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FORFEITED AND DELINQUENT LANDS—THE UNRESOLVED CONSTITUTIONAL ISSUE

JOHN W. FISHER, II*

I. INTRODUCTION

Perhaps no issue of real property law has been before the West Virginia Supreme Court of Appeals and considered by the legislature as frequently or produced more law review comments than the subject of forfeited and delinquent taxes. Intuitively one recognizes the issues presented as involving individual property rights on the one hand and the state's right to an effective system for the collection of taxes on the other. While these are important considerations, the issues presented are inherently no more difficult than many other competing interests routinely resolved by the courts. A review of the case law not only provides the necessary historical perspective on this issue, but also explains why the problem of delinquent and forfeited lands has required an inordinate amount of time and attention by the court and legislature. This article also will help focus attention on the important constitutional issue that the court needs to address.

Throughout this subject area's history is a cycle of court decisions and legislative responses. Recent events suggest that this cycle continues in apparent response to the decision of *Mennonite Board of Missions v. Adams*.¹

II. A HISTORICAL PERSPECTIVE—THE ORIGIN OF THE ISSUE

As is so often the case, to adequately understand the current developments, we must look to the past. Perhaps the best case with which to begin such a review is *McClure v. Maitland*.² In *McClure*, Judge Snyder traced the history of the early, and often unsuccessful, attempts of the Commonwealth of Virginia to settle its vast lands west of the Allegheny Mountains and to rectify earlier failures by legislative enactments. This case provides important insight not only into the practical obstacles to the settlement and development of these vast areas, but also as to the origins of article XIII of the West Virginia Constitution.

McClure involved 273,000 acres of land which was returned delinquent for nonpayment of taxes; certified by the auditor to the sheriff for sale for taxes; sold

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¹ *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). In apparent response to the recent decision of *Mennonite Board of Missions*, the 1985 session of the West Virginia Legislature amended chapter 11A, article 3, section 2 of the West Virginia Code dealing with the second publication of the list of delinquent real estate notices.

² *McClure v. Maitland*, 24 W. Va. 561 (1884).

by the sheriff; and purchased by him on behalf of the state.³ When the owner failed to redeem the property, the auditor certified it to the commissioner of school lands to be sold as school lands. Maitland, a nonresident of the state, was proceeded against by order of publication. The property was laid off in parcels not exceeding 640 acres and sold. Orders confirming the sales of these parcels were entered on several different dates in 1880, 1881, and 1882 with the total number of acres sold aggregating approximately 70,000 acres.⁴ In July 1881, Maitland appeared and excepted to the reports of sales made during the July term and subsequently contested those made in the November term. In his petition, Maitland asserted that he was a nonresident of the state and had not been personally served with process.⁵

From a review of Judge Snyder's decision, it is apparent that the statutory scheme of the Commonwealth of Virginia formed the basis for article IX of the West Virginia Constitution of 1863 and subsequently, the provision of article XIII of the West Virginia Constitution of 1872. Having demonstrated that the West

³ *Id.* at 561. Good definitions of "forfeited" and "delinquent" are provided in Note, *Taxation and Land Titles Under Article XIII of the West Virginia Constitution*, 65 W. VA. L. REV. 263, 268-69 (1963). This definition was quoted with approval by the court in *Pearson v. Dodd*:

Delinquent Lands: Delinquent lands are those upon which the owner failed to pay taxes and which have been listed as delinquent by the county sheriff and purchased by him for the state at public sale [or sold by him to "private" purchasers, i.e. individuals at the sale. *W. Va. Code* 1931, 11A-3-4 as amended]. . . . *Forfeited Lands:* Lands became forfeited when the owners fail to enter them for taxation on the land books of the proper counties and no taxes are paid on them for five consecutive years. This land is forfeited to the state by operation of law, and no formalities are necessary to convey title to the state. Lands are forfeited only for non-entry, not for nonpayment of taxes.

Pearson v. Dodd, 159 W. Va. 254, 260-61, 221 S.E.2d 171, 176 (1975) (quoting Note, *supra* note 3, at 268-69), *appeal dismissed*, 429 U.S. 396, *reh'g denied*, 430 U.S. 911 (1977).

This same law review article also provides a good summary of the historical development of article XIII of the West Virginia Constitution.

⁴ *McClure*, 24 W. Va. at 562.

⁵ *Id.* Were it not for its length, the legislative history provided by Judge Snyder in *McClure* would be included in this Article in its entirety as a footnote. It is suggested that in order to appreciate this subject matter, the decision should be read with particular attention to that portion of the decision. *See Id.* at 563-73. Judge Snyder concluded his review of the statutory development by stating:

An inspection of these provisions as they appear at large will establish manifestly that they were framed for the purpose and with the evident intention of putting in force and rigidly carrying out the system and policy inaugurated by the Acts of the General Assembly of Virginia of March 30, 1837, and March 15, 1838, hereinbefore mentioned, and that in every essential particular they are almost literal copies from said acts.

After noting some minor differences, the Judge continued:

But all these and whatever other differences may appear in them are immaterial and the closest examination will, it is believed, fail to discover any differences that can destroy or affect the analogy in the provisions of the two classes of law so far as they bear upon the class of lands to which those belong in this proceeding. It has been suggested that the right to except to the commissioner's report implies that it was contemplated there should be parties and controversy. I do not think such was intended.

Id. at 572.

Virginia constitutional provisions are based on the Virginia statutes, the court noted that "according to a well settled principle of law . . . the framers of our present Constitution and statutes by adopting the provision of the Acts of 1837 and 1838 intended thereby to adopt also the construction theretofore uniformly placed upon them by the courts of Virginia."⁶ Following an analysis of the Virginia decisions, the court concluded that the sale of such land involved an *ex parte* proceeding⁷ and noted that all of the cases involved collateral actions and not direct appeals of either orders or decrees directing or confirming the sales. It further noted that while much of the land in West Virginia was derived through such sales, "and that no case can be found in which an appeal was ever asked for, much less allowed, the conclusion is irresistible that no one even supposed that an appeal could or that it was intended one should be taken from such proceedings."⁸ The court observed that a statutory proceeding for a bill in chancery was adopted in 1844, which provided judicial review and demonstrated that "it was understood that before its enactment no right of appeal existed."⁹

Further evidence that the *McClure* court did not view the sale as a judicial function is found in its rejection of Maitland's argument that he had a constitutional right to be made a party to the proceeding, since he was entitled to the excess of the proceeds of the sale. In disposing of this argument, the court noted that this contention could not be "maintained upon any legal ground, because it *erroneously assumes that the proceeding is a judicial one and that Maitland as the former owner has an interest in or lien on the land or some interest in these proceedings.*"¹⁰ The significance the court attaches to this portion of its opinion is

⁶ *Id.* at 573.

⁷ The court's language regarding the *ex parte* proceeding was as follows:

No petition was filed, neither the former owner nor any other party was summoned or in any manner brought before the court. No pleadings were had and nothing to indicate or even suggest any controversy with any one or the recognition of any interest in the lands or the proceedings by any other than the State, [sic] It was throughout and in all respects treated merely as an *ex parte* proceeding by the commissioner and the court *for the sale of the lands as the absolute property of the commonwealth.*

Id. at 573 (emphasis added).

⁸ *Id.* at 574.

⁹ *Id.* at 575.

¹⁰ *Id.* (emphasis added). The court added that:

It necessarily follows then that the grant or claim thus conferred upon him, is a simple matter of grace, a gift without any consideration therefor, owing its whole existence to the volition of the grantor, and it is in no sense the recognition of a preexisting right to, or claim upon the land or its proceeds. It is a mere bounty gratuitously bestowed by the State, which she had the undoubted right to give or withhold. . . . I am, therefore, of opinion that said fifth section of the Constitution did not confer upon the Appellant, Maitland, any claim or interest in the land, or any interest or right to participate in the proceedings for its sale, his right to the surplus proceeds not arising until after the sale.

Id. at 580-81.

underscored by the lengthy discussion of its rationale contained within the decision.¹¹

Finally, in its review of the Virginia cases, the court explained the language in

¹¹ To adequately appreciate the problems faced and the conditions which gave rise to the constitutional provision which became article XIII of the 1872 Constitution, one needs to read the *McClure* decision. Since a general understanding of those conditions is necessary to gain a historical perspective, the following excerpt should prove helpful.

The whole history of that system [the effort of the Commonwealth of Virginia to unravel the title to the large tracts of lands which were neither settled or taxed] shows a most earnest and determined effort on the part of the Legislature, the judiciary and the people, speaking through our present Constitution, to destroy and annihilate the titles of such delinquent owners, who should, after every reasonable opportunity had been given them to comply with the laws, continue in default, and to protect actual settlers and those not in default. The purpose of the statute passed to enforce this system was not merely to create a lien for the taxes on these delinquent and unoccupied lands, but to effect by their own force and vigor an absolute forfeiture of them and effectually vest the title thereto in the State without the machinery of any proceeding of record or anything in the nature of an inquest of office. Such was intended to be and such was in fact the effect of these statutes. The constitutional competency of the Legislature to pass these laws and thus consummate the forfeiture and perfectly divest all the right, title and interest of the former owner by the mere energy and operation of the statutes themselves, has been repeatedly affirmed by the court of appeals of Virginia—*Staats v. Board*, 10 Gratt. 400; *Wild v. Serpell*, *Id.* 405; *Levasser v. Washburn*, 11 *Id.* 572; *Usher v. Pride*, 15 *Id.* 190; see also *Smith v. Tharp*, 17 W. Va. 221.

. . . .

The title to the land and all the right and interest of the former owner having thus by his default and the operation of the law become absolutely vested in the State and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity deem proper without consulting the former owner or anyone else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. In the exercise of this perfect dominion over her own property the State saw proper to transfer and vest her title to so much of said land owned by her in any person, other than those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same and was not in default for the taxes thereon chargeable to him. And as to the lands the title to which was not so transferred or otherwise released or exonerated, she elected to sell them at public auction and for that purpose appointed as her agents commissioners who were required by law to act under the direction and orders of her courts of record. The proceedings provided for effecting these sales have always been treated, as they were and are in fact, both under the acts of 1837 and 1838 of Virginia and the Constitution found statutes governing this case merely as *ex parte*. They are certainly proceedings neither *in rem* nor *in personam*; neither against the land itself nor against the former owner or any other person. The laws, as we have shown, by their *own force*, transferred to and vested in the State without any judicial enquiry or inquest of any kind. There could, therefore, be no necessity or reason for proceeding *in rem* against the land. That had already become the absolute property of the State and she had a perfect right to sell it without further enquiry. All the laws providing for the sale of these lands presuppose the title to have vested in the State prior to the commencement of the proceedings. In fact the whole authority of the commissioner and the jurisdiction of the court are based upon the assumption that the unconditional title is in the State; for unless such is the fact neither has any authority to act—*Twiggs v. Chevallie*, 4 W. Va. 463.

Smith v. Chapman,¹² which is later cited for the proposition that the proceedings are by nature a judicial proceedings, and noted that the judge who authored the *Smith* decision subsequently spoke of the proceedings as *ex parte*.

It should be emphasized that the court in *McClure* recognized that if the land was in fact not forfeited or delinquent, the "true owner" could attack the sale in a collateral proceeding, and if a forfeiture had not occurred, the sale was void. The rights of the owner of the property to protect his interest is further addressed by the court in responding to another of the appellant's arguments:

In the argument for the appellant it was assumed that sales made by commissioners of school lands were in some respects similar to sales of lands by sheriffs for delinquent taxes, and that, therefore, the proceeding must be construed with the same strictness and scrutiny. This is clearly a mistaken view. In the case of such sales by the sheriffs, the lands sold are the property of the owner, the State having no claim thereto beyond her taxes. The sale is the enforcement of the State's lien for her taxes and nothing more. But in the case of sales by the commissioner of school lands, the lands sold are the absolute property of the State, the former owner having no interest therein whatever. If the sale is irregular or improper in the former case the owner is prejudiced and he has the undoubted right to test the legality of the sale; but in the latter case the former has no interest and cannot, therefore, be prejudiced by the sale, however irregular or improper the proceedings under which it was made.¹³

One familiar with the cases in this subject area will recognize that many of the issues presented in subsequent cases were addressed in the *McClure* decision. That is not to say that *McClure* provides the answers to those issues, for indeed it does not, but rather it provides the basis for the understanding upon which the answers should have been developed.

