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Constitutional Law - Due Process - Adequacy of Notice by Publication

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CONSTITUTIONAL LAW — DUE PROCESS — ADEQUACY OF NOTICE BY PUBLICATION — In condemnation proceedings instituted by a city against a landowner, notice of proceedings to determine his compensation was given only by publication in the official city newspaper. The statute in force called for notice either in writing or by publication.[1] After the time authorized for appeal from a compensation award had elapsed, the landowner brought an equitable action to enjoin the city from entering upon the property, alleging that he knew nothing of the condemnation proceedings until after the time for appeal had passed. The trial court denied relief, holding that the newspaper publication was sufficient notice to meet due process requirements. The Supreme Court of Kansas affirmed.[2] On appeal, *held,* reversed. The notice by publication falls short of due process requirements. Justice Frankfurter dissented on the ground that the landowner did not allege that the compensation was inadequate. Justice Burton dissented on the ground that the notice provision was within the scope of legitimate local discretion. *Walker v. City of Hutchinson,* 352 U.S. 112 (1956).

In recent years all discussion of the question of adequacy of notice under the due process clause has been colored by *Mullane v. Central Hanover Trust Co.*[3] There the Court utilized the general test that "within limits of practicability notice must be such as is reasonably calculated to reach interested parties,"[4] and held notice by publication to known beneficiaries of a common trust fund insufficient. Although the decision is carefully limited to the situation before the Court, its reasoning created doubts as to the constitutionality of procedures in various state statutes which called for less than personal notice.[5] Specifically, the finding that publication alone is not a reasonable means of informing interested parties[6] and the Court's refusal to delve into the subtleties of the in rem-in personam

1 Kan. Gen. Stat. Ann. (Corrick, 1949) §26-202. This section was amended in 1955 to require that the city must mail a copy of the newspaper notice to the last known residence of the property owners unless such residence could not be located by diligent inquiry. Kan. Gen. Stat. Ann. (Corrick, Supp. 1955) §26-202.

2 178 Kan. 263, 284 P. (2d) 1073 (1955).

3 339 U.S. 306 (1950).

4 Id. at 318.

5 For a comprehensive treatment of the Mullane case and its effect upon various state statutes see Perry, "The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements," CURRENT TRENDS IN STATE LEGISLATION 32 (1952). The statutory reaction to the case is discussed in 39 IOWA L. REV. 665 (1954). For its possible effect upon probate procedures see 50 MICH. L. REV. 124 (1951).

6 Mullane v. Central Hanover Trust Co., note 3 supra, at 315.

distinction[7] indicated that a more stringent application of due process might replace the former tolerance toward state determination of proper notice.[8] A degree of speculation as to the eventual scope of the *Mullane* case is still necessary, but the decisions after it, especially the principal case, at least show that it will be broadly applied. Notice by publication is proper where the names, interests, and addresses of persons are unknown,[9] but better notice is necessary to inform a creditor in a railroad reorganization under the Bankruptcy Act.[10] Similarly, the Court found that even personal service was inadequate in an action to enforce a tax lien against a known incompetent.[11] Mailed notice was sufficient, however, to inform a landowner in a large city who failed to receive it because of the misconduct of his bookkeeper.[12] The principal case is the most striking application of the *Mullane* doctrine to date for condemnation is classified as an action in rem by a government, and in this area publication has long been regarded as adequate.[13] Although there is no decision of the Court holding directly that publication was sufficient notice in a condemnation proceeding against a known resident, the tenor of the cases which were distinguished in the principal case emphatically support the practice.[14] Final judgment is reserved as to the effect of the *Mullane* reasoning upon these earlier cases,[15] but it is apparent that their authority is greatly weakened.[16] Since most statutes require more than mere publication in condemnation actions,[17] the effect of the principal case will be

7 "But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally. . . ." Mullane v. Central Hanover Trust Co., note 3 supra, at 312. See Fraser, "Actions In Rem," 34 CORN. L.Q. 29 (1948), and Fraser, "Jurisdiction by Necessity—An Analysis of the Mullane Case," 100 UNIV. PA. L. REV. 305 (1951).

