullane* test. Personal service or mailed notice to mortgagees is now required, even though the Court noted that "sophisticated creditors," *i.e.,* commercial lenders, have the means to discover if property taxes are delinquent and if a tax sale would ensue.[28]

Historically, courts have distinguished between in rem and in personam proceedings.[29] Constructive notice by publication was deemed sufficient for in rem proceedings, including tax sales. At the turn of the century, the "caretaker theory" arose; the Supreme Court presupposed that owners of property would keep themselves informed of any proceeding affecting it.[30]

Although *Mullane* and its progeny[31] clearly rejected this theory, state courts in Missouri,[32] California,[33] and Oklahoma[34] have maintained that no-

---

26. *Id.* at 314.

27. 103 S. Ct. at 2711. The Court reached this conclusion after noting that a mortgagee's lien may be conveyed and has priority over subsequent claims or liens attaching to the property. *Id.*

28. *Id.* at 2712.

29. Service by publication "may answer in all actions which are substantially proceedings *in rem.* But . . . where the suit is merely *in personam,* constructive service in this form upon a non-resident is ineffectual for any purpose." Pennoyer v. Neff, 95 U.S. 714, 727 (1877).

30. *See* North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925); Longyear v. Toolan, 209 U.S. 414, 418 (1908).

31. *See, e.g.,* Schroeder v. City of N.Y., 371 U.S. 208, 211 (1962) (notice by publication in condemnation proceedings constitutionally inadequate); Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956) (newspaper publication in land condemnation inadequate where plaintiff resident's name was known to the city); Covey v. Town of Somners, 351 U.S. 141, 146-67 (1956) (notice by publication and mail to known mental incompetent of real property tax sale proceedings violated due process clause).

32. McMullin v. Carter, 639 S.W.2d 815 (Mo. 1982) (en banc). This case involved an action to quiet title to property purchased at a tax sale conducted under the Jones-Munger Act. *See* note 14 *supra.* The trial court found the statute unconstitutional because it did not require the tax collector to give notice by mail to persons owning and residing on property sought to be sold by a tax sale. 639 S.W.2d at 816. The Missouri Supreme Court reversed and upheld the statute as constitutional. *Id.* at 817 (citing two pre-*Mullane* cases, Spitcaufsky v. Hatten, 353 Mo. 94, 182 S.W.2d 86 (1944); Kennen v. McFarling, 350 Mo. 180, 165 S.W.2d 681 (1942)).

McMullin was decided incorrectly. The court ignored the impact of *Mullane* on notice requirements. Furthermore, *Spitcaufsky* was placed in doubt four years before *McMullin* by Collector of Revenue v. Parcels of Land Encumbered, 566 S.W.2d 475, 477-78 (Mo. 1978) (en banc) (although court ultimately refused to address questions of notice because the defendant did not have standing, dicta cited other states which applied *Mullane* to tax sales and found a lack of due process). Finally, on the same day

tice by publication is adequate. Fourteen states continue to conduct tax sales following only newspaper publication,[35] with Oregon and North Carolina going so far as to say that publication creates a conclusive presumption of actual notice.[36] An additional seven states do require notice of delinquency to the property owner, but this does not include information as to the time, date, and place of the sale.[37]

In thirteen of the twenty-two states which seemingly ignore *Mullane,* there is an interesting caveat. Before the purchaser at the tax sale can actually obtain a deed to the land, notice that the period of redemption is about to expire must be given to the titleholder, mortagee, and lienholders of record.[38]

---

the court decided *McMullin,* it handed down Garzee v. Sauro, 639 S.W.2d 830 (Mo. 1982). Citing *Mullane,* the *Garzee* court held that publication of notice of foreclosure would not satisfy notice requirements for due process. While *Garzee* dealt with the Land Tax Collection law, *see* note 14 *supra,* rather than the Jones-Munger Act, it seems inequitable that out-state property owners are due less process than those in Kansas City or St. Louis.

Many county tax collectors in Missouri make the effort to personally contact property owners by phone or letter. Telephone survey of tax collectors from the six most populous counties in Missouri (Sept. 30, 1983). Nevertheless, as pointed out in *McMullin,* this is a matter of grace. 639 S.W.2d at 816. Because the system is not uniform, not everyone is receiving the same quality or quantity of notice. It seems inevitable that *McMullin* will be overruled.

33. Atkins v. Kessler, 97 Cal. App. 3d 784, 793, 159 Cal. Rptr. 231, 236 (1979) ("[P]ublication of notice in the ordinary real property tax collection case is all the due process notice to which a delinquent taxpayer is entitled. Additional notices of sale are not necessary before the sale.").

34. Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265, 1267-68 (Okla. 1972), *vacated,* 414 U.S. 100 (1973), *reh'g denied,* 544 P.2d 505 (Okla. 1974), *cert. denied,* 426 U.S. 935 (1976).

35. *See* IOWA CODE § 446.9 (Supp. 1983-1984); KAN. STAT. ANN. § 79-2303 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 60, § 40 (West 1973); MISS. CODE ANN. § 27-41-55 (1972); MO. REV. STAT. § 140.170 (1978); MONT. CODE ANN. § 15-17-101 (1981); NEB. REV. STAT. § 77-1804 (1981); N.C. GEN. STAT. § 105-348 (1979); OR. REV. STAT. § 312.040 (1983); S.D. CODIFIED LAWS ANN. § 10-23-2 (1982); TEX. TAX CODE ANN. § 34.05 (Vernon 1982); WASH. REV. CODE ANN. § 84-64-010 (1962); WIS. STAT. ANN. § 74.33 (West Supp. 1983-84); WYO. STAT. § 39-3-104 (Supp. 1983).

36. N.C. GEN. STAT. § 105-348 (1979); OR. REV. STAT. §§ 312.040(1) (1983); *see also* MINN. STAT. § 280.01 (Supp. 1984) (titleholder is entitled to only post-sale notice).