As these later cases are reviewed, keep in mind the following aspects of the *McClure* decision. The court's decision began with the assumption that the title to the delinquent land was absolutely vested in the state, as the state previously acquired the title at the sheriff's sale for delinquent taxes. The court noted that it was at the sheriff's sale that the state's lien for taxes was to be enforced and "[i]f the sale is irregular or improper . . . the owner is prejudiced and he has the undoubted right to test the legality of the sale."¹⁴ Since the state acquired title at the sheriff's

And all the right, title and interest of the former owner having been completely divested, he has not a particle of interest in the land—no more than if he had never owned—there is, therefore, no possible reason for making him a party or proceeding against him *in personam* or otherwise. The proceeding is of necessity then neither *in rem* nor *in personam*; and as all judicial proceedings properly so styled must belong to either the one or the other of these classes, it follows that this is not and can not [sic] be in any technical sense a judicial proceeding. *Id.* at 576-78.

¹² *Smith v. Chapman*, 52 Va. (10 Gratt.) 465 (1854), quoted in *McClure*, 24 W. Va. at 578.

¹³ *McClure*, 24 W.Va. at 581.

¹⁴ *Id.*

sale, *McClure* was concerned with the procedure for returning the property to individuals to settle and improve, thereby becoming the basis for tax revenues. As Judge Snyder explained, the procedure adopted by our state's founders was patterned after the Virginia statutory scheme:

[The court's role is] merely a mode provided by the State for effecting the sale of lands which are her absolute property. She being a corporate body can act only by agents duly appointed by her. The commissioner and the courts are her agents appointed for that purpose . . . The State could have established any other agency for the disposal of her lands having no connection with her courts, and sales thus made would be just as effectual to pass her title as those made under this form of proceeding.¹⁵

The fact that other types of state owned property are included in the provisions of section 4 of article XIII of the West Virginia Constitution¹⁶ adds credence to Judge Snyder's explanation of the role assigned to the court in such proceedings. Finally, it is fair to speculate that as a contemporary of those who drafted this constitutional provision, Judge Snyder may have benefited from a vantage point in history unavailable to the jurists of the next generation who were called upon to interpret this less than artfully drawn provision.

With the passage of time, the distinctions so deftly drawn in the *McClure* decision became blurred. Almost immediately, some took offense to description of the court's role as administrative and nonjudicial. The seeds of confusion were sown when the court proceedings were turned to as the vehicle to safeguard the "owners" rights and assure fairness. "Casual comments" led to a courtship and ultimately an unhappy marriage uniting the due process requirements in a "taking" with the procedure prescribed for disposing of the state's title through a "proceeding" in the circuit court unexplained in article XIII of the constitution.

Judge Snyder's characterization of the court's role as nonjudicial in nature did not sit well with some members of the profession, as reflected in the court's opinion in *Holly River Coal Co. v. Howell*,¹⁷ decided eight years after the *McClure* decision. The West Virginia Supreme Court of Appeals, with Judge Snyder no longer sitting, in dictum and without challenging or refuting Judge Snyder's

¹⁵ *Id.* at 579.

¹⁶ Section 4 reads:

All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the state of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

W. VA. CONST. art. XIII, § 4.

¹⁷ *Holly River Coal Co. v. Howell*, 36 W. Va. 489, 15 S.E. 214 (1892).

analysis of *Smith v. Chapman*, referred to the circuit court proceedings as “judicial or quasi judicial.”¹⁸

If one were to characterize the *McClure* decision as addressing the issue of how the state disposed of land to which it had acquired title, *Holly River Coal Co.* could be characterized as starting to focus on how the state acquired such title. Judge Holt, in *Holly River Coal Co.*, referred to the sheriff’s sale for delinquency as follows:

Such ministerial sales for taxes had proved in all cases, where brought into question, a delusion and a snare to the purchaser; and the commonwealth after a patient waiting from 1815 to 1837 determined to no longer rely alone upon them. Hence the proceeding was made judicial or quasi judicial; and for this purpose committed to the one great court of original and general jurisdiction . . . and conforming its methods and procedure to the civil law, and wherein all liens were enforced and all mortgages foreclosed, and expressly likened it to such proceedings.¹⁹

At that point in our state’s history, the concern was not so much to safeguard the rights of former owners (most of whom were land speculators) but to assure the purchasers of the delinquent property a good title to the land.²⁰ Therefore, if

¹⁸ *Holly River Coal Co.*, 36 W. Va. at 502, 15 S.E. at 218. Syllabus 2 of that case reads: The acts of the legislature of Virginia of 30th March, 1837, and 15th March, 1838, and amendments *in pari materia*, created and provided for putting in operation a proceeding to ascertain and determine what lands were thus forfeited; and an officer called the “Commissioner of Delinquent and Forfeited Lands” was provided for the purpose, whose duty it was to ascertain and report such lands to the circuit superior court of law and chancery for his county.

Id. at 489, 15 S.E. at 214 (Syl. pt. 2).

Syllabus 3 states: “Such proceeding is a judicial one, in the nature of a proceeding against the land itself; and, when completed by a sale, is *prima facie* evidence of such forfeiture against all persons. And the orders and decrees made therein are conclusive against strangers in all collateral proceedings. *Id.* at 489-90, 15 S.E. at 214 (Syl. pt. 3).

¹⁹ *Id.* at 502, 15 S.E. at 218.

²⁰ The court in *Holly River Coal Co.* expressed this concern as follows:

It can not be doubted that the policy of the legislature in the various acts concerning delinquent and forfeited lands was not only to secure the commonwealth her just dues, but also (and in the main) to quiet titles in the western part of the State, and to remove the check to population and to the settlement and improvement of the country, which their unsettled condition served to create. The policy of the law was to convey a good title under these sales as far as the commonwealth had the means of so doing; and if the ownerships was vested in the commonwealth by reason of the land having never been granted, or by reason of forfeitures for non-payment of taxes or omission from the land-books under one or more titles, such title as the commonwealth had, passed to the purchaser at the forfeiture sale by the commissioners of delinquent and forfeited lands. It was a conveyance of the commonwealth’s right, made under authority of law in the appointed mode, and those who connect themselves with such conveyance connect themselves in derivation of title with the commonwealth.

Id. at 504, 15 S.E. at 219.

the title acquired at the sale of the land was the product of a judicial proceeding, it would greatly assist in bringing order to the chaos surrounding the title to such land, as suggested by the court in *Hays v. Heatherly*.²¹ The transformation of the court's role from one of disposing of property of which the state had previously acquired title into one of providing a judicial process to quiet title, produced the inherent inconsistencies in the procedure which have made it difficult for the court to satisfactorily address the due process issue as a part of the judicial proceeding provided in article XIII of the constitution.

Two years after the court broached the issue of the state's title in *Holly River Coal Co.* and *Hays*, it was presented the opportunity to consider a sheriff's sale based upon an erroneous assessment in *Cunningham v. Brown*.²² After recognizing the state's right to tax the land within its boundaries, the court addressed the fundamental issue of the "taking" and the requirement of due process by stating:

In these proceedings to ascertain delinquency and enforce payment by sale to be made by the sheriff the appropriate notice is required. Notice is of essence of things

²¹ Speaking for the court in *Hays v. Heatherly*, Judge Holt stated:

This brings us to the real point in dispute—the validity of a tax-deed made by the sheriff for land sold by him as delinquent at a ministerial sale had under chapter 31 p. 205, Code, (Ed. 1891.). In the case of *Coal Co. v. Howell*, 15 S.E. Rep. 214 (decided at this term) it became necessary to consider to some extent a judicial sale of delinquent and forfeited lands made by the commissioner of delinquent and forfeited lands, under the acts of 30th March, 1837 and 15th March, 1838.

Under the wise and sagacious leadership of Judges ALLEN and LEE, who were both perfectly familiar with the policy which led to the enactment of these laws, these proceedings were held to be judicial, as contrasted with the other well-known ministerial sales made by the sheriff; and in this way quiet and repose was given to the title to million of acres of uncultivated, and then unimproved, lands, through the central and southern part of (now) this State, by the doctrine laid down in *Smith v. Chapman*, 10 Grat. 445, and other cases, that the proceeding was a judicial one, in the nature of a proceeding against the thing itself; that the policy of the laws on the subject was to quiet titles as far as possible, and to convey a good title under these sales, as far as the commonwealth had the means of so doing. . . .

Hayes v. Heatherly, 36 W. Va. 613, 623, 15 S.E. 223, 227 (1892).

²² *Cunningham v. Brown*, 39 W. Va. 588, 20 S.E. 615 (1894).

The decision is summarized in Syllabus 1 by the court as follows:

A tract of land was properly entered and assessed for taxation in the name of the owner on the land-books of the county for the year 1882, and the taxes paid. In the year 1883 it was omitted without the fault or knowledge of the owner and placed back as an undistinguished part of a larger tract in the name of the former owner. It was restored to the land-books in the year 1884 in the name of the true legal owner, and all taxes since charged were duly paid, including specifically and by name the years 1884, 1885 and 1886. The larger tract, assessed in the name of the former owner, was returned delinquent for non-payment of the taxes for the years 1883, was sold by the sheriff on the 24th day of November, 1885, under chapter 31 of the Code, and not having been redeemed was conveyed by the clerk of the County Court by deed dated the 11th day of March, 1887, to the purchaser. *Held*. The deed conveyed to the purchaser no title to the small included tract, but, as to it, constitutes a cloud upon his title, which the owner has a right to have removed.

Id., 20 S.E. at 615-16 (Syl. pt. 1).

required to be done. And it is a fundamental rule, that in all judicial or *quasi* judicial proceedings affecting the rights of the citizen he shall have notice and an opportunity of a hearing before the rendition of any judgment, decree or order against him. In other words he must be warned and have his day in court. So strict is the rule, that, where a proceeding of a judicial nature is authorized, and the statute is silent as to notice, the adjudication will be void, unless notice is given to the party in interest. The common-law, "the just spirit of all laws," and the plainest principles of reason and justice forbid the taking of judicial steps against a person without notice to him and the opportunity to be present and be heard. Therefore a statute will not be interpreted, unless its words be specific, as authorizing judicial proceedings without notice to the party to be affected by them. Hence the statute in question must be construed, as far as it will admit of it, so as not to bring it into conflict with this principle of natural justice embodied in our fundamental law; and so far as it will not admit of such construction it must be held to be qualified and inoperative as far as overridden by such higher law.²³

The court recognized that the enforcement of the tax is through its lien on the property and that the statute "must be interpreted, construed and applied to the facts as they appear in the exercise of all the inherent functions of judicial power, which no statute can dispense with or take away."²⁴

In *Cunningham*, not only did Judge Holt place the "due process" requirements of the procedure of enforcing the state's tax lien as the central issue in the enforcement of that lien, he recognized that "due process" became an issue at the assessment/sheriff sale stage of the proceeding. It is not clear whether the principles discussed in this case are what Judge Holt had in mind when he referred to the sales in *Holly River Coal Co.* and *Hays* as being of a judicial nature, an extension of these expressions or a refinement of those earlier decisions through the process of articulating the "due process" requirements.

