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Constitutional Law - Due Process - Notice Required to Validate Tax Foreclosure of Property of Known Mental Incompetent

Frank M. Lacey S.Ed.
University of Michigan Law School

RECENT DECISIONS

CONSTITUTIONAL LAW—DUE PROCESS—NOTICE REQUIRED TO VALIDATE TAX FORECLOSURE OF PROPERTY OF KNOWN MENTAL INCOMPETENT— On May 8, 1952, the town of Somers instituted an action to foreclose a number of tax liens. One of these was upon the property owned by a person known in the community to be a mental incompetent, but who had not yet been so certified by a court. Notice was given to the incompetent taxpayer in compliance with the statute[1] by mail, posting, and publication. When she failed to answer within the prescribed period, foreclosure was entered and a deed to her property delivered to the town. Five days later she was declared a person of unsound mind, and was subsequently committed to a state hospital for the insane. After efforts by her committee to pay the taxes and recover the property failed, a motion was filed in the county court where the judgment of foreclosure had been entered. Petitioner sought an order to show cause why the default should not be opened, the judgment vacated and the deed set aside, and permission granted to answer with respect to the notice of foreclosure. The trial court, the Appellate Division of the Supreme Court, and the New York Court of Appeals all upheld the foreclosure proceeding, the latter certifying that on this record there was no denial of any constitutional right.[2] On appeal to the Supreme Court of the United States, *held,* reversed and remanded. Under the circumstances the foreclosure amounted to a taking without due process since the notice given the taxpayer was inadequate. Justice Frankfurter dissented on the ground that the New York court's refusal to grant relief could be construed as an indication that the petitioner had selected an inappropriate remedy. *Covey v. Town of Somers,* 351 U.S. 141 (1956).

Among the procedural rights long recognized as part of the due process, without which a state may not deprive any person of his property, is that of notice and opportunity to be heard.[3] In the area of civil actions in rem, where no personal judgment can be had against a defendant, this requirement of notice has always been more easily fulfilled than in actions in personam.[4] Even before the decision in *Mullane v. Central Hanover Bank and Trust Co.*[5] courts phrased the minimum constitutional requirement in

[1] 59 N.Y. Consol. Laws (McKinney, 1954) §165-b.

[2] Town of Somers v. Covey, 283 App. Div. 883, 129 N.Y.S. (2d) 537 (1954), affd. 308 N.Y. 798, 125 N.E. (2d) 862 (1955), noted probable jurisdiction, 350 U.S. 882 (1955), revd. 351 U.S. 141 (1956).

[3] Arndt v. Griggs, 134 U.S. 316 (1890); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[4] Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889); Arndt v. Griggs, note 3 supra. For a collection of early opinions see annotation 50 L.R.A. 577 at 597 (1901). There is language suggesting that the notice requirement is something above arbitrary classifications such as "in rem" and "in personam" in Mullane v. Central Hanover Bank and Trust Co., note 3 supra, at 312.

[5] Note 3 supra.

terms of reasonableness.[6] Due process standards were derived with a view to established forms and procedures, some of which could hardly be said to have been calculated to apprise defendants of the pendency of actions involving their property.[7] One of these procedures, notice by publication to known beneficiaries of common trust funds, was discredited by the *Mullane* case. But the broad general test there formulated, viz., that notice had henceforth to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . .,"[8] was so hedged about that it could not be ascertained how extensively the test would be applied to abrogate other traditional procedures.[9] That the impact of the *Mullane* decision was slow to reach the area of tax foreclosure is not surprising. Of all actions subject to the notice requirement to satisfy the guarantee of due process, the action to establish and foreclose a lien on real property for nonpayment of taxes has almost certainly received the most liberal treatment.[10] Notice and a hearing are clearly necessary to fix a tax based on evaluation as a charge upon property,[11] but it is not at all clear that any notice beyond that imparted by the statute and tax lists is necessary to foreclose a tax lien for nonpayment.[12] Practical considerations dictate that whatever procedure is approved should apply to the property of infants and incompetents with equal force. This has been the case in the past,[13] and will probably continue to be true in the future. However, where a known incompetent is deliberately left without the assistance of a committee until the period for redemption has lapsed, a special situation is presented. The brief opinion of the Court made it clear that the violation of due process in the principal case lay in the

[6] Arndt v. Griggs, note 3 supra, at 326; 1 JUDGMENTS RESTATEMENT §32, comment *f* (1942). See 50 MICH. L. REV. 124 (1951).

[7] For the early cases on this point see annotation 50 L.R.A. 577 at 597 (1901); Ownbey v. Morgan, 256 U.S. 94 at 110 (1921); Mullane v. Central Hanover Bank & Trust Co., note 3 supra, at 316.