37. ALA. CODE § 40-10-4 (1975); COLO. REV. STAT. § 39-11-101 (1982); DEL. CODE ANN. tit. 9, § 8771 (1975); FLA. STAT. ANN. § 197.072 (West Supp. 1983); LA. REV. STAT. ANN. § 47:2180 (WEST 1984); MD. ANN. CODE art. 81, § 75 (Supp. 1983); VA. CODE § 58-1117.1 (Supp. 1983).

38. *See* ALA. CODE §§ 40-10-120, -133 (1975); COLO. REV. STAT. § 39-11-128 (1982); FLA. STAT. ANN. § 197.256 (West Supp. 1983); IOWA CODE ANN. § 447.9 (West Supp. 1984); MD. ANN. CODE art. 81, § 106 (1980); MINN. STAT. § 281.13 (Supp. 1984); MISS. CODE ANN. §§ 27-43-1, -5 (Supp. 1983); NEB. REV. STAT. § 77-1832 (1981); N.C. GEN. STAT. § 105-374(c) (Supp. 1983); WASH. REV. CODE § 84-64-030 (Supp. 1983-84); WIS. STAT. ANN. § 75.12 (West Supp. 1983-84); WYO. STAT. § 39-3-108 (Supp. 1983).

Depending on the statute, this notice will be sent from six months to twenty years after the sale. Why these states choose to send mailed notice after, instead of before, the sale is not clear, for prior notice to interested parties could eliminate the need for the sale.

Whether post-sale notice will meet the due process test has not been addressed by courts. *Mennonite* did not directly resolve this question because Indiana statutes do not provide for such notice to mortagees.[39] Post-sale notice is adequate to the extent that the party has an opportunity to redeem the property. Nevertheless, a post-sale redemption price will include interest, which could be a substantial amount after accruing for six or seven years. The *Mennonite* court did refer to notice as a constitutional *precondition* to state action adversely affecting a property interest.[40] Basing a prediction on that language alone, *post*-sale notice will not meet the test.

Even if post-sale notice is constitutional, there are a few states, Missouri included, which rely solely on notice by publication. How authorities have managed to skirt due process requirements for so long may be grounded in a state's ever-present fiscal needs.[41] Collecting tax revenues is a vestige of states' rights that has long been given special deference.[42] No Supreme Court case has dealt directly with the issue of notice to property owners or mortgagors at a tax sale. Dicta in *Mennonite,* however, suggests that they deserve equal treatment.[43] Common sense dictates that if a creditor should get *Mullane*-type notice, so should an owner, especially one in possession who risks losing not just an investment, but a home.

While some recent cases still follow the caretaker theory,[44] from a practical point of view, what is out of sight is out of mind for many people.[45] If, as

---

39. *But cf.* IND. CODE ANN. § 6-1.1-25-6 (Burns 1984) (post-sale notice to owners only).

40. 103 S. Ct. at 2712.

41. *See* Spitcaufsky v. Hatten, 353 Mo. 94, 108, 182 S.W.2d 86, 94 (1944). *See generally* R. LAKE, REAL ESTATE TAX DELINQUENCY: PRIVATE DISINVESTMENT AND PUBLIC RESPONSE (1979).

42. In authorizing tax sale proceedings, the state is exercising its sovereign power to raise revenue essential to carry on the affairs of state, and this process does not require the same kind of notice as a suit at law, or even in proceedings for taking private property by emminent domain. Leigh v. Green, 193 U.S. 79, 89 (1904)

43. Notice by mail or other means equally certain to provide actual notice is the minimum constitutional precondition to a proceeding which will adversely affect the property interest of any party, whether knowledgeable or not in commercial practice, if its name and address are reasonably ascertainable. *Mennonite,* 103 S. Ct. at 2712.

44. *See* McMullin v. Carter, 639 S.W.2d 815, 818 (Mo. 1982) (en banc); Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265, 1267-68 (Okla. 1972), *vacated,* 414 U.S. 100 (1973), *reh'g denied,* 544 P.2d 505 (Okla. 1974), *cert. denied,* 426 U.S. 935 (1976).

45. A simple notice that taxes are due or delinquent may not be enough to spur the conscience of a procrastinating or financially distressed homeowner. Once these notices stop, because (unbeknownst to the owner) the property has been sold for back taxes, it could be easy to believe the local tax collector happened to let one case fall

in Missouri, there is no notice of the two-year period of redemption,[46] then quite unexpectedly the homeowner may receive a letter from the tax sale purchaser to either vacate the premises or start paying rent. States may claim this scenario could be avoided had the homeowner simply been on the alert for the notice by publication of the tax sale. As the *Mullane* court stated, however, "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper. . . ."[47]

Missouri courts have seemingly compensated for this lack of due process by finding exceptions to the Jones-Munger Act.[48] A popular attack against tax sale purchasers was inadequacy of consideration.[49] In 1977, the Missouri Supreme Court decided that consideration could no longer serve as the sole basis for setting aside a sale under the Jones-Munger Act.[50] Nevertheless, the court continued to construe the publication statute very broadly in favor of the owner. Sales were found void for inadequacy of the legal description in the notice,[51] premature publication,[52] failure to include name of record owner,[53] and failure to recite the correct years of delinquency.[54]

While Missouri has been skirting the issue, the majority of states have eliminated the due process problem, at least for property owners, by enacting statutes which require mailed notice.[55] Methods vary from certified or registered mail to simply postage prepaid. The recipient of the notice varies from owner or occupant to taxpayer. In three states, a problem arises because tax

---

between the cracks.

46. *See* MO. REV. STAT. § 140.340 (1978).

47. 339 U.S. at 315.

48. MO. REV. STAT. §§ 140.010-.720 (1978 & Supp. 1983).

49. *See* Bussen Realty Co. v. Benson, 349 Mo. 58, 61, 159 S.W.2d 813, 814 (1942) (en banc).

50. Powell v. County of St. Louis, 559 S.W.2d 189, 191 (Mo. 1977) (en banc). *See generally* Note, *Tax Sales of Real Estate—Inadequate Consideration No Longer Grounds for Invalidation,* 44 MO. L. REV. 822 (1979).