The various methods of acquiring title to different types of property, included in the provision of article XIII, contribute to the confusion. In *Cunningham*, the property was delinquent for nonpayment of taxes and was sold by the sheriff. When the state acquires title to delinquent property, it is as a result of a sheriff's sale.²⁵ In contrast, the process by which the state acquires title to *forfeited*

²³ *Id.* at 596, 20 S.E. at 618-19 (citations omitted). The "judicial proceeding" that Judge Holt referred to is the *assessment* of the land at the early level, and *not* the judicial sale pursuant to article XIII of the constitution. The court stated:

The assessment of land for taxation is judicial in effect, if not in form, and is subject to the general rule, that the proceedings shall not be *ex parte*, nor without due warning to all concerned; and under our constitution the legislature can no more make an assessment, under which property may be taken and sold without notice, than it could render a decree, which might be attended with the same result.

Id. at 594, 20 S.E. at 618. The duties of the assessor, clerk, and sheriff are discussed at various places in the opinion.

²⁴ *Id.* at 597, 20 S.E. at 619.

²⁵ W. VA. CODE §§ 11A-3-1 to -44 (1983).

lands²⁶ is more analogous to the process by which the state acquires title to *escheat* lands.²⁷

An early challenge to the sale of forfeited land by the state was made in *King v. Mullins*.²⁸ In *King*, the plaintiff challenged the state's method of selling its forfeited lands, alleged to be in violation of the fourteenth amendment of the United States Constitution. Following an extensive review of the state statutory and constitutional provisions and cases decided thereunder, the court upheld the procedure. A fundamental concern of the Court with the forfeiture procedure was the lack of inquisition, inquest, inquiry, or public transaction before the former owner was deprived of his title by the mere operation of the statute alone. The court recognized the importance of consistent interpretation of the fourteenth amendment in all states but also expressed concern that its decision in this case "might greatly disturb the land titles of two states [Virginia and West Virginia] under a system which has long been upheld and enforced by their respective legislatures and courts."²⁹ With this in mind, the Court elected to focus its attention on whether "the rights of the parties in this case can be fully determined without passing upon the general question of whether the clauses of the West Virginia Constitution in question, *alone considered*, is consistent with the national Constitution, that question may properly be left for examination until it arises in some case, in which it must be decided."³⁰ The Court noted that the statute which was in force at the time of the *McClure* decision was amended in March 1882 to

²⁶ W. VA. CODE § 11A-4-2 (1983) (forfeiture of lands for nonentry) reads:

It is the duty of the owner of land to have his land entered for taxation on the land books of the appropriate county, have himself charged with the taxes due thereon, and pay the same. Land which for any five successive years shall not have been so entered and charged shall be operation of law, without any proceedings therefor, be forfeited to the State as provided in section 6, article XIII of the Constitution, and shall thereafter be subject to transfer or sale under the provisions of section 3 and 4 of such article.

²⁷ W. VA. CODE § 37-2-1 (1985) (when property shall escheat) states that, "Whenever any person shall die intestate and without any heir or next of kin, owning real estate or personal property within this State, the title of such deceased person therein shall escheat to the State." W. VA. CODE § 37-2-5 (1985) (list of land by escheator).

Each escheator [W. VA. CODE § 37-2-4 (1985) makes the assessor of each county the escheator] shall annually, in September, prepare a list of all lands within his county, of which any person shall have died owning an estate of inheritance, intestate and without any known heir, or to which no person is known by him to be entitled, and transmit such list to the commissioner of school lands of his county, according to the provisions of section seven, article three of this chapter. [Repealed 1941. Replaced by W. VA. CODE §§ 11A-4-1 to -41 (1985).] If the State tax commissioner shall be of the opinion that other lands, not included by the escheator in such list, should be so included, and shall so advise the escheator, in writing, the escheator shall place such lands upon such list.

²⁸ *King v. Mullins*, 171 U.S. 404 (1898).

²⁹ *Id.* at 422.

³⁰ *Id.*

make the proceeding in which the former owner or claimant could intervene and redeem the lands and be relieved of the forfeiture."³¹

The effect of the Court's decision in *King* was to allow the due process protection to be satisfied by redemption procedures rather than focusing on what due process requires at the time of the taking in order for the state to acquire the title to such lands.³² The Supreme Court in *King* concluded that because of the redemption protection, the system in West Virginia met the minimum due process requirements.

By the turn of the century, the issues which would frustrate the court, the legislature and the citizens of the state had taken shape. The "wretched and embarrassed condition" of the land titles of the vast areas of Virginia, west of the Allegheny Mountains, and the stifling effect this confusion had on attempts to settle the area had led to the statutory provisions of the 1830s. The transposition of the Virginia statutory provisions into our Constitution created a rigidity which made it difficult to adjust to changing circumstances. The assignment of an ill defined role to the court, found in article XIII of the West Virginia Constitution, and the failure to adequately address either conceptionally or procedurally the due process requirements which are inherently a part of the protection of an individual's rights, was the legacy of the nineteenth century for the next generation of judges and legislators.

III. THE LEGACY OF THE GREAT DEPRESSION

The economic hardships created by the depression of the 1930s caused the number of delinquencies for nonpayment of taxes to significantly increase which led to a major legislative revision of the statutory provisions in 1941. The rise in delinquencies and the statutory changes together produced the ingredients for a resurgence in litigation of the issues surrounding the sale of delinquent lands.

³¹ With regard to the amended statute, the court noted:

It thus appears that under the statutes of West Virginia in force after 1882 the owner of the forfeited lands had the right to become a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his land.

Id. at 433.

³² The focus on redemption procedures is evident in the passage below:

If, as contended, the state, without an inquisition or proceeding of some kind declaring a forfeiture of lands for failure during a named period to list them for taxation, and by force alone of its Constitution or statutes, could not take the absolute title to such lands, still it was in its power by legislation to provide, as it did, a mode in which the attempted forfeiture or liability to forfeiture could be removed and the owner enabled to retain the full possession of and title to his lands. We should therefore look to the Constitution and statutes of the state together for the purpose of ascertaining whether the *system* of taxation established by the state was, in its essential features, consistent with due process of law.

Id. at 428.

The 1941 statutory rewrite was challenged in *Sims v. Fisher*.³³ The heart of the issue was identified by the legislature's declaration of intent and purpose:

It is the intent and purpose of the Legislature to abolish the existing judicial proceedings for the sale of land for the school fund, and to substitute therefor an administrative ex parte proceeding, thus reverting to the practice originally established and sanctioned in this State. The procedure provided for in this article is designed to convey to the purchaser not an original but merely a derivative title.³⁴

The court in *Sims* addressed the threshold issue presented by section 14 of article 4 of the 1941 Act, as follows:

With all deference to the will of the Legislature, we do not think it possesses the power to require any court to act as an "administrative agency", and any court which acts in such capacity violates the plain provisions of our Constitution. We are of the opinion, therefore, that the provisions of Article 4, Chapter 117, Acts 1941, which assumes to require the performance of administrative duties by circuit courts, in connection with the sale of lands for the benefit of the school fund, is plainly unconstitutional.³⁵

This conclusion was based primarily upon the separation of powers clause in article V of the state constitution and the court's decision in *Hodges v. Public Service Commission*.³⁶ While recognizing that the decision on the constitutionality of the threshold issue decided the case, the court in *Sims* stated that "the importance of the matter before us justifies a discussion of the other questions stated, and other questions properly related thereto, as well."³⁷

The second question presented in the case was phrased by the court as follows:

Whether under Section 4 and 5 of Article XIII of our Constitution, there can be a sale of land, the title to which is claimed to be vested in the State and sought to be sold for the benefit of the school fund, without a judicial determination that title thereto is so vested, and such land subject to sale.³⁸

In order to answer this question the court again traced the history of the development of the subject area in Virginia and West Virginia. In its review, the court adopted the historical analysis of Judge Holt in *Smith v. Chapman*, rather than the historical perspective of Judge Snyder in *McClure v. Maitland*, and determined that the proceedings in the Superior Court of Law and Chancery is one in the nature of a judicial proceeding.³⁹ After discussing and quoting the *McClure* deci-

³³ *Sims v. Fisher*, 125 W. Va. 512, 25 S.E.2d 216 (1943).

³⁴ *Id.* at 514, 25 S.E.2d at 217-18.

A summary of the provisions of the 1941 Act is provided by the court in its decision. *Id.* at 516-20, 25 S.E.2d at 219-21.

³⁵ *Id.* at 525, 25 S.E.2d at 222.

³⁶ *Hodges v. Public Service Comm'n*, 110 W. Va. 649, 159 S.E. 834 (1931).

³⁷ *Sims*, 125 W. Va. at 521, 25 S.E.2d at 221.

³⁸ *Id.*, 25 S.E.2d at 220.

³⁹ Judge Kenna, in a concurring opinion, argued that the court should expressly overrule its holding in the case of *McClure v. Maitland*, and believed it could do so without adversely affecting the acquired under the rules laid down therein. *Id.* at 542, 25 S.E.2d at 230. (Kenna, J., concurring).

sion, the court noted that the statute construed in that case was amended on March 18, 1882, and resulted in "vital changes in the existing statute. . . . It undoubtedly made the proceedings for the sale of lands for the benefit of the school fund a judicial one. . . ." ⁴⁰

Judge Fox, writing for the court, answered the second question in the following passage:

We consider this construction [the sale of such property as judicial] as the settled policy of the State, based upon constitutional requirements, sound public policy, and clear reasoning, and a construction from which, because of the probable effect of any changes on the land titles, it would be dangerous to depart, even if the power to do so existed. ⁴¹

While at first blush, this statement appears doctrinally indisputable, by the end of the decade, Judge Fox authored an opinion which held that the state must be the absolute owner of the land before it reaches the judicial proceeding just described.

Another crucial question addressed by the court was whether a judicial determination that there had been an actual vesting of title in the state was a condition precedent to entering of an order or decree for its sale. Of course, title could vest in the state by forfeiture, sale, or escheat, or the sale of lands categorized as waste or unappropriated. The court did not approach this issue from the point of what due process is required, but rather from whether a judicial finding was required.

In deciding that such a finding was a prerequisite to a sale, the court rejected the "safeguards" in the Act of 1941 provided to the former owners to challenge the sale after the fact. The court stated that "[t]he weakness of the act is that it does not provide any notice, or for any opportunity to test this question before sale, and we think that due process, and provisions of our Constitution require such notice and opportunity." ⁴² Interestingly, although the court briefly men-

⁴⁰ *Id.* at 532, 25 S.E.2d at 225.

⁴¹ *Id.* at 533, 25 S.E.2d at 226. By further attempting to distinguish between the cases, Judge Fox continued:

True, the State might, in her Constitution, have provided for a proceeding for the sale of her lands ex parte and administrative in its nature, having no connection with her courts, but she has not done so. Under our Constitution, she can only employ the functions and processes of the courts in their capacities as judicial bodies, and when, through the Legislature, the State attempts to impose upon the courts duties which may be fairly termed non judicial in their nature, she mistakes the method which should be employed to effect that purpose. The imposition of such duties on the courts can only be accomplished by an amendment to the Constitution.

Id., 25 S.E.2d at 226.

⁴² *Id.* at 536-37, 25 S.E.2d at 227. Perhaps this portion of the court's decision is best summarized in Syllabus 2 & 3 by the court:

tioned *King* later in its opinion, it does not discuss that case as a part of its discussion of this issue.⁴³

A third major issue addressed by the court involved the role of the Public Land Corporation of West Virginia in the new statutory process. The court concluded that while the Public Land Corporation may purchase such property, the corporation must sell the acquired property pursuant to the provisions of section 4 of article XIII of the constitution. For the purpose of the present discussion, this segment of the decision is of only passing interest.

