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CONSTITUTIONAL LAW - DUE PROCESS - NOTICE AND HEARING - VALIDITY OF STATUTE AUTHORIZING SEIZURE OF PROPERTY ILLEGALLY IN POSSESSION OF PAWNBROKER

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CONSTITUTIONAL LAW — DUE PROCESS — NOTICE AND HEARING — VALIDITY OF STATUTE AUTHORIZING SEIZURE OF PROPERTY ILLEGALLY IN POSSESSION OF PAWNBROKER — Complainant, believing his property to be illegally in the possession of defendant pawnbroker, obtained a search warrant, authorized by statute [1] to be issued, on complaint under oath, by any magistrate who is satisfied that there is reasonable cause for complainant's belief. Although the statute required the property to be seized and delivered to complainant on his posting a bond for double the value of the property, the property was not in fact seized.[2] However, actual notice to appear and be heard on a certain date was given to the defendant, even though such notice was not expressly required by the statute. Defendant appeared specially to seek abatement of the warrant, but the court instead ordered possession to be delivered to complainant on his filing the required bond. On appeal, *held*, the statute is unconstitutional as a violation of the due process clauses of the Federal Constitution and the state constitution because defendant was deprived of the possession of property without a prior notice and hearing. *Rassner v. Federal Collateral Society*, 299 Mich. 206, 300 N. W. 45 (1941).

During the past half-century the requirement of reasonableness in court procedure demanded by the due process clauses of the state and Federal Con-

[1] Mich. Comp. Laws (1929), §§ 9698, 9699; Stat. Ann. (Henderson) (1937), §§ 19.595, 19.596. These sections are part of a comprehensive pawnbrokers' act regulating every minute transaction of the pawnbroker.

[2] Four dissenting justices objected to deciding the constitutionality of this statute, since the property never was brought into the custody of the court. It was argued that since jurisdiction was not obtained even under the terms of the statute, no decision on constitutionality was necessary.

stitutions has been construed to include only the essential and inherent elements of justice. Notice and hearing have normally been found to be basic, but even these requirements are not necessarily demanded in all cases.[3] In eminent domain or tax proceedings the notice may be general rather than personal,[4] and a hearing is more often a nominal opportunity than an actuality.[5] In administrative procedure the hearing is stripped of many of the usual characteristics of a judicial trial,[6] and should summary action be necessary, the hearing may be postponed until after the property has been seized, destroyed or sold.[7] Notice and hearing may be dispensed with altogether where a tax procedure is essentially ministerial and notice and hearing would be unproductive,[8] in quasi-legislative administrative procedures,[9] or where privileges as distinguished from property rights are involved.[10] Although a reasonable likelihood of notice reach-

[3] See in general, MOTT, DUE PROCESS OF LAW 208 et seq. (1926).

[4] Tax proceedings: see the early case of McCarroll's Lessee v. Weeks, 5 Hay. (Tenn.) 247 (1814); State Railroad Tax Cases, 92 U. S. 575 (1875); Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 S. Ct. 663 (1884); Londoner v. City & County of Denver, 210 U. S. 373, 28 S. Ct. 708 (1908); and cases collected in MOTT, DUE PROCESS OF LAW 220 (1926) and 1916E L. R. A. 5.

Eminent domain: North Laramie Land Co. v. Hoffman, 268 U. S. 276, 45 S. Ct. 491 (1925), and cases collected in MOTT, DUE PROCESS OF LAW 222 (1926).

Tax equalization does not require notice and hearing. Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441, 36 S. Ct. 141 (1915); Hammond v. Winder, 100 Ohio St. 433, 126 N. E. 409 (1919). But see Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, 119 Neb. 138, 227 N. W. 452 (1929), and Draffen v. City of Paducah, 215 Ky. 139, 284 S. W. 1027 (1926).

[5] Kuntz v. Sumption, 117 Ind. 1, 19 N. E. 474 (1889); and see Central of Georgia Ry. v. Wright, 207 U. S. 127, 28 S. Ct. 47 (1907).