51. *See* Costello v. City of St. Louis, 262 S.W.2d 591, 595 (Mo. 1953); Acton Enters. v. Stottle, 646 S.W.2d 149, 150 (Mo. Ct. App. 1983).

52. Wates v. Carnes, 521 S.W.2d 389, 391 (Mo. 1975).

53. Mitchell v. Atherton, 563 S.W.2d 13, 17 (Mo. 1978) (en banc); Nole v. Wenneker, 609 S.W.2d 212, 216 (Mo. Ct. App. 1980). *But see* Ruley v. Drey, 643 S.W.2d 101, 103-04 (Mo. Ct. App. 1982).

54. Beldner v. General Elec., 451 S.W.2d 65, 78 (Mo. 1970) (dicta).

55. ALASKA STAT. § 29.53.240 (1972); ARIZ. REV. STAT. ANN. § 42-1835 (1980); ARK. STAT. ANN. § 84-1102.2 (1980); CAL. REV. & TAX. CODE § 3365 (West 1983); GA. CODE ANN. §§ 91A401, 39-120 (1981) HAWAII REV. STAT. § 246-56 (1976); ILL. ANN. STAT. ch. 120, § 711 (Smith-Hurd 1983-84); ME. REV. STAT. ANN. tit. 36, § 1073 (1964); MICH. COMP. LAWS ANN. § 211.61a (Supp. 1983-84); NEV. REV. STAT. § 361.565 (1983); N.H. REV. STAT. ANN. § 80:21 (Supp. 1983); N.Y. REAL PROP. TAX LAW § 1002 (McKinney Supp. 1982-83); N.D. CENT. CODE § 57-24-01 (1983); OHIO REV. CODE ANN. § 5721.18 (Page 1980); OKLA. STAT. ANN. tit. 68, § 24312 (West Supp. 1983-84); PA. STAT. ANN. tit. 72, § 5971(g) (Purdon 1968); TENN. CODE ANN. § 67-2018 (Supp. 1983); UTAH CODE ANN. § 59-10-64 (Supp. 1983); W. VA. CODE § 11A-3-2 (Supp. 1983).

sales are not invalidated by failure to send or failure to receive the mailed notice.[56] That provision resurrects a question of due process, which was addressed in *Garzee v. Sauro*.[57] In *Garzee*, the Missouri Supreme Court said that notice by mail cannot be merely optional,[58] for that would imply that notice by publication would satisfy due process. Citing *Mullane*, the court held that notice by mail is mandatory within the limits of practicability.[59]

While *Mennonite* leaves sending notice to property owners debatable, the Supreme Court made clear the notice requirement for mortgagees. For mortagees of record, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last-known available address, or by personal service.[60]

Before *Mennonite*, only four states provided for mailed notice to both mortagees and owners without request prior to sale.[61] Three other states required notice to mortgagees upon request, and two of those charged a nominal fee.[62] There are also some twenty-two states which provide mortgagees with notice after the sale but before the redemption period runs.[63]

The constitutionality of a state statute requiring a request to be filed before notice is sent was not before the *Mennonite* court because that Indiana statute was added after the events in *Mennonite* occurred.[64] In Missouri, a similar statute provides notice to mortgagees in power-of-sale foreclosures.[65] This scheme allows states to allocate resources by providing mailed notice only to those who request it. Unfortunately, a mortgagee who does not have the sophistication to discover whether tax sale proceedings have been initiated is

---

56. KY. REV. STAT. § 134.440 (1982); MO. REV. STAT. § 92.700 (1978); N.J. STAT. ANN. § 54-5-27 (West 1960).

57. 639 S.W.2d 830 (Mo. 1982).

58. MO. REV. STAT. § 141.440 (Supp. 1982); *see* note 14 *supra*.

59. 639 S.W.2d at 832. Of course, "within the limits of practicability" is open to definition. If a clerical error occurs and notice is sent to the wrong address, will the sale be invalid?

60. 103 S. Ct. at 2711.

61. CAL. REV. & TAX CODE § 3701 (West Supp. 1984); CONN. GEN. STAT. ANN. § 12-157 (West 1983); R.I. GEN. LAWS § 44-9-11 (1980); VT. STAT. ANN. tit. 32, § 5252 (1981).

62. IDAHO CODE § 63-1126B (1983); IND. STAT. ANN. § 6-1.1-24-4.2 (Burns 1984); LA. REV. STAT. ANN. § 9:5201 (West 1983).

63. *See* note 38 *supra; see also* GA. CODE ANN. § 91A-434 (1980); ILL. ANN. STAT. ch. 120, § 744 (Smith-Hurd Supp. 1983-84); ME. REV. STAT. ANN. tit. 36, § 1076 (1978); MICH. COMP. LAWS ANN. § 211.73C (Supp. 1983-84); N.H. REV. STAT. ANN. § 80:28 (Supp. 1983); N.J. STAT. ANN. § 54-5-77 (West 1983-84); N.D. CENT. CODE § 57-27-02 (1972); OKLA. STAT. ANN. tit. 68, § 24.323 (West 1966); S.C. CODE ANN. § 12-49-300 (Law. Co-op. 1976).

64. *See* 103 S. Ct. at 2708 n.2.

65. MO. REV. STAT. § 443.325 (1978), adopted in 1973, 1973 Mo. Laws 469, provides at least 20 days notice of a power-of-sale foreclosure for any person who files a request in the recorder's office of the county where the real property is situated. Whether this type of statute would be constitutional in a tax sale situation largely depends on the outcome of the balancing of interests test discussed at note 68 *infra*.

unlikely to be aware that he could request notice in the first place.

The *Mennonite* majority fashioned its rule from the view of the least sophisticated creditor, and then applied it across the board regardless of the creditor's expertise. The Court appeared to be influenced by the current surge in "creative financing,"[66] whereby many homeowners are forced to become first, or more often, junior mortgagees in order to sell their property. The Court's description of the state's burden of providing notice by mail as relatively modest also indicates the Court will not be swayed by a state's plea of time or money constraints.[67] Thus, if *Mennonite* is construed broadly, a state must send notice whether a mortgagee has requested it or not.