Having by its own words recognized it was providing guidance not necessary to decide the case, the dictum in *Sims* could perhaps best be summed up in the words of Sir Walter Scott: "Oh what a tangled web we weave." Following the decision in *Sims* the legislature, by necessity, began the process of rewriting the statute following the guidance the court had provided in its discussion.⁴³

The court again considered this product of the legislature in *State v. Farmers Coal Co.*⁴⁴ This case involved a provision of the 1941 statute which provided:

The former owner of any real estate purchased by the state or forfeited to the state for nonentry, or any other person who was entitled to pay the taxes thereon, may redeem at any time until such real estate has been sold as provided in article four of this chapter, and the sale confirmed by the circuit court.⁴⁵

In deciding that this provision was unconstitutional, Judge Fox, who wrote the majority opinion in *Sims v. Fisher*, explained:

To us it is perfectly clear that before the State has the right to maintain the suit authorized by Section 4 of Article XIII, it must have absolute title to the lands sought to be sold, and this means that as to lands delinquent and purchased by the State at a sheriff's sale there cannot exist at the date of the institution of such suit, any right of redemption in the former owner.⁴⁶

Under Section 4 of Article XIII of the Constitution of this State, the proceeding therein required to be instituted in circuit courts for the sale of lands for the benefit of the school fund, must be a judicial proceeding, requiring process or notice in advance of hearing.

Sections 4 and 5 of Article XIII of the Constitution of this State, properly construed, require, as a condition precedent to the entry of any order or decree for the sale of lands for the benefit of the school fund, a judicial finding that the land proceeded against is, in fact, subject to sale.

Id. at 512-13, 25 S.E.2d at 217 (Syl. pts. 2, 3).

⁴³ The amendments were reflected in 1943 W. VA. ACTS ch. 84; 1945 W. VA. ACTS ch. 140.

⁴⁴ *State v. Farmers Coal Co.*, 130 W. Va. 1, 43 S.E.2d 625 (1947).

⁴⁵ *Id.* at 8, 43 S.E.2d at 629 (quoting 1941 W. VA. ACTS ch. 117, § 8).

⁴⁶ *Id.* at 10, 43 S.E.2d at 630.

That absolute title in the State is a prerequisite to the institution of a suit to sell land for the benefit of the school fund, is further attested by the plain provision of Section 4, Article

As noted earlier, the court's decision in *State v. Farmers Coal Co.* is incompatible with its pronouncement of the court's role in the *Sims* case. Judge Fox's decision does not suggest that he is aware of inconsistency between the two opinions.

The court explained that the opportunity to redeem the land after it becomes constitutionally irredeemable (but before resolution of the suit by the deputy commissioner to sell the land) constitutes an *act of grace*, and if the state elected not to extend or withdraw this privilege, the former owner could not complain.

In a concurring opinion, Judge Kenna attempted to explain that the technical provisions of the constitution requiring the land to become irredeemable does not, as a practical matter, preclude the former owner from "redeeming" it. In his

XIII of the Constitution which requires that the "title whereto shall remain in the State until such sale as is hereinafter mentioned, be made." In our opinion, the title referred to in the language quoted above means absolute title, and there is no absolute title in the State, so long as any person has the right to reclaim that title through the process of redemption. Furthermore in a suit to sell land for the benefit of the school fund, it is assumed that the purchaser obtains title to the land he purchases, and not a mere claim thereto, subject to some one's right to redeem, where he has not been served with notice of the proceeding to sell, and has not actual notice thereof. To hold that the State may institute such a suit before absolute title becomes vested in it, as to lands sought to be sold, is to open the door to interminable confusion, resulting in the unsettling of land titles, and a state of uncertainty which, in our opinion, was never intended by the Legislature, and certainly not intended by the framers of our Constitution.

We are of the opinion that as to lands sold by the sheriff, purchased by the State, and not redeemed, before the State may institute a suit to sell the same for the benefit of the school fund, it must have absolute title thereto, free and clear of any right of redemption on the part of the former owner; that such absolute title does not exist, so long as the former owner has an unrestricted right to redeem such land sold by the sheriff at any time after such sale, both before and after the institution of a suit to sell the same for the benefit of the school fund; that there must be some time when the land proceeded against has become irredeemable, and that time is when the land has not been redeemed within a period definitely fixed by the Legislature for such redemption. Whether that date be one year or two years, or other period, after the sheriff's sale, is a question for legislative determination, but some period for redemption must be allowed, the end of which must be fixed and definite, and following the expiration thereof the land becomes irredeemable. The Constitution refers to land purchased by the State as "irredeemable," from which it necessarily follows that it was at some time subject to redemption after the State's purchase. If later, and after the institution of a suit to sell the same for the benefit of the school fund, the State elects as a matter of grace, and without affecting the irredeemable status of the land involved, or its absolute title thereto, to permit redemption during suit, long practice and the decisions of this Court would seem to justify such a procedure. We repeat: To justify a circuit court in entertaining a suit by the State to sell land for the benefit of the school fund, that land must have become irredeemable; and whether it has become irredeemable can only be determined by enactment by the Legislature of a law which fixes a final date for the redemption of land sold at a sheriff's sale, and which provides that after the passing of the date or period so fixed for redemption, it becomes irredeemable and subject to sale.

Id. at 13-14, 43 S.E.2d at 631-32.

discussion, he did concede that the title to such land must become "absolutely vested in the State" before it can be sold at the sale brought in the circuit court.⁴⁷

Considering that the composition of the court in *Farmers Coal Co.* was no different, with regard to the authors of the majority and concurring opinions, than the court which decided just four years earlier that the "first necessary step in any proceeding to sell land for the benefit of the school fund is a finding that the land sought to be sold is, in fact, subject to sale."⁴⁸ Nonetheless, the court in *State v. Farmers Coal Co.* held that *absolute* title had to be with the state before it could be certified to the circuit court for sale.

In 1948, a broad based challenge to the statutory provision of chapter 11A, article 4 of the West Virginia Code was presented to the court in *State v. Blevins*.⁴⁹ While the case involved eleven certified questions, only three of the questions are relevant to the present discussion. The due process related issues were posed in question numbers three, four, and five and were discussed by the court together.⁵⁰ The court noted that although the state's constitution requires the state to dispose of the five classes of property mentioned in section 4 of article XIII by a proceeding in the circuit court. "It is to be observed that the proceedings are not defined in the Constitution, nor does any provision of Article XIII characterize the proceedings as being in law, in equity, *in personam*, *in rem*, *inter partes* or *ex parte*."⁵¹ The court opined that under the statute here considered the suit is a proceeding *inter partes*, and substantially one *in rem*.⁵²

The court reaffirmed its earlier holding that "the former owner has no right to redeem his land from sale for tax delinquency and forfeiture for nonentry,"⁵³ but recognized that the *privilege* of redemption "is a substantial equity, a property right, and exists as long as legal title remains in the State. The right is no less important to the claimant because it is a gift from the State, it is his to the exclusion of others notwithstanding."⁵⁴ The court brought to a conclusion its discussion of the "due process" issues by stating:

It suffices to say that our conclusions on those questions are supported by reason and authority, and, accordingly, we hold that process issued and served by means of an order of publication, as provided by Section 12, constitutes due process of law, as required by the Fourteenth Amendment to the Federal Constitution, and Section 10 of Article III of the Constitution of this State. Lienholders of record, persons in possession, and persons claiming an interest in lands proceeded against,

⁴⁷ *Id.* at 19, 43 S.E.2d at 634.

⁴⁸ *Sims*, 125 W. Va. at 536, 25 S.E.2d at 227.

⁴⁹ *State v. Blevins*, 131 W. Va. 350, 48 S.E.2d 174 (1948).

⁵⁰ *See Id.* at 358-59, 48 S.E.2d at 180-81.

⁵¹ *Id.* at 362, 48 S.E.2d at 182.

⁵² *Id.*, 48 S.E.2d at 182.

⁵³ *Id.* at 366, 48 S.E.2d at 184.

⁵⁴ *Id.* at 367, 48 S.E.2d at 185.

if they desire to do so, may intervene in this suit "if so minded." The State is not called upon to have a search of the public records made, and thus ascertain if there are liens or claims against the land to which she is entitled. As hereinbefore indicated, the trial court is vested with sufficient authority and discretion to require proof of establishing the State's title to the lands to be sold, or that the State has no title to such lands.⁵⁵

In 1947, the legislature again turned its attention to the provision of chapter 11A, article 4, and amended section 12 which provided the means for obtaining service of process on the defendants. A challenge to the statute was again before the court in 1949 in *State v. Gray*.⁵⁶

In *Gray*, the Circuit Court of Webster County had held that the provision of the 1947 Acts of the Legislature, chapter 160, relating to the sale of property by the state for the school fund, was unconstitutional under the United States Constitution article 1, section 10 for two basic reasons.⁵⁷ First, the trial court's decision proceeded on the assumption that the Ordinance of 1861 and the Constitution of 1862 and 1872 created property rights to protect land titles as a result of the separation of West Virginia from Virginia. Following a review of the history of these documents and after recognizing the necessity of the sovereign right to tax, and enforce the payment of such taxes, the court rejected the circuit's reasonings.⁵⁸

The second issue in the *Gray* case involved the procedure for the sale of delinquent property purchased by the state at a sheriff's sale. To resolve this issue, the court again traced the history of the earlier statutes and cases. Judge Fox, who had repudiated the *McClure* decision in *Sims* (to the extent that the concurring judge

⁵⁵ *Id.*, 48 S.E.2d at 185.

⁵⁶ *State v. Gray*, 132 W. Va. 472, 52 S.E.2d 759, *appeal dismissed*, 338 U.S. 855 (1949).

⁵⁷ The court stated those reasons in these words:

The decree appealed from . . . may be said to be based on two propositions of law: (1) That Chapter 160 of The Acts of the Legislature, 1947, violates Section 10 of Article I of the Constitution of the United States, and in particular that part thereof which provides that: "No state shall . . . pass any . . . Law impairing the obligations of Contracts . . ." and (2) that said Act violates what is termed in said decree a compact between the Commonwealth of Virginia and the State of West Virginia, in respect to security of titles to land within the boundaries of this State, based upon the Acts of the Commonwealth of Virginia prior to the formation of this State.

Id. at 480-81, 52 S.E.2d at 765.

⁵⁸ The holding was expressed in these terms:

We hold, therefore, that the trial court erred in holding that Chapter 160 of the Acts of the Legislature, 1947, was unconstitutional by reason of any supposed compact between the Commonwealth of Virginia and this State. We hold, also, that Section 10 of Article I of the Constitution of the United States has no application to the Ordinance and constitutional provisions aforesaid, because the same do not constitute a compact which in any way limits the power to the Legislature of this State to impose and collect taxes on its own territory.

Id. at 489, 52 S.E.2d at 769.

stated the court should expressly overrule it), quoted at length and with approval from the *McClure* decision on this occasion and concluded that:

So far as we know, the ruling of *McClure v. Maitland* . . . still stands except as modified by *Sims v. Fisher*. . . . [The proceeding in the circuit courts for the sale of lands for the benefit of the school fund must be a judicial proceeding, requiring process and notice in advance of hearing.] The ruling in *McClure v. Maitland* . . . was based upon the provisions of Chapter 134, Acts of 1872-3, and the holding therein that to sustain a proceeding under Section 4 of Article XIII, absolute title to the land was required to be vested in the State, has been upheld throughout the years, and recently in the case of *State v. Farmers Coal Co.* Therefore, we rest our discussion on the basic fact that at the date of the institution of this suit, the former owners of the land sought to be sold, and those claiming any interest therein, had lost all right, title or just claim to any of said lands, or any interest therein.⁵⁹

The court noted that in 1882, following the *McClure* decision, the legislature amended the statute in force at the time of that case (the Act of 1872-73). In essence, that amendment provided that the sale of state lands under section 4 of article XIII of the constitution would be a judicial proceeding and that statute remained in force and effect until the rewrite of the law in 1941.⁶⁰ The court suggested that although *Sims* ruled unconstitutional the attempt to return to the administrative proceeding upheld in *McClure*, "there was no holding in that case on the question of the legal right of former owners to be made parties to such a proceeding and to have notice thereof. . . ."⁶¹ The court, following brief review of *Farmers Coal Co.* and *Blevins*, addressed the issue of service of process under section 12 of the Act as follows:

The apparent inconsistency disclosed by the provisions of the section lies in the fact that one provision requires that the summons issued shall be served on named defendants in the manner provided by law for the service of process in other chancery suits, and the other that the failure to do so shall in no wise affect that the validity of the proceeding. . . .⁶²

The majority recognized that the two defendants in the case made general appearances and thus did not have standing to contest defects in the service of process.