8 See, e.g., Arndt v. Griggs, 134 U.S. 316 (1890). See generally Perry, "The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements," CURRENT TRENDS IN STATE LEGISLATION 32 (1952); 70 HARV. L. REV. 125 (1957).

9 Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).

10 New York v. N.Y., N.H. & H.R. Co., 344 U.S. 293 (1953).

11 Covey v. Town of Somers, 351 U.S. 141 (1956). See 55 MICH. L. REV. 287 (1956).

12 Nelson v. New York City, 352 U.S. 103 (1956).

13 Collins v. Wichita, (10th Cir. 1955) 225 F. (2d) 132, cert. den. 350 U.S. 886 (1955), upheld the same statute found inadequate in the principal case. See North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925). See also 1 NICHOLS, EMINENT DOMAIN, 3d ed., §4.103[2] (1950); 1 MERRILL, NOTICE §518 (1952).

14 See Huling v. Kaw Valley Railway, 130 U.S. 559 (1889), upholding notice by publication to a nonresident landowner; North Laramie Land Co. v. Hoffman, note 13 supra, at 285, interpreting earlier cases as holding that notice by publication was constitutionally sufficient. The Hoffman case was distinguished in the principal case on the basis of the state decision which showed that notice actually had been mailed. Principal case at 117.

15 "Since appellant is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision." Principal case at 116.

16 See Fraser, "Actions In Rem," 34 CORN. L.Q. 29 at 43 (1948), criticizing distinctions between notice requirements to residents and nonresidents. Since the mails are equally effective as to both, the Mullane reasoning seems to obviate this distinction.

17 See Perry, "The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements," CURRENT TRENDS IN STATE LEGISLATION 32 at 118 (1952).

felt in only a few areas. Where only publication is required, however, the validity of past condemnation actions is uncertain.[18] The principal case also opens the door to possible invalidation of another procedure where publication has been regarded as satisfactory because the action is in rem, viz., governmental tax foreclosure.[19] It is likely, however, that the reason which supported such practices in the past—the need for expeditious tax enforcement[20]—may continue to temper the due process requirement. It is unfortunate that the Court in the principal case chose to distinguish the cases formerly regarded as controlling in this area and thereby add to the uncertainty which is the aftermath of the *Mullane* decision.[21] The rule at present appears to be that the best notice which is feasible must be given to known interested parties. Distinctions between in rem and in personam, resident and nonresident, and governmental and private actions seem to have no effect on the due process requirement except as they affect feasibility. The myth that notice by publication is reasonably calculated to inform interested parties appears to be shattered.[22] Only a strong showing of administrative necessity would be likely to validate proceedings wholly based upon such notice.

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18 This fear is expressed by Justice Burton. Principal case at 127.

19 See Leigh v. Green, 193 U.S. 79 (1904). The cases are collected in 160 A.L.R. 1026 (1946). For an excellent review of the authorities see Newark v. Yeskel, 5 N.J. 313, 74 A. (2d) 883 (1950).

20 See note 19 supra.

21 Various interpretations of the scope of the Mullane case can be found in Newark v. Yeskel, note 19 supra; 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); material in note 5 supra. Conflicting interpretations of the Mullane case caused the Wisconsin Supreme Court to split evenly, thereby affirming an order sustaining a demurrer to the complaint of a landowner who attacked publication notice of a special assessment. The case was eventually remanded to the state court for consideration in the light of the principal case and ultimately was reversed. Wisconsin Electric Power Co. v. Milwaukee, 263 Wis. 111, 56 N.W. (2d) 784 (1953), order sustaining demurrer to amended complaint affd. per curiam 272 Wis. 575, 76 N.W. (2d) 341 (1956), probable jurisdiction noted and case remanded 352 U.S. 948 (1956), order amended 352 U.S. 958 (1957), revd. (Wis. 1957) 81 N.W. (2d) 298.

22 Mullane v. Central Hanover Trust Co., note 3 supra, at 315; New York v. N.Y., N.H. & H. R. Co., note 10 supra, at 296; principal case at 116.