Washington Law Review

Volume 31
Number 2 *Washington Case Law - 1955*

6-1-1956

Taxation

George O'Dea

(1) Negligence—lack of evidence to support the contention.
(2) Express Warranty—unsupported by assignments of error.
(3) Implied Warranty of Fitness—lack of reliance on the seller's skill or judgment as required by RCW 63.04.160 (1), and doubt as to whether the transaction was a sale.

The court, in discussing whether there was a sale of goods within the meaning of RCW 63.04.020, stated the transaction was a "public service contract." What analytical value this label has was not made clear. The court relied on *Cornelius v. City of Seattle*, 123 Wash. 550, 213 Pac. 17 (1923). This case decided a garbage purchase was a public service contract for the purpose of determining whether garbage transactions were the proper subject of the exercise of a city's police power. This holding appears to have little bearing on the instant sales question. A holding that a transaction is subject to regulation under the police power is not inconsistent with a holding that a similar transaction is a sale.

The garbage appears to be a by-product of a portion of the Sanatorium's business—that of feeding patients and personnel—and as such, a proper subject of a sales transaction. The consideration for the sale was the plaintiff's forty dollar monthly payment plus his service to the defendant which consisted of removing the garbage from the Sanatorium. If, as the court says, the transaction is questionable, the writer feels it should not be questioned in terms of "public service" as defined in the *Cornelius* case.

TAXATION

Distraint and Sale—Adequacy of Notice. Two problems are discussed in this note. The first is whether or not the court applied the proper statute in the recent case of *Metzger v. Quick*.[1] The second problem is whether or not the construction accorded the statute by the court would violate the doctrine of *Mullane v. Central Hanover Bank and Trust Co.*[2]

In *Metzger v. Quick*, the plaintiff's personal property consisting of sawmill equipment was sold for taxes which had been levied, but were not yet due, and taxes which were delinquent. The county treasurer elected to make a distraint of the personalty.[3] A notice was posted on the premises and in two public places.[4] Although not required by the statute under which the treasurer was proceeding,[5] a registered letter was mailed to the last known address of the plaintiff. The letter was returned marked "unclaimed." Ten days after the posting of the notices of distraint and sale the property was sold.[6] The plaintiff

[1] 46 Wn.2d 477, 282 P.2d 812 (1955).
[2] 339 U.S. 306 (1949).
[3] Among other defenses set up by the defendant was one that he was acting pursuant to RCW 84.56.100—.110. The writer considers it to be relatively unimportant in the light of the majority opinion.
[4] RCW 84.56.070. "He [the county treasurer] shall advertise the sale by posting written notices in three public places."
[5] RCW 84.56.070 provides only for posting.
[6] RCW 84.56.070 provides that "... such sale, which shall not be less than ten days after the taking of such property."

alleged the reasonable value of the property to be in excess of $15,000. The taxes were ascertained to be $161.44. The property was sold for $875.

Basically, two statutes are in issue in the principal case. RCW 84.56.070, entitled "Distraint and sale for personal property taxes," requires the county treasurer to proceed to collect all personal property taxes, giving notice by mail that the taxes are due, and are collectable by the treasurer if not paid. He is authorized to prepare papers in distraint and, without notice or demand, seize sufficient goods to pay the taxes. He is further authorized to sell the goods at a public sale if the tax be not paid.

RCW 84.56.080 is entitled "Distraint of stationary property." It provides for the distraint of property, such as standing timber, or property which the treasurer should believe to be incapable, or reasonably impracticable, of manual delivery. In such instances the treasurer must first file a notice of distraint with the county auditor, and mail a registered letter to the taxpayer giving him notice thirty days before any sale of that property.

Cutting across the two statutes mentioned above are RCW 84.56.090, .100, and .110, entitled "Jeopardy distraint..." These provide that when the treasurer reasonably believes that property is being removed from the state, or is being dissipated, the treasurer may distrain without demand or notice. The difference among the three statutes pertains to the time of distraint. The times for action are: after tax is due, after levy, and before levy.

The plaintiff's contention was that the county treasurer, having elected to make a *constructive* seizure of the property, must comply with RCW 84.56.080, which sets forth the process for distraining stationary property. He maintained that the property seized was bulky and was also "... incapable or reasonably impracticable of manual delivery."[7] The plaintiff further contended that if acting under RCW 84.56.070 (Distraint and sale for personal property taxes), the county treasurer must either take the property into his *actual* possession, or give *actual* notice of the distraint.[8]

In sustaining the trial court, the majority held that it is discretionary upon the county treasurer to choose the manner in which he may distrain and take personalty into his possession. "... [T]o distrain per-

[7] RCW 84.56.080.