_____ The author of the majority opinion in *Gray* also wrote the majority opinion in *Sims*. In responding to the argument that there existed some form of contract between the state and former owner created by the previous statutory provision, the court noted that:

The fundamental error of those who would sustain the theory of a contract between the State and former owner of real estate sold for nonpayment of taxes _____ and purchased by the State lies in their ignoring the fact that the supposed contract

⁵⁹ *Id.* at 492, 52 S.E.2d at 770 (citation omitted).

⁶⁰ *Id.* at 493, 52 S.E.2d at 770-71.

⁶¹ *Id.* at 494, 52 S.E.2d at 771.

⁶² *Id.* at 497-98, 52 S.E.2d at 773.

which they would enforce is based upon the fault of the former owner [i.e. the former owner's failure to pay the taxes as required by law].⁶³

The court discussed various authorities which recognize that the procedure for the collection of taxes was distinguishable from suits, actions, and other proceedings for the collection of debts under the common law or statutes designed for that purpose. Included in this discussion is a quote from *King*, that "it is well settled-that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character."⁶⁴ The crux of the decision is found in the following statement:

In our opinion, Section 12, as a whole, is constitutional on the theory that, as so early held in *McClure v. Maitland*, . . . a former owner of land, or persons holding liens against the same, have lost all of their rights when the title to the land they own or had claim to became completely vested in the State.⁶⁵

The court resolved the issue of the apparent inconsistency in the provisions of section 12 by concluding that the last portion of the section was only intended to apply when the names of owners and claimants were not known and were not intended to nullify the service of persons provided for in the preceding part of that section.⁶⁶

⁶³ *Id.* at 501, 52 S.E.2d at 774.

⁶⁴ *Id.* at 507, 52 S.E.2d at 777 (quoting *King*, 171 U.S. at 429).

⁶⁵ *Id.* at 508-09, 52 S.E.2d at 778.

⁶⁶ This inconsistency was identified in the passage below:

We hold, therefore: (1) That when the real estate proceeded against in this cause became irredeemable on the 1st day of July, 1947, the former owner, and all persons having an interest in, or liens upon said land, lost all their right, title and interest therein, and the said land became the absolute property of the State; (2) that under the Constitution of this State a judicial proceeding is necessary to sell said lands under the provisions of Section 4, Article XIII of our Constitution, and that in said proceeding the Legislature has the power to provide for such sale without making the former owner or other interested persons therein a party thereto; (3) that the provisions of Sections 11 and 12, Chapter 160, Acts of the Legislature, 1947, providing that former owners, and other interested persons, be made parties to such proceeding, and requiring the service of process on parties defendant, and an entry of an order of publication as to those not served, constitutes only an act of grace on the part of the State, and not an act required by Section 4 of Article XIII of the Constitution of this State; (4) that Chapter 95, Acts of the Legislature, 1882, providing for a judicial proceeding for the sale of lands returned delinquent for the nonpayment of taxes, did not operate to create a contract between the State of West Virginia and the owners of the land, and that the enactment of Chapter 160 of the Acts of 1947, in so far as it may have changed the proceeding provided for in the Acts of 1882 aforesaid, was within the power of the Legislature and is constitutional and valid; (5) that Chapter 160, Acts of 1947, aforesaid, requiring the service of process on all parties to the proceeding therein providing for, if within the jurisdiction of the court in which such proceeding or suit is instituted, is valid and binding on the Circuit Courts of the various counties of the State, and that such courts have the power, and, in our opinion, are charged with the duty of requiring the service of such process on all persons residing in this State, who can be located and served; and (6) that Chapter 160 of the Acts of 1947, does not violate the provisions of Section 10, Article I of the Constitu-

Within two years, the issue of obtaining process on the defendants via publication was back before the court in *State v. Simmons*.⁶⁷ This case differed from *Gray*, in that the questionable provision of section 12 of the Act was squarely presented to the court in *Sims*.⁶⁸

In *Simmons*, the property was returned delinquent in the name of Cottrell for the nonpayment of the 1945 taxes, and sold by the sheriff to the state on December 9, 1946. In June 1947, Cottrell sold the lot by a general warranty deed to Drake who immediately recorded it. Taxes on the land were paid for the years of 1946, 1947, and 1948. The land became irredeemable in June 1948, and was certified to the Deputy Commissioner of Forfeited and Delinquent Lands on September 22, 1948. The suit instituted by the Deputy Commissioner on November 22, 1948, named Cottrell as a defendant, but no process was personally served on him. Drake was not named as a defendant and no process was issued as to him. An order of publication against all named defendants and all unknown parties who possessed or claimed an interest in the lands was obtained. The property was sold by the sheriff to an individual purchaser and a deed was made in June 1949. In October 1949, Cottrell and Drake filed their petition to set aside the deed delivered to the purchaser in June 1949.⁶⁹ The case was considered by the supreme court in the form of five certified questions, the first three of which are relevant to the present discussion.⁷⁰ After quoting extensively from *Blevins*, the court summarized *Blevins*, *Gray*, *Farmers Coal Co.*, and *Fisher* as follows:

tion of the United States, nor Section 10 of Article XIII of the Constitution of this State, and is valid and binding upon the courts of this State.

Id. at 512-13, 52 S.E.2d at 779-80.

⁶⁷ *State v. Simmons*, 135 W. Va. 196, 64 S.E.2d 503 (1951).

⁶⁸ Section 12 was once again amended this time after this suit was filed, by Chapter 134, Acts of the Legislature, 1949.

⁶⁹ *Simmons*, 135 W. Va. at 198-200, 64 S.E.2d at 505-06.

⁷⁰ The three relevant questions were as follows:

1. Whether in a suit instituted by the State under the provisions of Chapter 160, Acts of the Legislature, 1947, for the purpose of selling, for the benefit of the school fund, lands which have been forfeited or sold to the State for taxes, the former owner of any such land, who, at the time of the institution of such suit, is a resident of the county in which such land is situated, may be proceeded against by order of publication naming such former owner and giving a local description of the land sought to be sold by the State.

2. Whether in a suit so instituted for such purpose, persons having or claiming any interest in such land, as disclosed by the public records and persons, other than the former owner, in possession of such land, may be proceeded against by an order of publication as unknown defendants.

3. Whether in a suit so instituted for such purpose, failure to effect personal service on the former owner or a person having or claiming any interest in such land, as disclosed by the public records, or a person in possession of such land, who, at the time of the institution of such suit, is a resident of the county in which such land is situated, is cured by the provisions of Chapter 134, Acts of the Legislature, 1949.

Id. at 202-03, 64 S.E.2d at 507.

To sell delinquent lands for the benefit of the school fund, under a valid legislative enactment, it is essential that the suit in the circuit court of the county in which the lands are situated be a judicial proceeding, and that the lands sold by the sheriff and purchased by the State have become irredeemable and the absolute title to them has become vested in the State.⁷¹

The central issue in *Simmons* involved the sufficiency of the order of publication for obtaining process of the "former" owners of the property. If the "dictum" of *Gray* controlled, process as to these individuals would have been insufficient because the former owner was not personally served. Of course, it was on the issue of process and publication that Judge Lovins wrote the concurring opinion in *Gray*. Judge Haymond, a contributing author to the majority opinion written by Judge Fox in *Gray*, reconsidered his position and reversed himself to agree with Judge Lovins' position as set forth in the concurring opinion in *Gray*.⁷² As author of the majority opinion, Judge Haymond wrote: "After further consideration of the foregoing statements and the questions to which they relate, the writer of this opinion concurs in the view with respect to those statements expressed in the concurring opinion of Judge Lovins in the *Gray* case."⁷³ Judge Haymond explained that the first part of section 12 which provided for personal service should be viewed as directory and not mandatory in character. This construction would not be inconsistent with the proviso at the end of section 12 which provided that if personal service were not obtained it would in no way affect the validity of the proceedings.⁷⁴

⁷¹ *Id.* at 209, 64 S.E.2d at 510 (citations omitted).

⁷² See *Gray*, 132 W. Va. at 513, 52 S.E.2d at 780 (Lovins, J., concurring).

⁷³ *Simmons*, 135 W. Va. at 211, 64 S.E.2d at 511. The statements to which Judge Haymond was referring were as follows:

Section 4 of Article XIII of the Constitution of this State does not require that former owners, and other parties interested in land proceeded against thereunder, shall be made parties to such proceeding; but the legislative requirement of Chapter 160, Acts of the Legislature, 1947, that in such as proceeding such former owner or other named defendants shall be served with process, will be enforced by the courts of this State.

Gray, 132 W. Va. at 472-73, 52 S.E.2d at 761 (Syl. pt. 4).

Section 12 of Chapter 160, Acts of the Legislature, 1947, empowers the circuit courts of this State to require the personal service of process, in suits instituted thereunder, on all persons within the jurisdictions of said courts, where such service of process can be had.

Id. at 473, 52 S.E.2d at 761 (Syl. pt. 7)

⁷⁴ The court in *Simmons* explained this construction of section 12 in the passage below: Section 12, Article 4, considered and construed as a whole, means that in a suit to which it applies, the former owner of the land involved, and any other persons having or claiming an interest in such land, may or may not be named in the summons; that if any such person shall be named as a defendant, he may or may not be personally served with process in the suit; that an order of publication, setting forth the requisite facts and information, shall be entered; and that the former owner, and all other interested persons, whether named or not named as defendants, may be validly proceeded against by such order of publication, even though such persons may reside within the jurisdiction of the court in which suit is instituted. The section, as so interpreted and applied, is directory, not mandatory, in character. It satisfies the requirements of due process of law and is not violative of any provision of the

The court resolved the second certified question in a similar manner by stating that persons with liens against or claims of an interest in the property could be proceeded against as unknown defendants in the order of publication.⁷⁵

Finally, the court noted that the right of redemption had consistently been recognized as a "mere grace accorded by, and not required of, the State,"⁷⁶ and that this right or privilege was adequately safeguarded by the code provisions. The court pointed out that this was not the first time that large amounts of real estate had been sold and investments made in reliance upon such proceedings. To nullify this title would create confusion and hardship as to land titles.⁷⁷ Although it expressed regret as to the implications of the decision for Drake, it noted the failure of Cottrell to meet his obligation to pay taxes as the cause of the problem.⁷⁸

As one would anticipate, Judge Fox filed a dissent. In many respects his dissenting opinion reflects both the dilemma the court had created for itself and a crucial unresolved issue. At this point the court conceded that Judge Snyder was correct in holding that the State was the absolute owner of the land at the time of the deputy commissioner's sale,⁷⁹ but based upon the separation of powers princ-

Constitution of the United States or of the Constitution of this State. It was not necessary to obtain personal service of process upon the petitioner, Cottrell, the former owner of the lot proceeded against, and the proceedings had upon the order of publication are valid and binding upon him as a named defendant in this suit. In *State v. Blevins*, 131 W. Va. 350, 48 S.E.2d 174, this Court, citing *Longyear v. Toolan*, 209 U.S. 414, 28 S. Ct. 506, 52 L. Ed. 859, said that it is not a violation of due process of law to award an order of publication, authorized by statute, against a resident defendant.

Simmons, 135 W. Va. at 214, 64 S.E.2d at 513.

⁷⁵ The court resolved this question as follows:

[I]n a suit to sell delinquent and forfeited lands for the benefit of the school fund, as provided by Chapter 160, Acts of the Legislature, 1947, Regular Session, persons holding record liens, persons having or claiming an interest in, and persons in possession of, such lands, may be proceeded against by an order of publication, as unknown defendants; that such procedure is not violative of the due process provisions of the Constitution of the United States or of the Constitution of this State; and that the court may, in such suit, enter a decree of sale, even though such unknown defendants may be residents of this State. It follows that the proceedings against Drake, who was proceeded against as an unknown defendant, based upon the order of publication in this suit, are valid and binding as to him.

