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Adequacy of Notice—Due Process

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ADEQUACY OF NOTICE — DUE PROCESS

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The purpose of this comment is to survey some of the Washington statutes and case authorities which involve notice, and to discuss them in reference to a number of recent United States Supreme Court decisions involving procedural due process considerations. It is believed that a broadened scope and meaning have been attached to "notice," as a requirement of procedural due process. This survey has been confined to the areas categorized as proceedings *in rem,* but it is not exhaustive of them.

DUE PROCESS

"The Mullane case . . . was a proceeding *in personam,* . . . The proceeding herein is *in rem.*"[1] The value to be attached to this and similar statements frequently made by courts in answer to an attack on the adequacy of notice is doubtful.

Procedural due process, as it is envisioned by the fourteenth amendment, includes all of the procedural steps required to deprive a person of life, liberty, or property.[2] Frequently, the requirement is stated as consisting of reasonable notice and an opportunity to be heard.[3] The approach of the Court to due process cases frequently has been to go behind the state court record and make an independent finding on the fairness of the proceeding.[4] The standards by which fairness is judged are not precise or explicit,[5] but they conform to the social philosophy of individual members of the Court.[6]

State courts frequently have relied on the distinctions between *in personam, quasi-in-rem,* and *in rem* proceedings.[7] The difference between *in personam* and *in rem* was set forth by one court as follows:

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[1] In re Shew's Estate, 48 Wn.2d 732, 734, 296 P.2d 667, 669 (1956).

[2] Holden v. Hardy, 169 U.S. 366 (1889); Hagar v. Reclamation District, 111 U.S. 701 (1884); Blackmer v. United States, 284 U.S. 421 (1932); Palko v. Connecticut, 302 U.S. 319 (1938). See *Ex parte* Wall, 107 U.S. 265, 289 (1882).

[3] Snyder v. Massachusetts, 291 U.S. 97 (1934); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); United States v. Carolene Products Co., 304 U.S. 144, n.4 (1938); Hess v. Pawloski, 274 U.S. 352 (1927); Milliken v. Meyer, 311 U.S. 457 (1940).

[4] WOOD, DUE PROCESS OF LAW (1951), see particularly pages 412, 414, 415, 417.

[5] See United States v. Cruikshank, 92 U.S. 542 (1875); Rochin v. California, 342 U.S. 165 (1952); Wolf v. Colorado, 338 U.S. 25 (1949).

[6] See note 4 *supra.*

[7] *Cf.* Hill v. Persons Claiming Any Interest, 329 Mich. 683, 46 N.W.2d 584 (1951); *In re* Shew's Estate, 48 Wn.2d 732, 296 P.2d 667 (1956); Cook, *The Powers of Courts of Equity,* 15 COLUM. L. REV. 37, 106, 288 (1915).

> '. . . *(I)n personam*' and '*in rem*' differ in that the former . . . [is] . . . directed against specific persons and seek[s] personal judgments, while the latter . . . [is] . . . directed against the thing or property or status of a person and seeks judgment thereto as against the world.[8]

The term "*quasi-in-rem*" was explained as follows:

> A *quasi-in-rem* proceeding . . . [is] . . . an action between parties where the direct object is to reach and dispose of property owned by them or of some interest therein, and in which the judgment operates only as between the particular parties to the proceedings.[9]

Generally, in order to subject a person to a personal judgment there must have been personal service within the jurisdiction.[10] However, substituted service has been satisfactory when the proceedings involve an out of state resident or nonresident.[11]

Notice in *in rem* proceedings has been held to require much less. Notice by posting or by publication generally has been sufficient in such proceedings to assure a person all of his constitutional rights. This has been true when the state has been acting directly on the *res,* and is settling right and title thereto.[12]

Contrary to state court practice,[13] the United States Supreme Court has refused to decide a case solely by classifying it as a proceeding either *in rem* or *in personam.* As was said in *Mullane v. Central Hanover Bank and Trust Co.,*

> Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of the law, or on other issues, or the reasoning which underlies them, we do not rest the

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[8] Martin v. Wheatley, 62 F. Supp. 104, 107 (W.D. Ark. 1945). See 1 C.J.S., *Actions* § 52 (1936).

[9] Werbe v. Holt, 98 F. Supp. 614, 617 (W.D. Ark. 1951). For a lucid explanation of the terminology see Gassert v. Strong, 38 Mont. 18, 98 Pac. 497, 500 (1908). See also Cook, *The Powers of Courts of Equity,* 15 COLUM. L. REV. 37, 106, 288 (1915).

[10] See McDonald v. Mabee, 243 U.S. 90 (1917); GOODRICH, CONFLICT OF LAWS §§ 72-73 (3rd ed. 1949); STUMBERG, CONFLICT OF LAWS §§ 69-71 (2nd ed. 1951).