[8] The plaintiff relied on J. K. Lumber Co. v. Ash, 104 Wash. 388, 176 Pac. 550 (1918).

sonal property, the county treasurers are not required by law to take physical possession of the property."[9] This ruling stems from RCW 84.56.070 (Distraint and sale for personal property taxes).

In regard to the plaintiff's contention that RCW 84.56.080 was controlling, the majority answered that this statute has given the county treasurer the right "... to determine whether the property is incapable or reasonably impracticable of manual delivery ... and that, therefore, it was not necessary to file the notice of distraint and sale with the county auditor."[10] The court said that the defendant did not abuse his discretion since the plaintiff had moved the machinery up to the mill, "... and it is assumed that the purchaser moved it away."[11]

The majority construed RCW 84.56.070 to mean that after February 15th of each year, the treasurer shall proceed to collect all personal property taxes. He shall give notice by mail that the taxes are due and payable. If he is unable to collect the taxes, the treasurer shall prepare papers in distraint, and *without notice or demand* distrain sufficient goods to pay for the uncollected taxes. He shall advertise the sale by posting written notices in three public places.[12]

The majority relied on *J. K. Lumber Co. v. Ash*[13] and *State ex rel. Peoples National Bank v. King County*.[14] Neither of the two cases is exactly in point. The use of the *State ex rel. Peoples National Bank* case was inappropriate because the validity of the distraint was not in issue.[15] The exact issue before the court in the *Ash* case[16] was whether a sheriff could accomplish a valid distraint and sale by giving actual notice and by the posting of notices at the site of the property being distrained, or whether he must take actual possession of the property. The property consisted of railroad tracks and rolling equipment. The court held that the distraining official need not take the property into his actual possession, that by posting notices and by giving the

[9] 46 Wn.2d at 483, 282 P.2d at 815.
[10] *Ibid.*
[11] *Ibid.*
[12] One question in the mind of the writer: need there even be a notice posted on the premises in order to satisfy the majority?
[13] 104 Wash. 388, 176 Pac. 550 (1918).
[14] 36 Wn.2d 10, 216 P.2d 225 (1950).
[15] The Peoples National Bank case involved a mortgage held by the respondent on certain machinery and office furniture. A distraint was levied for unpaid taxes; the mortgage-holder tendered the amount due on the property covered by the mortgage. The issue was the superiority of liens. It was held that the mortgage was prior to the lien raised by the distraint. In 36 Wn.2d at 11 the court said, "Appellants levied a distraint...." At page 14 reference is made to a lien. There appears no indication as to whether there was an actual seizure, a constructive seizure, notice, or no notice. See Brief of Respondents, pp. 17-19, and Reply Brief of Appellants, pp. 12-13 of Metzger v. Quick.
[16] Note 12 *supra.*

plaintiff actual notice he had complied with the statute.

Note that RCW 84.56.080 (Distraint of stationary property) was passed and amended in 1933[17] and that the *Ash* case was decided in 1918. The *Ash* case should have been construed in light of the later passage of RCW 84.56.080 in those instances in which a constructive seizure of personal property is involved.

The writer prefers the opinion of the minority as a more cogent analysis of that portion of the code dealing with distraints. The minority maintains that RCW 84.56.070 is applicable to a physical seizure or distraint of property, and that RCW 84.56.080 pertains to constructive seizure or distraint. Therefore, these two statutes provide for the two basic *types* of distraint, as well as spelling out *how* the distraints may be made. An exception would be if actual notice were given the taxpayer.

The minority maintains that RCW 84.56.070 (Distraint and sale for personal property taxes), supplemented by RCW 84.56.090, .100, and .110 (the jeopardy distraint statutes), provides the basic *occasions* for distraint. The theory of the minority was that, where all property is presumably in the possession of its owner, actual seizure by tax officials imparts notice.[18] Posting of notices, or constructive seizure, does not so convincingly support a presumption of notice as does actual seizure.[19] This distinction, says the minority, was recognized by the legislature in the enactment of RCW 84.56.080 (Distraint of stationary property). The minority concludes that if a county treasurer utilizes a constructive seizure, although making a jeopardy distraint, he must comply with RCW 84.56.080 (Distraint of stationary property) in order to make a lawful distraint.

Present in cases of this type is the problem of three policies which demand reconciliation: the state's need for revenue,[20] the need to

---

[17] See Graffell v. Honeysuckle, 30 Wn.2d 390 at 399, 191 P.2d 858 at 863 (1948), wherein the principle is set forth that a legislative body is presumed to be familiar with prior court decisions relating to a statutory enactment.

[18] See Windsor v. McVeigh, 93 U.S. 274 (1876).