Id. at 215, 64 S.E.2d at 513.

⁷⁶ *Id.* at 216, 64 S.E.2d at 514 (quoting *State v. King*, 64 W. Va. 545, 550, 63 S.E. 468, 470 (1908) (Syl. pt. 19)).

⁷⁷ *Id.* at 218, 64 S.E.2d at 515.

⁷⁸ *Id.* at 218-19, 64 S.E.2d at 515.

⁷⁹ Judge Fox, the author of most of the key opinions dealing with this subject since 1941, stated in his dissent:

In my opinion, if we adopt, as I think we must, this theory that the State, being the absolute owner of land which has become irredeemable, either from forfeiture or sale, it follows that it has power to dictate the terms upon which its own property may be sold, so long as the requirements of due process of law are observed. . . .

Id. at 221, 64 S.E.2d at 517 (Fox, J., dissenting).

iple set forth in *Sims*, the court concluded that the proceeding in the circuit court had to be a judicial proceeding. The *Sims* decision was not based upon due process considerations but rather that the legislature could not give administrative responsibilities to the courts.

There is a basic inconsistency in holding that the state was the absolute owner of the property, *and* that it had to provide notice to the former owners before it could sell that property, to which the former owners had no rights or claims except as given to them as an act of grace by the state. However, the nagging and persistent problem, which was well expressed by Judge Fox, remained:

To me there is something repellant in the idea of depriving people of rights and property through the processes of the courts of the land without personal service of process where it can be had, or the best notice that can be given where, on account of the limits of jurisdictions, all interested parties cannot be reached.⁸⁰

Judge Fox then reconsidered his own opinion in *Gray*, and concluded that the former owners must be properly served *not* because of any interest in the land but because of their rights to the proceeds of any sums in excess of the taxes, costs, and interest.⁸¹

For most practical purposes, the *Simmons* decision brings to a close this chapter of the subject.⁸² The subsequent decision of *Robinson Improvement Co. v. Tasa Coal Co.*,⁸³ discussed below, represented a logical extension of the principle set forth in *Simmons*.

Dean Clyde Colson, who provided a helpful insight into the legislative rewrite of 1941, justifiably criticized the court's decisions in the decade between *Sims v. Fisher* and *State v. Simmons*, the majority of which had been authored by Judge Fox.⁸⁴ Interestingly, while the court had been sharply critical of *McClure* in *Sims*,

⁸⁰ *Id.* at 232, 64 S.E.2d at 522.

⁸¹ In the words of Judge Fox:

Further study of the questions has brought me to the conclusion that Sections 4 and 5 of Article XIII of the Constitution, read together, require that former owners be made parties to the proceeding authorized by Section 4, not because they have any interest in the land, as such, but because they have a property interest in the proceeds of any sale of any land formerly owned by them respectively, made in such proceeding, after the payment of taxes and costs. Furthermore, I am now of the opinion that this right to be made a party to such proceeding, and to be served with process therein, where such process may be had within the State, amounts to more than a mere act of grace. I think it is a right which grows out of the two sections of the Constitution mentioned above.

Id. at 233, 64 S.E.2d at 522-23.

⁸² The decision in *State v. Simmons* also resolved a companion case in *Davis v. Hylton*, 135 W. Va. 815, 65 S.E.2d 287 (1951). In *State v. Davis*, 140 W. Va. 153, 83 S.E.2d 114 (1954), the court recognized that a deed from the Public Land Corporation of West Virginia, to forfeited or delinquent land (although void under the *Sims*) could constitute color of title for the purpose of acquiring title pursuant to the provision of section 3, article XIII.

⁸³ *Robinson Improvement Co. v. Tasa Coal Co.* 143 W. Va. 293, 101 S.E.2d 67 (1957).

⁸⁴ Colson, *Service of Process in A Delinquent Lands Proceeding—A Suit That is Not A Suit*, 54 W. VA. L. REV. 55 (1951).

McClure was warmly embraced in *Gray* and *Simmons*. Although this series of decisions laid to rest the issue of the sale of forfeited and delinquent lands for the school fund for the next thirty years, the concerns of Judge Fox about the due process of such procedures survived. While Judge Fox had identified the constitutional issue, it appears that his fixation with the requirement that the sale must be of a judicial nature caused him to seek the due process protection as a part of the "sale process" instead of focusing the issue at the time when state *acquires* the title to the property.

A few months prior to the *Simmons* decision, the United States Supreme Court considered the due process implications of a New York procedure which permitted a trustee to make judicial settlement of trust accounts by notice to the beneficiaries solely through newspaper publication, in *Mullane v. Central Hanover Bank & Trust Co.*⁸⁵ The Court in *Mullane* noted that "[m]any controversies have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."⁸⁶

The Court reasoned that due process involved a balancing of the interest of the state with the individual's interest sought to be protected, and stated that it had not committed itself to any formula for achieving this balance between these competing interests. The Court in *Mullane* did suggest the following:

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 objective.⁸⁷

The Court recognized that while there may be situations in which resort to publication may be acceptable, the notice by publication in *Mullane* failed to meet the test "because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand."⁸⁸

The facts and circumstances of *Mullane* can easily be distinguished from the forfeited and delinquent land problems faced by this state, yet the concerns expressed by the Court form the foundation for subsequent decisions which have had a direct implication to our procedure.

As indicated above, the legal significance of the decision in *Simmons* is best understood when one considers the decision in *Robinson Improvement Co. v. Tasa*

⁸⁵ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁸⁶ *Mullane*, 339 U.S. at 313.

⁸⁷ *Id.* at 314.

⁸⁸ *Id.* at 319.

Coal Co. In that case, the plaintiff sought to cancel two deeds made by the Deputy Commissioner of Forfeited and Delinquent Lands for Wetzel County, asserting in its bill of complaint that:

said oil and gas interest were not, in truth and fact, delinquent and the return so made not correct; that plaintiff has paid and holds receipt for the payment of all taxes on the said tracts for the year 1931 and thereafter, and that plaintiff has promptly paid the taxes upon said land at all times.⁸⁹

Although the validity of the proceedings was challenged by the allegation that the taxes had been paid, the plaintiff did not challenge the procedural or jurisdictional basis of the proceedings. Therefore, without such issues being raised, the court summarily concluded:

The plaintiff, being by the purport of the orders presumed to have been a party to the suit, had its day in court for any defenses it may have desired to make, and having failed to do so cannot be heard to complain. We conclude that the suit formerly pending in the Circuit Court must be considered as regularly brought and determined and with no appeal therefrom, that it adjudicated with finality the issues of delinquency, the sale to the state, and the sale thereof to the defendant of the property described in the two deeds.⁹⁰

After the turmoil of the 1940s, the court's decisions in *Simmons* and *Robinson Improvement Co.* ushered in a period of relative calm.⁹¹ While litigation surrounding the sale of such property did not cease, the subsequent decisions could be characterized as refinements rather than changes.

⁸⁹ *Robinson Improvement Co.*, 143 W. Va. at 295-96, 101 S.E.2d at 69.

⁹⁰ *Id.* at 300, 101 S.E.2d at 71-72.

⁹¹ To remove the skepticism surrounding tax deeds issued upon the termination of administrative processes and to insure purchasers of good title in their purchases of lands sold by the state for the benefit of the school fund are two apparent reasons why the Legislature, after previous unsuccessful attempts, enacted in 1947 the present statute as contained in Code 11A-4, which provides a judicial proceeding *inter partes* and substantially one *in rem*, meeting the "due process" requirements of Article XIII, Sections 4 and 5 of the West Virginia Constitution.

The purpose of the provisions providing for the suit by the Deputy Commissioner of Forfeited and Delinquent Lands to sell lands forfeited by delinquent is to afford judicial determination of all the questions of the rights of the parties and then to make the proper order, which may or may not be appealable, and when that proceeding is completed in proper manner, even though it may be erroneous, the decision is final as in any other case of *res adjudicata*. *Reuben O. Zirkle v. Moore, Keppel & Company*, 110 W. Va. 535, 158 S.E. 785; *Ida Walker v. West Virginia Gas Corporation*, 121 W. Va. 251, 256, 3 S.E.2d 55. The purchaser acquiring the title of the state is substantially the same party as and in privity with the state in the foreclosure proceeding and the plaintiff cannot claim lack of proper parties as a basis for the non-application of this principle of law.

Robinson Improvement Co., 143 W. Va. at 301-02, 101 S.E.2d at 72.

IV. THE ISSUE THAT WILL NOT GO AWAY

Following *Robinson Improvement Co.*, the next major decision on this issue was *Pearson v. Dodd*.⁹² In *Pearson*, oil and gas interests which had become delinquent for nonpayment of taxes in 1961, were sold to the state in 1962, certified by the Auditor to the Deputy Commissioner of Forfeited and Delinquent Lands of Kanawha County in 1964 and sold by the Deputy Commissioner pursuant to the provisions of the statute to Dodd in 1966. The only notice given to the former owner, Pearson, of the sale of his property was by way of publication in two local newspapers.⁹³ While other issues were raised and resolved,⁹⁴ the issue of importance to the present discussion involves the appellant's assertion that provisions of chapter 11A, article 4, section 12, as amended violated the due process clause of the fourteenth amendment. The court noted that a challenge to the predecessor to the current section 12 was made in *Simmons* on similar grounds and rejected.⁹⁵

The appellant in *Pearson* argued that *Simmons* no longer represented sound law in view of subsequent Supreme Court decisions.⁹⁶ Judge Haden, writing for the court, identified the crucial question as "whether the prerogative contained in *W. Va. Code* 1931, 11A-4-18 as amended, [an opportunity, as distinguished from the right to redeem after delinquent property is certified to the deputy commissioner for sale] gives a former owner of property significant interest, or something less, in the circuit court sale of such property."⁹⁷

⁹² *Pearson*, 159 W. Va. 254, 221 S.E.2d 171.

⁹³ *Id.* at 258, 221 S.E.2d at 174-75.

⁹⁴ The court stated that forfeiture for nonentry is not favored, and, in fact, there is a presumption against forfeiture of title for nonentry until rebutted by the state. In this case, an entry on the land books in the name of the former owner prevented a forfeiture, and title remained in Pearson until 1962 when the interest was sold to the state because of delinquency in 1961. *See Id.* at 260-62, 221 S.E.2d at 176-77.

The court also decided that irregularities in the proceedings were cured by the provisions of W. VA. CODE § 11A-4-33. *See Id.* 262-66, 221 S.E.2d at 177-78.

⁹⁵ *Id.* at 268, 221 S.E.2d at 179-80.

⁹⁶ The appellant relied principally upon *Mullane*, 339 U.S. 306 (1950), and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67, *reh'g denied*, 409 U.S. 902 (1972).

⁹⁷ *Pearson*, 159 W. Va. at 270, 221 S.E.2d at 181.

Of course, the *Mullane* due process requirement, that notice be reasonably calculated to apprise "interested parties" of the pendency of action, presupposes under the Fourteenth Amendment that the parties retain or have some property interest to be affected by the action. In other words, if a person has no interest in the land that is being sold for the school fund, then he has no constitutional right to receive the kind of notice that *Mullane* demands. What exactly is meant by an "interested party" is not certain; however, the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) did shed further light on the matter when it stated:

"The Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to ex-

The court noted that a great deal of confusion existed concerning the distinction between the *right* to redeem and the *privilege* to redeem because the court considered redemption in general terms. Judge Haden discussed some of the court's earlier decisions and concluded:

Therefore, it is our opinion, and we so hold, that the former owner is not such an interested party in the circuit court sale to invoke the constitutional protection. The procedural due process guarantees found in such cases as *Mullane, Fuentes, North Georgia Finishing v. DiChem* and *Payne v. Walden*, etc., do not extend so broadly as to embrace parties without a significant property interest.⁹⁸

A helpful summary as to intent of the court in clarifying the subject area also is contained within the decision.⁹⁹

tend protection to any significant property interest, . . . including statutory entitlements." *Id.* at p.87 of the United States Report.