As legislatures try to accommodate the *Mennonite* rule, request-type statutes may become more prevalent, and the position of the *Mennonite* dissent may ultimately prevail. The dissenting Justices stressed that earlier notice cases used a balancing test which allowed a state to weigh its costs against the interests of the relevant class.[68] They pointed out that 95% of mortgagees are private institutional lenders and federally supported agencies.[69] As for those 5% non-professional money lenders, the dissent merely stated that the state cannot reasonably be expected to assume the risk of its citizens' business ventures.[70] Thus, if *Mennonite* is construed narrowly, one may see a return to a modified version of the "caretaker theory," with mortgagees having to take the initial step to protect their interest.

Another potential area for litigation is the application of *Mennonite* to interested parties other than owners and mortgagees. In dissent, Justice O'Connor construed the *Mennonite* holding to apply to the legally protected property interest of *any* party.[71] The dissent believed that this problem is further compounded by the uncertainty of what reasonable efforts the state must provide in ascertaining the name and address of an affected party.[72] Dicta suggests that a state may be required to search even beyond the public

---

66. *See generally* M. MADISON & J. DWYER, THE LAW OF REAL ESTATE FINANCING § 7.04 (1981); INST. OF CONTINUING LEGAL EDUC., CREATIVE REAL ESTATE FINANCING (1968).

67. 103 S. Ct. at 2712.

68. *Id.* at 2713 (O'Connor, J., dissenting) ("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.'") (quoting *Mullane,* 339 U.S. at 314). The state's interest is maintaining a balanced budget by collecting all revenues it is owed. The interest of the individual is to save his ownership in a piece of real estate. Since real estate taxes are a major source of funding for public schools and county government, it is likely the scales are tipped in favor of the state.

69. 1982-83 U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 511.

70. 103 S. Ct. at 2716 n.6 (O'Connor, J., dissenting).

71. *Id.* at 2712. This holding could apply to other situations, like power-of-sale foreclosures.

72. *Id.* at 2715.

record.[73]

The Missouri Supreme Court posed one such problem when it applied *Mennonite* to deed of trust beneficiaries in *Lohr v. Cobur Corp.*[74] In his concurring opinion, Judge Blackmar queried whether the appropriate notice should be given to the trustee, the beneficiary, or both.[75] Trustees are usually lawyers or bank officers who have no personal interest in the property, and often are unaware that the deed of trust exists. Notice to the beneficiary is clearly more important, but it would be prudent to send notice to both.

In Missouri, however, giving notice to the current beneficiary or mortgagee may be quite difficult. Missouri law does not require that assignments of real estate mortgages and deeds of trust be recorded.[76] Thus, without additional investigation, a tax collector has no way of knowing if the first mortgagee still has an interest in the property. This is another problem the Missouri legislature must address.[77]

Another interested party is the possesser of a mineral estate which has been severed from the surface fee. Courts have held that a county's tax lien is on the entire estate, and a title founded on a tax sale will include both the surface and mineral interest.[78] The Missouri Supreme Court has held that the local assessor need not ascertain the exact status of titles, nor determine the

---

73. *Id.* at 2711 n.4.

74. 654 S.W.2d 883 (Mo. 1983) (en banc). Defendant Cobur had executed and delivered a deed of trust to Pioneer Bank and Trust Co. as security for a loan. Thomas Powers was named trustee; his name and the bank's name and address were contained in the recorded deed. Nevertheless, when real estate taxes became delinquent and proceedings were commenced by the collector of Revenue of St. Louis County, neither Pioneer nor Powers received mailed notice of the sale, nor were their names mentioned in the published notice. Lohr purchased the property at the tax sale, and ultimately brought suit to quiet title. Pioneer and Powers counterclaimed, asserting that their recorded first deed of trust was in full force. The trial court found that the notice provisions of MO. REV. STAT. §§ 140.150, .170 (1969) were unconstitutional as applied. The Missouri Supreme Court affirmed, citing *Mullane* and *Mennonite.* 654 S.W.2d at 855-56.

75. *Id.* at 887 (Blackmar, J., concurring).

76. As a result, according to an informal survey of three title companies, only 10-20% of the assignments are recorded.

77. On November 11, 1983 at a meeting of the Missouri Bar Property Law Committee, a draft bill was presented which would repeal MO. REV. STAT. §§ 443.040-.120, .390 (1978), which dealt with presentation of notes for identification or cancellation. The proposed act would require that mortgage assignments be recorded.

78. *See* Payne v. A.M. Fruh Co., 98 N.W.2d 27, 31 (N.D. 1959); Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265, 1267-68 (Okla. 1972), *vacated,* 414 U.S. 100 (1973), *reh'g denied,* 544 P.2d 505 (Okla. 1974), *cert. denied,* 426 U.S. 935 (1976). *But see* Kirk v. Smith, 253 So. 2d 492, 493 (Fla. Dist. Ct. App. 1971) (tax deed extinguished previously reserved mineral rights, but only because the sale occurred prior to enactment of FLA. STAT. ANN. § 193.481 (West 1983) requiring separate taxation of surface and subsurface interests); Wilson v. Clark, 278 So. 2d 250, 254 (Miss. 1973) (tax sale purchaser did not obtain mineral interest due to uncertainty of its description, despite his three years in possession).

names of individuals with an interest in the estate for either a valid assessment or a valid sale.[79] Thus, not only would a holder of a mineral estate fail to receive mailed notice, but his name would not even appear in the newspaper notice. The Missouri court found nothing in the statutory plan that requires that a township assessor be a skilled title examiner.[80] *Mennonite,* however, seems to require a search for mineral interests and that appropriate notice be sent to holders of these interests.[81]