[6] See, in general, STASON, THE LAW OF ADMINISTRATIVE TRIBUNALS (1937); MAURER, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW (1937); Symposium, 37 YALE L. J. 515 ff. (1938).

[7] North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 S. Ct. 101 (1908); and see 24 HARV. L. REV. 268, 333, 441 (1911). For notice and hearing in administrative tribunals see 34 COL. L. REV. 332 (1934); 80 UNIV. PA. L. REV. 96 (1931). Many types of summary procedure have been upheld in the use of the police power, but also on historical or other grounds. For example, summary procedure has been used against banks, banking officials, and stockholders, taxpayers, tax collectors, attorneys, etc. And in Coler v. Corn Exchange Bank, 250 N. Y. 136, 164 N. E. 882 (1928), seizure of the property of husbands deserting their families was upheld. See also AMERICAN DIGEST, Century ed., "Constitutional Law," § 928 (1899); and Decennial Digests, "Constitutional Law," Key No. 306.

[8] Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 S. Ct. 663 (1884); Bell's Gap Ry. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533 (1890). Cf. Commonwealth v. Sisson, 189 Mass. 247, 75 N. E. 619 (1905).

[9] Health Department v. Rector of Trinity Church, 145 N. Y. 32, 39 N. E. 833 (1895); Tulsa v. Weston, 102 Okla. 222, 229 P. 108 (1924). Cf. Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418, 10 S. Ct. 462 (1890); Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 83 N. E. 693 (1908); Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67 (1908).

[10] Licenses may be revoked, aliens excluded, or officers removed from public office. See STASON, THE LAW OF ADMINISTRATIVE TRIBUNALS 247-274 (1937); 34 COL. L. REV. 332 (1934); 80 UNIV. PA. L. REV. 96 (1931).

ing the parties in interest, rather than actual notice in fact, is all that is required, the best means for affording that notice must be utilized.[11] However, in cases involving proceedings in rem, or quasi-in rem, there have been intimations in the cases that the mere seizure of property is enough notice to owners.[12] In testing the reasonableness of the statute in the principal case, it may be noted that the complainant is given the advantages of a general search warrant, a drastic writ even in criminal procedure; [13] yet the action is in many respects simply a modification of common-law replevin, where prior notice is unnecessary.[14] When the legislative difficulty in restricting the availability of pawnshops as markets for stolen goods is considered, the procedure does not seem unreasonable.[15] Seizure being allowed only on the pawnshop premises, it would seem that this alone is a reasonable assurance of notice, and indeed it is difficult to imagine a case where such a seizure would not afford notice in fact.[16] Certainly actual notice to the pawnshop owner is more probable than in the case of the average service by publication. It seems likely that the legislative draftsman assumed that notice was inevitable. The court might, had it so desired, have implied a requirement of notice into the statute to save its constitutionality. Other courts have done so.[17] While it may be said that actual personal notice

[11] Service by publication has been upheld whenever there is a res before the court. Arndt v. Griggs, 134 U. S. 316, 10 S. Ct. 557 (1890). The dicta of Justice Holmes in Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900), to the effect that the best practical means of affording notice is both a minimum and a maximum requirement of due process has been widely quoted.

[12] Luther v. Fowler, 1 Grant Cas. (Pa.) 176 (1854), holding seizure of a boat or vessel sufficient notice to the owner to confer jurisdiction. Cf. Herbert v. Bicknell, 233 U. S. 70 at 74, 34 S. Ct. 562 (1914): "It has been said from of old that seizure is notice to the owner." Some substitute for notice besides mere seizure was required in Hassall v. Wilcox, 130 U. S. 493, 9 S. Ct. 590 (1888); Windsor v. McVeigh, 93 U. S. 274 (1876). These cases involved land, however, where absentee ownership is more common and where seizure is not very effective as notice. Thus the general rule is that these two types of rather ineffective notice, seizure and publication, must be combined to satisfy the requirement of reasonableness. See 2 So. CAL. L. REV. 480 (1929). Note that in the principal case the problem is only notifying the possessor, not the owner; hence seizure is likely to be more effective as notice.