Id. at 274-75, 221 S.E.2d at 183.

⁹⁸ *Id.* at 274-75, 221 S.E.2d at 183.

It is our belief, and we so hold, that [under *Code*, 11A-3-8 . . .] a former owner possesses a statutory entitlement, *i.e.* a right to redeem at any time within eighteen months of the date of the State purchase. If, however, redemption does not occur during this period, then the statutory entitlement no longer exists because absolute title has vested in the State. Only at this latter point in time is the State permitted by *W. Va. Const.*, Art. XIII, §§ 3 and 4 to institute a suit to sell lands for the school fund. *State v. Gray*, 132 W. Va. 472, 52 S.E.2d 759 (1949); *State v. Blevins*, 131 W. Va. 350, 48 S.E.2d 174 (1948); *State v. Farmers Coal Co.*, 130 W. Va. 1, 43 S.E.2d 625 (1947). Once this suit is commenced, a former owner [under *Code* 11A-4-18,] has only the opportunity to petition as a "privilege of redemption." But since it is purely discretionary with the court under *Code* 11A-4-18, as amended, whether to accede to the redemption request, actually it is not accurate to refer to the former owner as possessing a "privilege" of redemption.

In any event, the point of this lengthy, but necessary, discussion is to clarify the interest of the former owner [under *Code* 11A-4-18] in the circuit court sale of the State's title to his former property. At the time of the circuit court proceeding, the State has absolute title in the subject property; the former owner has no ownership at all. Nor does such former owner have a statutory right to redeem. The Legislature, by its statement of intent and policy found in the last paragraph of *W. Va. Code* 1931, 11A-4-12, as amended, has been explicit in this regard. The former owner's opportunity to redeem is "extended to him by the legislature as an act of grace;" furthermore, "there is no constitutional requirement that the former owner . . . be personally served with process."

Id. at 273-74, 221 S.E.2d at 182-83 (footnotes and citations omitted).

⁹⁹ That summary is contained in the passage below:

This opinion is intended to clarify the cases of *State v. Gray*, *State v. Simmons*, *Davis v. Hylton*, 135 W. Va. 815, 65 S.E.2d 287 (1951), *Beckley v. Hatcher*, and *Work v. Rogerson*, all of which failed to distinguish between a former owner's right to redeem under *W. Va. Code* 1931, 11A-3-8, as amended, and a former owner's opportunity to petition to redeem under *W. Va. Code* 1931, 11A-4-18, as amended. It is also meant to remove any implication contained in *State v. Mason*, W. Va., 205 S.E.2d 819, 823 (1974), that *W. Va. Code* 1931, 11A-4-18, as amended, provides a former owner the *right* to redeem. Cases decided by this Court, which dealt with interpretation of statutes in effect prior to March 8, 1947, are inapposite to the question considered on this appeal, as those statutes were substantially different from those presently interpreted.

Id. at 275-76, 221 S.E.2d at 184 (citations omitted).

There can be little doubt that Judge Haden's analysis in *Pearson* is a correct statement of the law based upon the West Virginia Constitution, statutory provisions, and court decisions. Implicit in the decision is the recognition that the circuit court proceeding is to effectuate the sale of property to which the state has absolute title. If we are to assume that the owners of property are entitled to due process under the fourteenth amendment, the focus should then be on the appropriate stage and the correct form. Logically, the due process protection must precede the point at which the state acquires title. Interestingly, the case provided clues as to the answer to this important question. Following the West Virginia Supreme Court of Appeals decision, the appellants filed a petition for certiorari with the United States Supreme Court, which was granted on June 22, 1975.

At approximately the same time the *Pearson* case was decided by the West Virginia Supreme Court of Appeals, an author was considering this very issue in a 1975 volume of the *Yale Law Journal*.¹⁰⁰ In addition to providing a very enlightening analysis of the issue, the author reflected on recent developments in the United States Supreme Court. It was noted that the Supreme Court was paying particular attention to appeals in which a state supreme court had upheld notice by publication in proceedings to sell land for nonpayment of taxes.¹⁰¹

The Court was apparently looking for the right case in which to express its view on such proceedings. A case from Oklahoma which looked promising turned out to be unacceptable because there was apparently adequate state grounds to support the decision and following oral argument, the case was remanded to the state court for further proceedings.¹⁰² A second case noted by the author was from New York¹⁰³ and was dismissed for want of substantial federal question when a review of the record established that the landowner had received notice of redemption rights in the mail. Therefore, it appeared that *Pearson* presented the precise issue the Court was searching for to decide the constitutional question of whether service of process by publication alone satisfied due process requirements. The case was docketed by the Court, but following oral argument the appeal was dismissed for want of a properly presented federal question. In its *per curiam* decision the Court stated:

The Jurisdictional Statement phrased the due process question presented by the appeal as whether notice by publication of the tax sale was constitutionally deficient, but was unclear whether the challenge was directed to the 1962 sale to the State or to the 1966 sale to appellee Dodd. At oral argument counsel for appellant made clear, however, that her challenge was not addressed to the procedures for

¹⁰⁰ Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 (1975).

¹⁰¹ *Id.*

¹⁰² *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973), cited in Note, *supra* note 100, at 1509, *reh'g denied* 414 U.S. 1138 (1974).

¹⁰³ *Botens v. Aronauer*, 414 U.S. at 1059 (1973) (mem.) cited in Note, *supra* note 100, at 1510.

notice attending the 1962 transfer of the interest to the State, Tr of Oral Arg. 21-23, but solely to the procedures for notice attending the 1966 sale of the interest by the State to appellee Dodd. Indeed, we were repeatedly informed that the 1962 sale to the State was not even "an issue in this case." *Id.* at 22, 25, 26. But under state law absolute title had vested in the State at the expiration of the 18-month period after the 1962 sale during which appellant might have but did not exercise her right to redeem: § 11A-4-12 expressly provides that in such circumstance "the State has absolute title to all . . . land sold to the State for nonpayment of taxes . . . [which has] become irredeemable. . . ." Appellant thus has no constitutionally protected property entitlement interest upon which she may base a challenge of constitutional deficiency in the notice provisions attending the 1966 sale to appellee Dodd.¹⁰⁴

It is apparent from the per curiam decision as well as subsequent events that the Supreme Court wanted the opportunity to address the 1962 sale at which the property was sold to the state. The issue surrounding notice to former owners *after* the state became the absolute owner did not present a substantial federal question.

V. AN OPPORTUNITY LOST

The Supreme Court's per curiam decision in *Pearson v. Dodd* provided considerable insight into the due process issue. However, when the West Virginia Supreme Court of Appeals was presented with the question in *Don S. Co., v. Roach*,¹⁰⁵ it failed to pursue the leads provided by the Supreme Court in the per curiam dismissal of *Pearson*. Although the court in *Roach* moved in the direction suggested by the United States Supreme Court and reached the correct result, it made a conscious decision to stop short of resolving the constitutional issue.¹⁰⁶

In *Roach*, the court was presented with a case in which the defendant-appellant had purchased the subject property in 1973 for \$8,500 as a home for his wife and children. The taxes for 1973 were prorated between the grantor and defendant and paid in the grantors name. These were the last taxes paid on the property. The appellant's introduced evidence to the effect that they received no tax tickets or notice of taxes owed on the property. At the sheriff's sale for the nonpayment of taxes, the property was purchased by the state. Pursuant to the

¹⁰⁴ *Pearson v. Dodd*, 429 U.S. 396, 397-98 (1977) (per curiam).

¹⁰⁵ *Don S. Co. v. Roach*, 168 W. Va. 605, 285 S.E.2d 491 (1981).

¹⁰⁶ The court's avoidance of the constitutional issue is evident from these words:

We wish to emphasize that we do not here reach the question of the constitutionality of the notice by publication provisions of Chapter 11A, article 3; rather we find that under the particular set of facts revealed by the record in this case, the appellants were deprived of their property without sufficient notice. We do not believe the holding of this case will extend to literate people with knowledge of their duty to pay taxes.

Id. at 614-15, 285 S.E.2d at 496.

statutory proceeding, the land was ultimately certified to the Deputy Commissioner of Forfeited and Delinquent Lands for Harrison County. At the Deputy Commissioner's sale, the appellee purchased the land for \$325.00. The sale to purchaser was confirmed by the circuit court on June 19, 1979. When the defendants refused to vacate the premises upon demand, the purchaser at the tax sale brought an action to secure possession of the premises and for damages for its detention.¹⁰⁷ The court noted that "[t]he low educational achievements of the appellants, and Donald Roach's illiteracy are factors which belie the theory that constructive notice by publication is sufficient to apprise landowners of their duty to pay taxes."¹⁰⁸ The court noted that the legislature had amended section 11A-1-8 in 1976 to require mailing of notice to taxpayers, and identified the need for a further amendment to provide with the notice the admonition that the failure to pay taxes could result in the sale of the real property by the state.¹⁰⁹ The court summarized its holding as follows:

We therefore hold that where a landowner has no notice that real estate taxes are due, and of his duty to pay such taxes, and where there is no evidence of record indicating that notice was published in compliance with statute, a jurisdictional defect arises which renders void the tax deed to the property.¹¹⁰

As indicated above, the court elected not to reach the constitutional issue and further limited the scope of the holding by stating: "We do not believe the holding of this case will extend to literate people with knowledge of their duty to pay taxes."¹¹¹ The failure to consider the constitutional issue and the apparent limiting of the decision to a specific class of taxpayers (*i.e.*, the illiterate), significantly reduced the precedential value of this case.

Two years after *Roach*, the court again considered the issue of notice to taxpayers in *Cook v. Duncan*.¹¹² Cook purchased three lots in 1973 in Harpers Ferry for \$17,200. Although the mailing address for the lots was Route 3, Harpers Ferry, Cook actually resided in Frederick, Maryland during the period of time involved. Cook paid taxes on the property for 1974 and the first half of 1975. Taxes for the second half of 1975 were not paid and after the publication of a delinquent notice in the local newspaper, the sheriff sold the property to the appellee Duncan in

¹⁰⁷ *Id.* at 608-09, 285 S.E.2d at 493-94.

¹⁰⁸ *Id.* at 613, 285 S.E.2d at 496.

¹⁰⁹ The court elaborated on the need for a more specific notice:

However, in order to better insure its effectiveness, the notice provided in *W. Va. Code* § 11-A-1-8 [sic] should include a statement that the failure to pay real property taxes could result in sale of the real property by the State, and that if the land is not redeemed by the payment of delinquent taxes within eighteen months of the sale, the landowner risks the loss of all claim to title.

Id. at 614, 285 S.E.2d at 496.

¹¹⁰ *Id.*, 285 S.E.2d at 496.

¹¹¹ *Id.* at 615, 285 S.E.2d at 496.

¹¹² *Cook v. Duncan*, 301 S.E.2d 837 (W. Va. 1983).

November 1976 for \$450.00. Notice of the right to redeem as required by section 11A-3-23 was sent by registered mail to Route 3, Harper Ferry, and after two unsuccessful attempts at delivery, the notice was returned by the post office marked, "moved, left no address." The appellees then published a legal notice in the local paper.

The county clerk issued the tax deed to the purchaser in May 1978 and Cook filed suit in November 1978 to set aside the tax deed alleging that the clerk's attempt to notify her of the right to redeem was insufficient.¹¹³ The court noted that the appellants did not challenge the constitutionality of the process on the actual sale of the property. The appellants argument focused on the provision of West Virginia Code section 11A-3-20 which defines what persons must do before they can secure the deed for the property.¹¹⁴ After identifying irregularities in the order of publication¹¹⁵ and the failure to file a proper report or survey,¹¹⁶ the court suggested that the primary issue involved the clerk's failure to exercise "due diligence" (as required by section 11A-3-24) in the determination of the owners residence prior to classifying the appellants into one of the three categories provided in section 11A-3-24 for notification.¹¹⁷ Since the holding was controlled by the

¹¹³ *Id.* at 838.