[19] *Cf.* McAllister, *Taxpayers' Remedies—Washington Property Taxes*, 13 WASH. L. REV. 91 at 99 (1938). "The county treasurer collects the tax out of the proceeds and pays any balance to the owner. In all this the taxpayer has had personal notice that a tax in a certain amount was due, but beyond that he has had no personal notice. The notice of sale is merely published." See also: Eldridge, *Property Tax Collection Procedure in Washington*, 17 WASH. L. REV. 123 (1942).

[20] See Commercial Waterway District No. 1 of King County v. King County, 197 Wash. 441, 85 P.2d 1067 (1938) to the effect that the power of taxation is an essential and basic attribute of sovereignty, and that the receipt of money from general taxation is necessary to the support of the state. See also State v. Allen, 2 McCord 55 (S.C. 1822).

protect the tax collecting servants,[21] and the need to protect the rights of the taxpayer.[22] The majority holding can afford little protection of the taxpayer's rights.

At present, a situation seemingly exists in which a distraint may be made by constructive seizure, but the statute which spells out the process whereby stationary property, or property which is reasonably impracticable of manual delivery, is to be distrained may be ignored, except for those specific categories set forth in RCW 84.56.080 (Distraint of stationary property). Thus, neither actual notice of the impending sale, nor the constructive thirty-day notice called for in RCW 84.56.080 (Distraint of stationary property), need be given the taxpayer. There may be no opportunity for the taxpayer to pay his taxes and redeem his property.

Mullane v. Central Hanover Bank and Trust Co.,[23] a United States Supreme Court decision, appears to threaten the majority's construction of RCW 84.56.070 (Distraint and sale for personal property taxes). The underlying principle in the *Mullane* case is that, as to known persons whose rights are to be accorded finality in any respect, the best notice possible under the circumstances must be given.[24] In the holding of the *Mullane* case, the best notice possible as to known persons is actual notice or notice by mail. To those persons whose whereabouts or identities were unknown, notice by posting, publication or seizure would be sufficient.

The scope of the *Mullane* case has not as yet been determined.[25] Two cases, decided on the *Mullane* case, have come before the Supreme Court,[26] and one before the Washington Supreme Court.[27]

---

[21] See Spaulding v. Adams County, 79 Wash. 193, 140 Pac. 367 (1914), wherein the court maintains that tax statutes have been liberally interpreted, and that the actions of taxing officials are upheld in all cases where the substance and spirit of the statute has been pursued, although there may have been a departure from the strict letter of the statute.

[22] See Morgan v. Larson, 183 Wash. 287, 48 P.2d 621 (1935). The court says that regard must be had for the rights of taxpayers in spite of the fact that the sale of personal property is summary to the highest degree. See also Wilberg v. Yakima County, 132 Wash. 219, 213 Pac. 931 (1925).

[23] 339 U.S. 306 (1949). Here, the trustee of a common-trust fund filed a petition for settlement as required by statute. It was held that, as to known persons, the lack of a requirement of personal service by the statute did not comply with "due process." See Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951); Notes, *The Effect of Mullane v. Central Hanover Bank and Trust Company Upon Publication of Notice in Iowa*, 36 IOWA L. REV. 47 (1950); 5 MIAMI L. Q. 153 (1950); 25 WASH. L. REV. 282 (1950).

[24] 339 U.S. at 314.

[25] *Cf.* Pierce v. Hildebrand, 103 F. Supp. 396, 399 (S.D. Iowa 1952) (dictum). "... [W]e anticipate much in time will be said to delimit Mullane."

[26] Standard Oil Co. v. New Jersey, 341 U.S. 428 (1950); City of New York v. New York, New Haven and Hartford R.R., 344 U.S. 293 (1952).

[27] New York Merchandise Co. v. Stout, 43 Wn.2d 825, 264 P.2d 863 (1953).

As to known persons, the problem is whether *Mullane* could be properly applied to the construction of a statute which requires no notice, other than posting, of a distraint and sale. The constitutional violation would fall under the "due process" clause of the fourteenth amendment to the Federal Constitution.[28]

Courts have tended to categorize distraint and sale as one in the nature of an action or proceeding in rem with no convincing argument as to why it is in rem.[29] This need not prove to be an impassible barrier. The court in the *Mullane* case was careful not to decide whether they were faced with a problem in rem or in personam. Thus, it is suggested that perhaps the labels, in rem and in personam, may not be weighed as heavily as they once were.[30]

Analytically, it is possible to construe the proceeding in the instant case to be one in personam. Thus, if the object of an action be one to enforce a power over a particular res, then the action may be classified as one in rem. If the object of the action be one to enforce a personal liability, that is, to secure damages and thus get at the property of a determinate person or number of persons generally, then the action may be classified as one in personam.[31]

The motive or object of the state in distraining property should be to secure payment of taxes, that is, to secure damages. To attribute the motive or object sought to be that of a sale alone, would be to cast the state in the anomalous role of ignoring the interest of its citizen in the res.