The leaseholder is also an interested party. Some long-term leases require the lessee to pay property taxes. If the lessee's name is the only one on record with the tax collector, then the problem shifts back to the owner getting notice. But in many tenant-landlord situations, the tenant is not responsible for property taxes and would be totally unaware of a pending tax sale. Even for recorded leases, the vast majority of states do not provide the leaseholder with notice. Furthermore, a tenant risks being evicted by the tax sale purchaser, or at the very least, having his rent raised. Unlike private mortgage foreclosures, where the purchaser takes possession subject to any leaseholds created prior to the mortgage, many states issue a tax deed totally free of encumbrances.[82] The extra burden to tax collectors to mail notice to tenants is minimal, at least for single-family residential property. If the taxpayer's address is different than the property's address, it could be assumed the property is being rented, and it would be simple to send separate notice to "occupant." Of course, the situation is more complicated for apartment complexes or large commercial buildings.[83]

Once a tenant receives notice of a pending tax sale, there may be additional complications. In some states, a tenant may not acquire a title at a tax

---

79. Dornman v. Minnich, 336 S.W.2d 500, 507 (Mo. 1960), (overruling Kernkamp v. Wellsville Fire Brick Co., 237 Mo. App. 457, 170 S.W.2d 692 (1943)).

80. *Dornman,* 336 S.W.2d at 507.

81. Some courts take the view that the mineral estate will not vest in the tax sale purchaser if mineral rights are assessed and taxed separately. *See* note 78 *supra.* Thus, the mineral estate holder would not have a property interest affected, and the *Mennonite* rule would not apply. It may be prudent for a tax collector to send notice anyway.

82. In jurisdictions where the tax is a charge only on the land, where no personal liability is contemplated, and where the proceeding is strictly in rem, the title conveyed pursuant to a valid tax sale is generally not the title of the delinquent taxpayer, but a new title to the land in fee simple absolute, created by an independent grant from the sovereign. 72 AM. JUR. 2D *Taxation* § 962 (1974); *see* Bell v. Myers, 28 Md. App. 339, 343-46, 345 A.2d 105, 108-09 (1975); State *ex rel.* Buder v. Hughes, 350 Mo. 547, 552, 166 S.W.2d 516, 518 (1942); Morey Eng'g & Constr. Co. v. St. Louis Artificial Ice Rink Co., 242 Mo. 241, 252-53, 146 S.W. 1142, 1143-44 (1912). Some states treat tax sales as proceedings in personam which give purchasers the title held by the delinquent taxpayer. *See* Annot., 75 A.L.R. 416 (1931).

83. It would be expensive for the state to send notice to every renter, but in that situation it is unlikely a tax sale purchaser would evict renters of income-producing property. Nor is it likely that one renter in a complex would want, or could afford, to purchase the whole building. Perhaps in a commercial setting, a corporate renter would prefer to buy the building rather than move or negotiate a new lease.

sale that could be asserted against his landlord.[84] In other words, a tenant cannot take advantage of the landlord's failure to pay taxes in order to terminate the relationship between them. Instead, the tenant's remedy is to pay the delinquent taxes and deduct them from the rent. In states that allow tenants to purchase at tax sales, it has been held that the tenant cannot assert the tax title against the landlord until the tenant has surrendered possession.[85]

Remaindermen are yet another class whose property interests are affected by tax sales. While there are some future interests that are impossible or impractical for tax collectors to ascertain,[86] some recorded deeds very plainly set out who is the life tenant and who is the remainderman. Courts have held that purchasers of tax deeds obtain title to the fee, which includes remainder estates,[87] so without notice a remainderman must totally rely on the ability and good faith of the life tenant to pay taxes. Moreover, the remainderman's interest is often more valuable than the life tenant's. It makes sense for tax collectors to provide remaindermen the opportunity to protect their interest, for, as *Mennonite* pointed out in the case of mortgagees, it may ultimately relieve the county of the more substantial administrative burden of conducting a tax sale.[88]

One interested party that may not need notice is an owner of an easement. The majority of courts, Missouri included, have held that a tax sale purchaser takes land subject to any easements or restrictive covenants.[89] The reasoning is that the dominant estate's value is increased by the existence of the easement, and the tax should reflect this increase. The servient estate declines in value, and a sale for nonpayment of that tax ought to be a sale of the lessened estate, and the title passed is subject to the easement.[90] In jurisdictions which hold that a tax deed includes all easements, the easement holder has a legally protected interest at stake and should be considered an interested party within the *Mennonite* rule.[91] Even in jurisdictions where easements are protected, a tax collector that has searched the title for all the other interests might as well send one more letter.

---

84. *See* Brunson v. Bailey, 245 Ala. 102, 104, 16 So. 2d 9, 11 (1943); Macumber v. Gillett, 138 Neb. 714, 719, 294 N.W. 854, 857 (1940). *See generally* Annot., 172 A.L.R. 1181, 1186 (1948) (discussion of minority view).

85. Quon v. Sanguinetti, 60 Ariz. 301, 304-05, 135 P.2d 880, 881 (1943); Simpson v. Ricketts, 185 Miss. 280, 292-93, 186 So. 318, 320 (1939).

86. Some remainders are contingent because the identity of the remainderman cannot be ascertained. For example, when the remaindermen are the heirs of the life tenant, their identity cannot be determined until the life tenant's death. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 152 (2d ed. 1956).

87. *See* Pannell v. Moore, 237 Ga. 761, 762, 229 S.E.2d 603, 605 (1976); Hunott v. Critchlow, 365 Mo. 600, 612-14, 285 S.W.2d 594, 602-03 (1956).

88. 103 S. Ct. at 2712 n.5.

89. *See* Engel v. Catucci, 197 F.2d 597, 599 (D.C. Cir. 1952); Budnick v. Indiana Nat'l Bank, 165 Ind. App. 457, 466, 333 N.E.2d 131, 134 (1975); Schlafly v. Baumann, 341 Mo. 755, 763-64, 108 S.W.2d 363, 368 (1937).

90. *Engel*, 197 F.2d at 599.