¹¹⁴ *Id.* at 839.

At any time after October thirty-first of the year following the sale, and on or before December thirty-first of the same year, the purchaser, his heirs or assigns, in order to secure a deed for the real estate purchased, must: (1) Secure and file with the clerk of the county court [county commission] the survey or report provided for in sections twenty-one and twenty-two [§§ 11A-3-21 and 11A-3-22] of this article; (2) examine the title in order to prepare a list of those to be served with notice to redeem and request the clerk to prepare and serve the notice as provided in sections twenty-three and twenty-four [§§ 11A-3-23 and 11A-3-24] of this article; and (3) deposit, or offer to deposit, with the clerk a sum sufficient to cover the cost of preparing and serving the notice. For failure to meet these requirements, the purchaser shall lose all the benefits of his purchase.

If the person requesting preparation and service of the notice is an assignee of the purchaser, he shall, at the time of the request, file with the clerk a written assignment to him of the purchaser's rights, executed, acknowledged and certified in the manner required to make a valid deed.

W. VA. CODE § 11A-3-20 (1983), *quoted in Cook*, 301 S.E.2d at 839 n.3.

¹¹⁵ The notice did not commence within the first two weeks of February. *Cook*, 301 S.E.2d at 840.

¹¹⁶ The appellee attempted to fulfill this requirement by filing a copy of a plat of the subdivision on which the lots were located. *Id.* at 841.

¹¹⁷ *Id.* The court in *Cook* identified these categories of section 24 as follows:

As soon as the clerk has prepared the notice provided for in the preceding section [§ 11A-3-23], he shall cause it to be served upon the following persons: (1) The person in whose name the real estate was returned delinquent and sold, or, in case of his death, his heir or devisee and his personal representative, if such there be; (2) any grantee of such person, or his/her or devisee and his personal representative, if such there be, if a conveyance of such real estate is recorded or filed for record in the office of the clerk; (3) any person having a lien upon such real estate disclosed by any paper recorded in the clerk's office; and (4) any other person having such an interest in the property as would entitle him to redeem, if the existence of such interest appears of record.

statutorily imposed responsibility of the clerk to use due diligence, and not by the state constitution, this requirement apparently could be modified by statutory revision.

In light of the guidance provided by the court in *Pearson*, the decisions of the West Virginia Supreme Court of Appeals in *Cook* and *Roach* were somewhat surprising. While the decisions resolved the conflict between the party litigants, they did little to clarify the issues or address the fundamental issue presented to the court. In fact, in *Roach*, the court restricted its holding to a specific class of individuals, and, in *Cook*, the decision turned on a statutory construction which presumably could be repealed by the legislature if it chose to eliminate the statutory requirement that the clerk must use "due diligence."

The due process (surrounding the taking) that the West Virginia Supreme Court of Appeals refused to address was subsequently decided by the United States Supreme Court. On the same date the decision in *Cook* was handed down, the United States Supreme Court was hearing arguments in *Mennonite Board of Missions v. Adams*,¹¹⁸ a case which would decide "whether notice by publication and posting provide a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes."¹¹⁹ Although this case involved a mortgagee, it cannot be disputed that the *owner* of the property interest deserves *at least* equal notice of a sale for taxes, as that notice to which the mortgagee is entitled.¹²⁰ In addition, if one assumes that the Supreme Court had a pur-

The notice shall be personally served upon all such persons residing or found in the State in the manner provided for serving process commencing a suit, on or before the first day of February following the request for such notice. If any person entitled to notice is a nonresident of the State or if his residence is unknown to the clerk and cannot by due diligence be discovered, the notice shall be served by publication as a Class III-O legal advertisement in compliance with the provisions of article three [§ 59-3-1 *et seq.*], chapter fifty-nine of this Code, and the publication area for such publication shall be the county in which such real estate is located. If service by publication is necessary, publication shall be commenced within two weeks after February first, and a copy of the notice shall at the same time be sent by registered mail, return receipt requested, to the last known address of the person served. The return of service of such notice and the affidavit of publication, if any, shall be in the manner provided for process generally and shall be filed and preserved by the clerk in his office, together with any return receipts for notices sent by registered mail.

W. VA. CODE § 11A-3-24 (1983), *quoted in Cook*, 301 S.E.2d at 839 n.5.

It should be noted that in *State ex rel. Morgan v. Miller*, 350 S.E.2d 724 (W. Va. 1984), the court reaffirmed the position taken in *Cook* that "persons seeking to obtain complete title to property sold for taxes must comply literally with the statutory requirements." *Id.* at 730. At issue in *Morgan* was the inability of the purchaser at the tax sale to comply with the provision of W. VA. CODE § 11A-3-20 in a timely manner because the clerk's office was closed on December 31, 1984, "pursuant to an improper order of the County Commission of Kanawha County." *Id.* at 731.

¹¹⁸ *Mennonite Bd. of Missions*, 462 U.S. 791.

¹¹⁹ *Id.* at 792.

¹²⁰ The procedures required in Indiana for notification of a tax sale are similar to those which existed in West Virginia. In the critical aspects, the Indiana and West Virginia procedures were essentially the same.

pose in accepting *Pearson*, only to dismiss it after it was conceded the state had acquired title, it cannot logically be argued that the principle set forth in *Mennonite Board of Missions* is not equally applicable to the *owner* of the property.

After the Court in *Mennonite Board of Missions* determined that a mortgagee has a legally protected property interest that entitled him to notice reasonably calculated to apprise him of the pending tax sale, the Court stated that this case was controlled by the analysis in *Mullane*.¹²¹ In holding that the Mennonite Board of Missions was not properly notified of the tax sale, the Court explained:

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. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.¹²²

In order to satisfy the constitutional prerequisite the Court stated that:

Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sales proceedings are therefore likely to be initiated . . . [The] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. . . . 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 practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.¹²³

The decision in *Mennonite Board of Missions* was not an unanimous decision. Justice O'Connor wrote a dissent in which Justices Powell and Rehnquist joined. This dissent expressed alarm that the decision effectively rejected *Mullane* and its progeny "by accepting a per se rule against constructive notice. . ."¹²⁴ and departed from the test of "reasonableness" of the means chosen. In essence, *Mullane* determined that "reasonableness" was a balancing of the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment."¹²⁵

In view of the developments of the last decade, it is time for the West Virginia Supreme Court of Appeals to again address the fundamental issue raised by the

¹²¹ *Mennonite Bd. of Missions*, 462 U.S. at 798.

¹²² *Id.* at 798.

In a footnote to this statement, the Court stated "We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." *Id.* at 799 n.4.

¹²³ *Id.* at 799-800.

¹²⁴ *Id.* at 805 (O'Connor, J., dissenting).

¹²⁵ *Id.* at 801 (quoting *Mullane*, 339 U.S. at 314-15).

manner the state enforces its tax lien against real property located in West Virginia.

VI. CONCLUSION

It is hoped that this lengthy discussion, much of which has been presented in the court's own words, will contribute to an understanding of this issue. An analysis of the constitutional provisions, the cases, and the statute leads to the conclusion that "due process" must be afforded to the property owner when the state enforces its tax lien at the sheriff's sale under article 3 of chapter 11A, *i.e.* when the state initiates the "taking." Of course, chapter 11A, article 1, section 8 of the West Virginia Code was amended in 1976 to provide for mailing a notice to "every person owing real or personal property taxes, a copy of such taxpayers annual tax ticket showing what tax is due and how such may be paid . . . by first class United States Mail";¹²⁶ in 1983, chapter 11A, article 3, section 2 was amended to require that notice of delinquency be mailed to the taxpayer;¹²⁷ and in 1985, further amended to provide that lienholders were entitled to such notice.¹²⁸ One must keep in mind that much of the land now "owned" by the state because of the nonpayment of taxes was acquired prior to these amendments. In addition, the 1985 amendment to section 11A-3-12 required that notice be mailed to the lienholder, as an apparent attempt to comply with the United States Supreme Court holding in *Mennonite Board of Missions*, two years after the Supreme Court recognized this as a constitutional right.

It also should be kept in mind that there is no procedure analogous to the sheriff's sale for forfeited land and, therefore, the process of the state's acquiring title to forfeited lands presents unique problems which are not adequately addressed in the current law.¹²⁹ If the West Virginia forfeiture provisions were subject to a direct attack, it is reasonable to assume that the *King v. Mullen* decision would no longer be followed. This assumption is based upon reservations expressed in *King*.¹³⁰ In addition, in other areas, the provision for a hearing following the loss

¹²⁶ W. VA. CODE § 11A-1-8 (1983).

¹²⁷ *Id.* § 11A-3-2 (1983).

¹²⁸ *Id.* (Supp. 1986).

¹²⁹ The current law provides that:

Land which for any five successive years shall not have been so entered and charged shall by operation of law, without any proceedings therefore, be forfeited to the State as provided in Section 6, Article XIII of the Constitution, and shall thereafter be subject to transfer or sale under the provision of Section 3 and 4 of such Article.

Id. § 11A-4-2 (1983).

¹³⁰

Under these circumstances, our duty is not to go beyond what is necessary to the decision of the particular case before us. If the rights of the parties in this case can be fully determined without passing upon the general question whether the clause of the West Virginia Constitution in question, *alone considered*, is consistent with the national Constitution, that question may properly be left for examination until it arises in some case in which it must be decided.

King, 171 U.S. at 422.

of a right has been looked upon with disfavor.¹³¹ Therefore, given the fact that the Auditor, acting as Commissioner of Forfeited and Delinquent Land, must have ir-redeemable title (*i.e.*, absolute title) before he can certify the land to the Deputy Commissioner for sale, it is logical to believe the Court may require that due process protection must be afforded before such certification can occur. As one considers the due process protection of the property owner, one should not lose sight of the fact that the courts have consistently recognized that the individual's rights are balanced with legitimate state interests.

Justice O'Connor's dissent in *Mennonite Board of Missions* raises a valid concern that the majority was departing from the reasonableness test in *Mullane*,¹³² and that the additional burden the majority was placing on the state was unreasonable.¹³³ The concern with the burden placed on the state was also acknowledged by the majority in *Mennonite Board of Missions* as follows: "We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record."¹³⁴ It is, therefore, suggested that our court's definition of "due diligence" as defined in *Cook* should be carefully reexamined. It is also submitted that if the court does consider the constitutional issue of due process at the sheriff's sale under article 3 of chapter 11A, it should reaffirm the notion that *Cook* was decided on the basis of the statute and not the constitutional issues. Finally, it is submitted that while *Roach* reached a correct result, it did so upon very questionable grounds and should be considered as an abrogation as far as the development of an understanding or solution to the constitutional question is concerned. With the guidance provided by the United States Supreme Court in

¹³¹ See, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring a welfare recipient be given a fair hearing before the loss of benefits).

¹³² "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'." *Mennonite Bd. of Missions*, 462 U.S. at 801.

¹³³ The unreasonableness of the burden is underscored by the passage below:

It cannot be doubted that the State has a vital interest in the collection of its tax revenues in whatever reasonable manner that it chooses: "In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale, the State is in exercise of its sovereign power to raise revenue essential to carry on the affairs of state and the due administration of the laws. . . . 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.'" *Leigh v. Green*, 193 U.S. 79, 89, 48 L. Ed. 623, 24 S. Ct. 390 (1904) (quoting *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 239, 33 L. Ed. 892, 10 S. Ct. 533 (1890)). The State has decided to accommodate its vital interest in this respect through the sale of real property on which payments of property taxes have been delinquent for a certain period of time. . . . In the instant case, that 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 mortgagee, perhaps whether the mortgage has been paid off, and whether there is a dependable address.

Id. at 806 (footnote omitted).

¹³⁴ *Id.* at 799 n.4.

the per curium dismissal of *Pearson v. Dodd* and the decision of *Mennonite Board of Mission*, our court has the opportunity to resolve an issue that has proved troublesome to our state and its citizens for a significant period of time.