[11] Milliken v. Meyer, 311 U.S. 457 (1940); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Substituted service of process on nonresidents has been upheld, when there has been some method provided to insure notice of suit. Generally, litigation has been restricted to automobile accident cases, suits involving a corporation carrying on a business within the jurisdiction, or cases wherein consent may be found. See Hess v. Pawloski, 274 U.S. 352 (1927); Olberding v. Illinois Central R.R. Co., 346 U.S. 338 (1953) (Autos). International Shoe Co. v. Washington, *supra*; Traveler's Health Assoc. v. Virginia, 339 U.S. 643 (1950) (Business); GOODRICH, CONFLICT OF LAWS § 73 (3rd ed. 1949).

[12] 1 MERRILL, NOTICE § 518 (1952).

[13] See Winnebago Furniture Mfg. Co. v. Wisconsin Midland Ry. Co., 81 Wis. 385, 51 N.W. 576 (1892); City of Newark v. Yeskel, 5 N.J. Super 313, 74 A.2d 883 (1950); Collins v. City of Wichita, 225 F.2d 132 (10th Cir. 1955). *See* the excellent dissent of Justice Oliphat in the Yeskel case, *supra. See also* Churchill v. Bigelow, 333 Mass. ——, 129 N.E.2d 903 (1955).

> power of the state to resort to constructive service in this proceeding upon how its courts or this Court may regard this historical antithesis.[14]

The *Mullane case*, and *Walker v. City of Hutchinson*, both presumably proceedings *in rem*, set forth the rule that

> . . . if feasible, notice reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests must be given.[15]

It is clear that were the rule read literally, an effort must be made to inform known persons that their rights will be affected, whenever notification is feasible or reasonable. Persons who are unknown or absentees may be notified satisfactorily by the traditional forms of publication or posting. The limits of the rule probably will be determined by what is administratively feasible as related to whomsoever is charged with the duty to give notice. Further, it is believed that the requirements that will be laid down can be fair and need not be onerous.

A remaining question is, how far must one search in order to ascertain whether a person is "known," and what is his address? Must city and state records be used if they should be within the reach of the notifying person acting under the state power? Does the search extend to records outside of an administrator's office? Must one search all state records? Does the rule require a search to be made in the local telephone directory, or city directory? Do "records" include the general knowledge of the community? An examination of a number of recent decisions by the United States Supreme Court will shed light on these questions.

Recent U.S. Supreme Court Decisions

The leading case is *Mullane v. Central Hanover Bank and Trust Co.*[16] Here, a state statute permitted the pooling of small trust estates into one large fund for investment purposes. Periodic accountings were called for. The only notice required or given of an impending accounting was published. The notice contained the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of the participating estates. Prior to the first investment of the common fund, each person known to the trustee

[14] 339 U.S. 306, 312 (1950).
[15] 77 S.Ct. 200, 202 (1956).
[16] 339 U.S. 306 (1950).

as one entitled to the income or principal of the trust was notified of the event by mail. This notice technique was attacked under the fourteenth amendment.

It was held that notice by publication, under these circumstances, did not give the persons sought to be bound proper notice which would accord them their constitutional rights. Since the trustee knew the names and addresses of the beneficiaries, there was no tenable ground for not giving them personal notice. The reason the published notice was defective was that under the circumstances, it was feasible to give notice reasonably calculated to reach those who could have been informed easily by the best possible means at hand. Seemingly, the notice need not reach everyone, but only those most likely to safeguard the interests of all.

Thus, apparently, if the person seeking to give notice has the name and address within his personal reach, there is no constitutional reason for not giving personal notice to one in danger of being divested of some legal interest. The best notice possible under the circumstances must be given.[17]

In the recent case of *Walker v. City of Hutchinson*,[18] the plaintiff owned land in the city of Hutchinson, Kansas. Pursuant to statute,[19] defendant city moved to condemn land by determining that it was needed for public use. Three appointed commissioners assessed the damages. By statute, the commissioners were required to give notice to landowners and lienholders of record either by giving ten days notice in writing or by publishing notice once in the official city newspaper. Published notice was made and damages determined. Plaintiff sought to enjoin the city from trespassing upon his property, contending that he had been denied his constitutional rights under the "due process" clause of the fourteenth amendment. Both the trial court and the Kansas Supreme Court held that published notice accorded to the plaintiff all of the notice and opportunity for hearing to which he was entitled.[20] The state court reasoned that this was true since the proceeding was *in rem*, and that, historically, published notice was sufficient. The plaintiff appealed and was granted review.[21]

The majority saw the issue before the Court to be whether or not

[17] See Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951); Note, 25 WASH. L. REV. 282 (1950).
[18] 77 S.Ct. 200 (1956).
[19] KAN. GEN. STAT. of Kan. §§ 26-201, 26-202 (1949).
[20] Walker v. City of Hutchinson, 178 Kan. 263, 284 P.2d 1073 (1955).
[21] 350 U.S. 930 (1955).

newspaper publication alone, as a prerequisite to proceedings to fix compensation in condemnation cases, measures up to the quality of notice required by the due process clause.