91. *But see* Annot., 168 A.L.R. 529, 530 (1947).

One more party to consider is a judgment lienholder. Missouri courts have long held that a tax lien is superior, and any inferior liens are extinguished by a tax sale, except that the lienholder retains the right of redemption.[92] To exercise this redemption, however, the lienholder needs to realize a sale has taken place. It is unlikely these people will read the published notices, so once again *Mennonite's* holding implies that notice must be mailed. This class of interested parties may place a greater burden on tax collectors. In Missouri, judgment liens will not be found in the recorder's office along with the rest of the pertinent information. It is conceivable the collector must check the county court docket along with the rest of the pertinent information. It is conceivable the collector must check the county court docket every day up to the date of the tax sale for new lienholders. Perhaps it is here that courts will draw the line and carve an exception to *Mennonite.*

Following *Mennonite,* it may be reasonable to assume that states must provide mailed notice to *all* interested parties before a tax sale is constitutional. There is a parallel constitutional question, however, that *Mennonite* failed to raise. Tax sales could be attacked for failure to provide an opportunity for a hearing. After *Mullane, Sniadach v. Family Finance Corp.*[93] and *Fuentes v. Shevin*[94] held that procedural due process required not only notice, but an opportunity to be heard. A number of states have since utilized *Fuentes* to invalidate power of sale provisions.[95] The same arguments could be made against tax sales, but the courts have not addressed this issue.

The state could argue that since so few issues are presented in a delinquent tax situation, a hearing would serve no purpose. Whether or not the taxes are actually delinquent might be an issue, but if the taxes have been paid, any subsequent sale would be void. On the other hand, the Supreme Court has held that if a person is entitled to a hearing, he has the right to support his allegations by argument, however brief, and if need be, by proof, however informal.[96] There is no doubt that there is state action in a tax sale proceeding and that a constitutionally protected interest is being affected.

---

92. McMullin v. Carter, 639 S.W.2d 815 (Mo. 1982) (en banc). *Carter* relied on Lohr v. Cobur Corp., 622 S.W.2d 270 (Mo. Ct. App. 1981) (lien on the deed of trust extinguished by tax sale). *Lohr* was recently overruled. *See* note 74 and accompanying text *supra*); *see also* State *ex rel.* Buder v. Hughes, 350 Mo. 547, 166 S.W.2d 516 (1942).

93. 395 U.S. 337 (1969) (prejudgment garnishment without provision for a judicial hearing prior to a garnishment violated due process clause).

94. 407 U.S. 67 (1972) (state replevin statutes struck down because they did not provide for an opportunity to be heard before chattels were taken from the possessor).

95. *See, e.g.,* Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976); Turner v. Blackburn, 389 F. Supp. 1250 (W.D. N.C. 1975). *See generally* G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 16, § 7.25.

96. Londoner v. City of Denver, 210 U.S. 373, 386 (1908) (assessment, apportionment, and collection of property taxes); *see also* Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing required prior to termination of welfare benefits).

Whether the sale triggers the right to a hearing will ultimately be decided by weighing the private interest against the cost in time and money to the state.

It is clear that *Mennonite* affects the rights of parties with a legal interest in property subject to a tax sale. This case also affects those who purchase property at tax sales. At first glance, *Mennonite* appears only to cast a cloud on tax titles, but in the long run, this case could improve marketability of tax titles.

In Missouri, the legislature has not been consistent in protecting grantees of a tax deed from attack by delinquent owners.[97] Tax deeds issued prior to 1845 were held to be no evidence of title,[98] so marketability was negligible. This improved after 1872, when general tax laws provided that tax deeds were prima facie evidence of title.[99] In 1933, the Jones-Munger Act specified a statutory form for tax deeds, and failure to comply meant a void title.[100] These procedural requirements resulted in more title defects, and thus, reduced marketability. The best attempt at strengthening tax titles was a 1949 amendment that provided that tax deeds are conclusive evidence of title two years from recording the deed.[101] This statute is still in effect, but it only applies to first class charter counties electing not to operate under Jones-Munger.[102]

For out-state Missouri, tax titles continue to be difficult to market, despite a special three-year statute of limitations.[103] Other states' limitations range from one to seven years,[104] but the length is irrelevant if the tax deeds can continue to be attacked beyond the date set by statute. Since 1839,[105] and most recently in 1982,[106] Missouri courts have tolled the running of the three-year limitation for any number of reasons.[107] One result has been Title Exami-

---

97. The tax sale purchaser is issued a certificate of purchase. MO. REV. STAT. § 140.290 (1978). There is a two-year period of redemption, during which the purchaser has an inchoate title. *Id.* § 140.340. If no one redeems the land, then on production of the certificate of purchase, the collector shall execute a deed in fee simple absolute to the purchaser/grantee. *Id.* § 140.420.

98. *See* Moreau v. Detchemendy, 41 Mo. 431 (1867); Bosworth v. Bryan, 14 Mo. 575 (1851); Reeds v. Morton, 9 Mo. 878 (1846); Morton v. Reeds, 6 Mo. 63 (1839).

99. MO. REV. STAT. § 9958 (1929) (repealed 1933).

100. MO. REV. STAT. § 140.46 (1949) (current version at *id.* (1978)).

101. MO. REV. STAT. § 141.610 (1949) (current version at *id.* (1978)).

102. *See* note 14 *supra.* MO. REV. STAT. § 92.855 (1978) also has a two-year "conclusive evidence" provision for St. Louis City.

103. MO. REV. STAT. § 140.590 (1978). *See generally* Scott, *Marketability of Tax Titles in Missouri,* 20 UMKC L. REV. 153 (1952).

104. *See, e.g.,*. CAL. REV. & TAX. CODE § 3638 (West 1983) (one year); ILL. ANN. STAT. ch. 83, § 4 (Smith-Hurd 1983-84) (seven years); IND. CODE ANN. § 6-1.1-24-11 (Burns 1978) (two year rebuttable presumption, four year conclusive evidence); MICH. COMP. LAWS ANN. § 7.118 (1978) (five years if purchaser is in possession); N.Y. REAL PROP. TAX LAW § 1020 (McKinney 1980) (two years).