[13] Such use was held invalid in People ex rel. Robert Simpson Co. v. Kempner, 208 N. Y. 16, 101 N. E. 794 (1913).

[14] See Mich. Comp. Laws (1929), §§ 14820, 14824, which imply that the summons in replevin may be served after possession has been delivered to the plaintiff. Though notice is provided and required before any final adjudication is made, there may be a complete transfer of possession without prior notice and hearing.

[15] See City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N. W. 29 (1895).

[16] In the principal case notice was in fact given by the officer. It has been said that it is not what *is* done under a statute in a given case, but what *may be* done that determines its constitutionality. Stuart v. Palmer, 74 N. Y. 183 (1878); Lacey v. Lemmons, 22 N. M. 54, 159 P. 949 (1916); Northern Cedar Co. v. French, 131 Wash. 394, 230 P. 837 (1924); Moffat Co. v. Hecke, 68 Cal. App. 35, 228 P. 546 (1924). But actual notice in fact seems to have been enough in People v. McCoy, 125 Ill. 289, 17 N. E. 786 (1888); Armory Realty Co. v. Olsen, 210 Wis. 281, 246 N. W. 513 (1933).

[17] This was done in State v. Chittenden, 127 Wis. 468, 107 N. W. 500 (1906), and Cooper v. Board of Works, 14 C. B. (N. S.) 180, 143 Eng. Rep. 414 (1863),

could easily have been required by express statutory provision, yet it should be noted that valuable rights are not seriously affected, since possession [18] is transferred only temporarily, pending defendant's suit within ten days.[19]

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but expressly refused in People ex rel. Fonda v. Morton, 148 N. Y. 156, 42 N. E. 538 (1896); People ex rel. Lodes v. Department of Health, 189 N. Y. 187, 82 N. E. 187 (1907).

[18] There is much confusion in the cases as to whether possession is such an important element of property that it cannot be taken without notice and hearing. It is submitted that there is no lack of reasonableness in a procedure which transfers possession temporarily, merely thrusting the burden of going forward with litigation upon defendant. This is a commonplace in attachment, garnishment, replevin and analogous proceedings. Cf. the ex parte injunction. In every case cited in the principal case, and in Modern Loan Co. v. Police Court, 12 Cal. App. 582, 108 P. 56 (1910), which is heavily relied on, there was some permanent transfer of possession involved, i.e., tantamount to a transfer of ownership or some other major ground for the decision.

In Moffat Co. v. Hecke, 68 Cal. App. 35, 228 P. 546 (1924), possession of cattle believed to be stolen was seized without prior notice and hearing, but subsequent disposition of the cattle was left entirely to an officer. The court implies that had notice and hearing been required at this later stage the proceeding would be valid.

In Boca & L. R. R. v. Superior Court, 150 Cal. 147, 88 P. 715 (1907), it was admitted that an ex parte injunction could deprive defendant railroad of the use and possession of its railroad tracks crossing those of the plaintiffs, but an injunction including an order to tear up the tracks was refused.

Much confusing dictum is cited from ejectment cases where the courts traditionally speak of possessory rights but really decide questions of title or permanent right to possession. Zabowski v. Loerch, 255 Mich. 125, 237 N. W. 386 (1931); Meacham v. Bear Valley Irrigation Co., 145 Cal. 606, 79 P. 281 (1904).

The author has been able to find no other cases where a temporary pre-trial shift in possession was condemned for lack of prior notice and hearing.

[19] The court mentions lack of notice to the pawnor as an additional ground for the decision. It is, however, no requirement of due process that all parties claiming legal interests must be before the court. The proceeding is not determinative of the rights of the pawnor.