Seizure, posting or publication usually is not sufficient in in personam proceedings. Generally, more is required in the nature of notice.[32]

Since actual notice, or something approaching actual notice, is required in in personam actions, the fatal weakness in the construction of RCW 84.56.070 would seem manifest. The majority, in the principal case, said, "The legislature saw fit to specifically waive notice

---

[28] U.S. CONST. amend. XIV, § 1.

[29] People v. Skinner, 18 Cal.2d 349, 115 P.2d 488 (1941). See Puget Sound Power and Light Co. v. Cowlitz County, 38 Wn.2d 907, 234 P.2d 506 (1951) wherein the court, in an opinion none too candid, discounts the debt theory of personal liability for personal property taxes. *Contra*, Raymond v. King County, 117 Wash. 343, 201 Pac. 455 (1921); Wilberg v. Yakima County, 132 Wash. 219, 231 Pac. 931 (1925). See 1 COOLEY, TAXATION § 24 (4th ed. 1924).

Categorized as a proceeding in invitum. Independent School District No. 39, Creek County v. National Exchange Co., 164 Okla. 176, 23 P.2d 210 (1933).

Compare Spokane County *ex rel.* Sullivan v. Glover, 2 Wn.2d 162, 97 P.2d 628 (1940) (land), with Anderson v. Daugherty, 169 Ky. 308, 133 S.W. 545 (1916) (land).

[30] 339 U.S. at 312.

[31] Cook, *The Powers of Courts of Equity*, 15 COLUM. L. REV. 37, 106, 288 (1915). Attention is drawn particularly to page 49.

[32] Note 23, *supra*.

of distraint when it provided that '... he [the treasurer] *shall without demand or notice distrain* ...' If notice of distraint is desired, the legislature must provide for it."[33] This holding would appear inconsistent with that of the *Mullane* case.

The weakness inherent in the above analysis may be found in *Puget Sound Power and Light Co. v. Cowlitz County*.[34] There, the court held a tax on personal property not to be a personal obligation. However, the writer believes that the true nature of a distraint and sale, in so far as an action is concerned, is one in personam.

Other theories exist which could be utilized by the courts to achieve a more just result than that of the principal case.

Note should be taken that statutes once thought sacrosanct have either fallen or have been changed to conform to the *Mullane* case.[35]

In conclusion, the courts should recognize that where inadequate notice is afforded by statute the end result is an unjust forfeiture and a form of legalized larceny. The *Mullane* case should be read and applied in its most literal terms. Finally, if analytically it is not possible to construe the *Mullane* case as requiring actual notice, where feasible, common decency should require more than the antiquated procedure of notice by posting or publication.[36]

GEORGE O'DEA

Incidence of State Inheritance Tax—Time of Vesting of Real Property and Income. In *Clark v. Nash*, 46 Wn.2d 401, 281 P.2d 857 (1955), the testator devised specific income property to the respondent and bequeathed and devised the residue to others, "... after payment of all of my just debts, *taxes*, and costs of administration." The trial court was reversed in its holding that the respondent took free from the state inheritance tax. Pursuant to RCW 83.08.060, any intention to provide that a bequest be made free and clear of any claim of taxes must be made in the will. "A mere statement that the testator desires his taxes to be paid does not clearly express an intention to charge his estate with taxes imposed by law upon a beneficiary." Clear and express language must be used in order to obviate a similar controversy.

The court also construed RCW 11.04.250 to mean that "... real property and the right to receive the income therefrom vest in the devisee as of the death of the decedent, subject only to the trusteeship of the executor during the probate of the estate."

[33] 282 P.2d at 816. It should be noted that the litigants argued the case on the analogy of similarity to a levy and attachment proceeding, but this argument was ignored by the court.

[34] 38 Wn.2d 907, 234 P.2d 506 (1951).

[35] RCW 11.76.040 (1955 c 205 § 13). This statute now provides that written notice must be provided each heir or distributee. *Cf.* Mulhern v. Gerold, 116 F.Supp. 22 (D. Mass. 1953). Pagni v. Commonwealth, 179 Pa. Super. 213, 116 A.2d 294 (1955).

[36] The advisory committee comment on IOWA R. CIV. P., p. 369 states, "Notice by posting had its place and probably accomplished its purpose, before the days of newspapers, crowded cities and improved facilities for communication. Realistically it has long been archaic so far as accomplishing any function, other than adherence to ancient traditions is concerned."