[8] Mullane v. Central Hanover Bank and Trust Co., note 3 supra, at 314.

[9] "Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects." 339 U.S. 306 at 314 (1950). See 50 MICH. L. REV. 124 (1951); 39 IOWA L. REV. 665 (1954) for some disturbances caused by the Mullane case. For conflicting interpretations, see Estate of Pierce, 245 Iowa 22, 60 N.W. (2d) 894 (1953); Tilley, "The Mullane Case: New Notice Requirements," 30 MICH. ST. B. J. 12 (Jan. 1951).

[10] Leigh v. Green, 193 U.S. 79 (1904); Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232 (1890); 160 A.L.R. 1026 (1946); 145 A.L.R. 597 (1943).

[11] Ricardo v. Ambrose, (3d Cir. 1954) 211 F. (2d) 212; Bowie v. Town of West Jefferson, 231 N.C. 408, 57 S.E. (2d) 369 (1950). For the possible effects of Mullane on this, see Wisconsin Electric Power Co. v. Milwaukee, 263 Wis. 111, 56 N.W. (2d) 784 (1953).

[12] Newark v. Yeskel, 5 N.J. 313, 74 A. (2d) 883 (1950); Foggs v. Crutcher, 216 Ark. 438, 226 S.W. (2d) 48 (1950). See 160 A.L.R. 1026 (1946). But see Opinions of the Justices, 139 Me. 420, 38 A. (2d) 561 (1943).

[13] Upholding constructive notice on the insane (1) by statute: Levy v. Newman, 130 N.Y. 11, 28 N.E. 660 (1891); (2) by publication: Spitcaufsky v. Hatten, 353 Mo. 94, 182 S.W. (2d) 86 (1944); (3) by mail: Devitt v. Milwaukee, 261 Wis. 276, 52 N.W. (2d) 872 (1952). But see Lissner v. State Mtg. Corp., (Tex. Civ. App. 1930) 29 S.W. (2d) 849.

fact that, under the circumstances, compliance with the statutory procedures did not furnish adequate notice.[14] In prior cases the refusal to disclose a condition of incompetency to the court so that the helpless party may be protected has been held to be extrinsic fraud justifying the setting aside of the judgment.[15] Also, judgments procured against persons incompetent at the time of service or subsequently may be set aside if the original trial was not a fair adversary proceeding and a defense can be shown.[16] The defect in such judgments, however, has been felt to be equitable and not constitutional. As a result of the present decision it would appear that when a party is known to be incompetent and without a committee, even the best means of service may fall short of due process requirements. If the *Mullane* test were to be applied generally to actions to foreclose tax liens, publication and other forms of constructive notice so widely used in these proceedings might well be found insufficient "under all the circumstances, to apprise the interested party of the pendency of the action. . . ."[17] Practical considerations would seem to point to a different result, however, for, it has been pointed out, the methods at the disposal of a state for realizing revenue from taxes must be swift and simple, and taxpayers should be held to be apprised of the essential details of these methods by the statutes themselves.[18] This basic consideration may carry such weight that even service by publication as to known parties,[19] expressly repudiated in the *Mullane* case, might be found to comply with due process requirements in these tax enforcement situations.

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[14] After quoting from Mullane the Court went on: "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement." Principal case at 146.

[15] Olivera v. Grace, 19 Cal. (2d) 570, 122 P. (2d) 564 (1942).

[16] Laney v. Dean, 258 Ala. 37, 61 S. (2d) 109 (1952); Hodges v. Phoenix Mutual Life Ins. Co., 171 Kan. 364, 233 P. (2d) 501 (1951); 140 A.L.R. 1336 (1942).

[17] Mullane v. Central Hanover Bank & Trust Co., note 3 supra, at 314. The notice provisions of the New York statute declared unconstitutional in its application in the principal case are actually far more elaborate than most. The statute calls for posting, publishing and mailing to last known address, which would, absent the question of willful disregard of incompetency, in all likelihood satisfy the Mullane test. For some other typical provisions see cases cited note 19 infra.

[18] Devitt v. Milwaukee, note 13 supra; Leigh v. Green, note 10 supra.

[19] Most states use publication notice even as to known residents. Litchfield v. County of Marin, 130 Cal. App. (2d) 806, 280 P. (2d) 117 (1955); Murphy v. Clakamas County, 200 Ore. 423, 264 P. (2d) 1040 (1953); State v. Simmons, 135 W. Va. 196, 64 S.E. (2d) 503 (1951); Newark v. Yeskel, note 12 supra.