105. Morton v. Reeds, 6 Mo. 64 (1839).

106. Leuck v. Russell, 632 S.W.2d 40, 42 (Mo. Ct. App. 1982) (dicta).

107. *See* notes 51-54 and accompanying text *supra. See generally* M. GILL, REAL PROPERTY LAW IN MISSOURI 1175-1194 (1949); M. GILL, MISSOURI TAX TITLES

nation Standard 24 adopted by the Missouri Bar,[108] which in essence says an examining attorney is justified in requiring proof of twenty-seven years of adverse possession before passing title on any tax deed. Furthermore, adverse possession is impossible in many instances, since much tax sale property consists of vacant lots or scrub land.

This strict title standard does not encourage bidding at tax sales. Most tax sale purchasers are not looking for a place to live. They are either speculators or interested parties who want to recoup their loss. Either way, the purchaser will most likely want to resell the property. Few people want to wait twenty-seven years. Furthermore, adverse possession must be "continuous, open, exclusive and peaceable."[109] This will require more proof than merely paying taxes. Purchasers at tax sales can be faced with owning property that no title company will insure and no astute investor will buy. To expedite matters, purchasers must bring a suit to quiet title, hoping no interested party will defend. This additional court time, which is always a cost to taxpayers, could be eliminated through statewide application of a conclusive statute of limitation. *Mennonite* may be the impetus for such legislation.

It seems that courts have compensated for lack of notice under the Jones-Munger Law by applying the other statutory requirements quite strictly. In rewriting the statutes to meet *Mennonite*'s standard, notice under the administrative, power-of-sale foreclosure should become as constitutionally adequate as that under judicial foreclosure. It would make little sense to continue to have two statutes of limitations. There are many benefits of a uniform policy. First, marketability of title should be consistent whether the property is in metropolitan or out-state Missouri. Second, a two-year statute of limitations will encourage taxpayers to be more prompt about redeeming their claims, and perhaps reduce delinquency as a whole. Third, purchasers at tax sales will bid more if they are receiving a marketable title, thus reducing the number of cases in which bids are not equal to the taxes. Fourth, if a tax deed is conclusive evidence of title after two years, the extra time and money for suits to quiet title will be eliminated.[110]

Until the legislature makes the appropriate changes in the tax sales statutes and tax collectors uniformly comply, tax sale purchasers are left in uncertainty. As shown in *Lohr v. Cobur Corp.*,[111] failure to mail notice to deed of trust beneficiaries left the purchaser with a substantial cloud on his title. The Missouri Supreme Court has recently heard a case where a non-resident property owner sought to set aside a tax deed for failure to receive notice. The court, applying *Mennonite*, held that, if the address of a non-resident property

---

(1938); Comment, *Tax Deeds Void on Their Face and Three Year Statute of Limitations*, 20 MO. L. REV. 87 (1955).

108. 23 MO. ANN. STAT. ch. 442 app. (Vernon Supp. 1983).

109. *Id.*

110. Scott, *supra* note 103, at 162.

111. 654 S.W.2d 883 (Mo. 1983) (en banc).

owner is readily available, mailed notice is required.[112] There is also the potential for other uninformed interested parties to attack a purchaser's title. What remains to be answered is what remedy will a tax-sale purchaser have for money paid into the public treasury.[113] Regardless of the outcome, there will be increased cost to the taxpayer and less money in the local treasury. This is another reason for the legislature to act quickly.

The *Mennonite* decision does not address whether the new notice rule will be applied retroactively. A general rule is that judicial decisions are to be applied retroactively.[114] This concept has its origin in English law.[115] As to the construction of statutes, the general rule has been that a decision reversing or overrruling a prior decision is generally retrospective in its operation and relates back to the enactment of the statute.[116] In more recent years, the federal courts have created two sets of criteria for retroactivity. One applies to constitutional rules of criminal procedure and is inapplicable in this case.[117] The other governs civil cases and was set out in *Chevron Oil Co. v. Huson.*[118] In *Chevron Oil,* the Supreme Court gave a history of non-retroactivity and created a three-prong test:[119] (1) the decision must establish a new principle of law either of first impression or one not "clearly foreshadowed"; (2) retrospective application should not retard the operation of the rule in question; and (3) retroactivity should not produce substantial inequity. In *Chevron,* the Court applied the rule in question prospectively,[120] but subsequent federal decisions applying the same test have decided rules should be applied retroactively.[121]

Retroactive applicability of judicial pronouncements is the rule, and there is a strong presumption in favor of retroactivity in the federal courts.[122] The burden of proof is on the party who seeks prospective application only.[123]

---

112. Schwartz v. Dey, 665 S.W.2d 933 (Mo. 1984). The case was remanded to determine the reasonableness of the collector's efforts to provide notice. 665 S.W.2d at 935.

113. This question was raised but not answered in Lohr v. Cobur Corp., 654 S.W.2d 883, 887 (Mo. 1983) (en banc) (Blackmar, J., concurring).

114. Cash v. Califano, 621 F.2d 626, 628 (4th Cir. 1980).

115. 1 W. BLACKSTONE, COMMENTARIES *70 ("[S]ubsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation.").

116. 21 C.J.S. *Courts* § 194(a) (1940).

117. *See* Brown v. Louisiana, 447 U.S. 323, 328 (1980).

118. 404 U.S. 97 (1971).

119. *Id.* at 106-07.

120. In Rodriguez v. Aetna Casualty & Sur. Co., 395 U.S. 352 (1969), the Supreme Court held that the state statute of limitations on a personal injury action would apply rather than the admiralty doctrine of laches. In *Chevron,* the Court decided retroactive application of this decision would be inequitable and fail to promote the rationale behind the rule. 447 U.S. at 107.

121. *See, e.g., In re* Dillin, 557 F. Supp. 363, 364-65 (S.D. Ga. 1983) (applied Truth-In-Lending regulations retroactively); Rachubka v. Incom Int'l, 555 F. Supp. 552, 553 (E.D. Ohio, 1982) (retroactive application of state statute of limitations governing vacation of arbitration award).

122. *In re* Dillin, 557 F. Supp. at 364.

123. *Id.*

Thus, in the *Mennonite* situation, if a mortgagee seeks to enforce its old mortgage on a tax sale purchaser where the statute of limitation has run, it will be the purchaser who must carry the burden of proof.

The first prong of the *Chevron* test may be difficult for a purchaser to prove. It could be said that *Mennonite* was clearly foreshadowed by *Mullane.* Many cases have considered notice, and a decision applying due process notice requirements to tax sales is not surprising. In fact, Indiana expanded its own statute to include notice to mortgagees before *Mennonite* was appealed to the Supreme Court.[124] The second prong would be even harder to prove. The purpose of the *Mennonite* rule is to give due process notice to mortgagees. Retrospective application of that rule would not retard its operation; rather, it would promote it. The third prong of the test, however, will be a purchaser's mainstay. Substantial inequitable results are possible if retroactivity relates back to the enactment of a given tax sale statute. In Missouri, that would create clouds on every tax title granted since 1933 when Jones-Munger was enacted, or perhaps as far back as 1877. Even if retroactivity is enforced from the date of *Mullane,* when standards for notice were foreshadowed, potential suits could attack unperfected thirty-year old tax titles.

One possible compromise is to apply *Mennonite* retroactively to any tax sales still within the period of redemption. This could be confusing, however, as the length of redemption periods varies from state to state.[125] As the court in *In re Dillin* said, "Retroactivity cannot be applied on a piecemeal basis dependent upon facts peculiar to each case. Otherwise, no clear rule of law would evolve leaving courts and lenders alike in a quandry as to the applicability of [the] particular judicial pronouncement."[126] A federal court's best approach may be to apply *Mennonite* prospectively.

In Missouri courts, the test for retroactivity is different.[127] In *Barker v. St. Louis County,*[128] the Missouri Supreme Court stated that if the overruled decision deals with a rule of procedure, then the effect of the subsequent overruling decision is prospective only; if the overruled decision deals with substantive law, then the effect is retroactive.[129] Substantive law creates and defines legal rights, while procedural law aids and protects those defined rights.[130] *Barker* dealt with a statute imposing a twenty-day limit for claims of compensation in eminent domain cases. The court held the statute unconsitutional, but held the effect of the decision would be prospective except as to the plaintiff. The court concluded that while eminent domain was a substantive right,

---

124. *See* note 10 *supra.*

125. MO. REV. STAT. § 140.340 (1978) (two years); N.Y. REAL PROP. TAX LAW § 1020 (McKinney 1972) (one to three years, depending on the circumstances).

126. 557 F. Supp. 363, 365 (S.D. Ga. 1983).

127. Other than Oklahoma, Missouri appears to be the only state to use the procedure/substance test. *See generally* Annot., 10 A.L.R.3D 1371 (1966).

128. 104 S.W.2d 371 (Mo. 1937).

129. *Id.* at 377.

130. *Id.* at 377-78.

the twenty-day limit was a procedure for enforcing that right.[131]

A similar result occurred when the Missouri test was applied in *State v. Walker*,[132] where the rule that polygraph examinations were inadmissible was deemed procedural in nature and, thus, only prospective in application. Missouri courts have used the procedure/substance test for both civil and criminal cases. The supreme court, however, has applied different standards from time to time. In *Keltner v. Keltner*,[133] the Missouri Supreme Court, citing a federal decision,[134] said that generally, it is considered undesirable to give retroactive effect to overruling decisions, except under the most compelling circumstances. *Keltner* dealt with a rule that an obligor under a divorce decree could be held in contempt for failure to pay alimony. The court considered the degree to which the prior rule may have been justifiably relied on.[135] Since imprisonment was at stake, the court switched to a more standard criminal procedure analysis.[136]

In deciding whether *Mennonite* or *Lohr* will be applied retroactively, the Missouri court still may apply its old test. As in *Barker*, the notice provision seems to be a procedural step in the substantive right of a county to collect delinquent taxes. On the other hand, interest in property is a substantive right affected by lack of notice. Although an argument could be made for retrospective application, prior decisions lean in favor of prospective application only.

There is a difference, however, between the impact of retroactivity on title examination as compared with litigation. A title examiner may be convinced that courts will apply *Mennonite* prospectively, but nevertheless declare a tax deed unmarketable because the title is not completely free from possible litigation. Until the courts settle this issue, doubts should be resolved against the validity of title, and thus an examiner should assume retroactive application.[137]

Mennonite is a case with far-reaching impact. It will instigate legislative revisions, litigation over tax titles, and a boon for title examiners. There clearly is a new burden to tax collectors, but a simple solution is to conduct a title search before every tax sale, and tack the $100.00 or more cost onto the delinquent tax bill. If marketability of tax titles is increased by proper legislation, then the tax collectors' burden will be offset by the new surge of bidders at tax sales.

For the sake of stability and avoidance of an avalanche of litigation, *Mennonite* should not be applied retroactively. There will be enough cases arising

---

131. *Id.* at 379.
132. 616 S.W.2d 49 (Mo. 1981) (en banc).
133. 589 S.W.2d 235, 239 (Mo. 1979).
134. United States *ex rel.* Angelet v. Fay, 333 F.2d 12, 21 (2d Cir. 1964), *aff'd*, 381 U.S. 654 (1965).
135. 589 S.W.2d at 240 (citing Annot., 10 A.L.R.3D 1371, 1378 (1966)).
136. *See* note 117 *supra*.
137. Title insurance companies that deal with thousands of mortgages can afford to take this small risk and spread any loss. This is more of a concern to individual attorneys who examine titles.

after June 22, 1983 to give *Mennonite* the landmark status it deserves.

VICKI A. DEMPSEY