Resting on *Mullane*,[22] the Court held that procedural due process had not been afforded to this plaintiff, and reversed the prior decisions. The rule enunciated by the Court was that

> . . . if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.[23]

The notice given " . . . may vary with circumstances and conditions."[24] One of the circumstances and conditions where less than actual notice may be given occurs when unknown or missing persons are involved. There is no rigid formula laid down; the rule is flexible in its entirety. No adherence is given to the categorization made by the state court of the proceeding being *in rem*.

The Court recognizes that publication is grossly inadequate to convey information that a person's rights will be affected. In the *Walker* case, plaintiff's name and address were known to the city. Plaintiff's name was on its official records. Thus,

> Even a letter would have appraised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.[25]

The city relied upon *Huling v. Kaw Valley Railway & Improvement Co.*[26] In *Huling*, plaintiff, a nonresident, complained that land taken pursuant to a condemnation statute denied him due process of law. The statute provided for thirty days notice by publication before damages were fixed. The Court held that the plaintiff had *not* been denied due process, and said that

> . . . this was all the notice they had a right to require.[27]

The distinction drawn by the Court was that in the *Walker* case plaintiff was a resident, while in *Huling* plaintiff was a nonresident. Although the *Huling* decision was not overruled, its very existence as operative law is threatened. Thus,

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[22] See note 16 *supra*.
[23] See note 15 *supra*.
[24] *Ibid.*
[25] *Ibid.*
[26] 130 U.S. 559 (1889).
[27] *Id.* at 563.

> . . . we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision.[28]

The requirements of *Mullane* and *Walker* are not burdensome in the eyes of the Court. It said,

> Nor is there any reason to suspect that it [the *Walker* decision] will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation.[29]

A letter is enough.

Justice Frankfurter dissented, saying that from the pleadings and record, he was uncertain what relief this plaintiff desired. Did plaintiff want to contest the taking of the land, or the amount of the award, or to restrain the city from entry so that he might have another hearing to fix compensation; or did he wish to obtain a permanent injunction from entry? Frankfurter believed the taking of the land to be constitutional, the only doubt being the question of reasonableness of the amount of the award. Since this question had not been properly raised, he felt that the state decision should be affirmed.[30]

The separate dissent of Justice Burton partially spells out the scope of the majority's decision when he says,

> Particularly, I am not ready to throw a cloud of uncertainty upon the validity of condemnation proceedings . . . [31]

In another recent case, *City of New York v. New York, N.H., & H. Ry. Co.*,[32] the city sought to enforce liens raised by services provided by it. The railroad went into receivership. Published notice was given, calling for creditors to present claims. The liens were sought to be enforced after the non-claim statute had run. The United States Supreme Court held that published notice was not enough to cut off creditors' claims. Resting on *Mullane,* there was no indication that the Court felt the contention that the proceeding was *in rem* was significant.[33]

The obvious conclusion drawn is that the receiver was obligated to scan his records to determine who the bankrupt's creditors were, and to inform them personally that their claims were subject to being

[28] 77 S.Ct. at 203 (1956).
[29] *Ibid.*
[30] *Ibid.*
[31] 77 S.Ct. at 208 (1956).
[32] 344 U.S. 293 (1953).
[33] See the dissent, *In re* New York, N. H. & H. Ry. Co., 197 F.2d 428 (2nd Cir. 1952).

cut off. It is not a heavy burden to search a business's "accounts payable," and mail a notice that some action must be taken by the creditor.

A later case reiterates the demand that the notice given must be meaningful. In order to be meaningful, more than a resort to the empty requirements of a statute must be made, however valid compliance with the statute might be under ordinary circumstances.

In *Covey v. Town of Somers*,[34] plaintiff was a landowner in Somers, New York. Upon failure to pay her taxes, a tax lien was impressed upon her property. Published notice, posted notice, and notice by mail were given. A judgment of foreclosure was rendered, and a deed to her property given the town. Five days later plaintiff was adjudged insane and committed to a state mental institution. After commitment, the property was sold, but not before plaintiff's guardian, who had been appointed after the foreclosure judgment, had tendered the unpaid taxes plus interest to the defendant.

The state courts approved the action of the town, but the United States Supreme Court held that due process had been denied since

> . . . she had been known to the town to be an incompetant for fifteen years.[35]

Thus, the Court ruled, in effect, that when the state knows (or reasonably should know) that it is dealing with an incompetent, the state must insure that the notice is effective to afford protection to his legal rights. Exact compliance with the foreclosure statute was not enough. The fact of incompetency may never appear on the tax rolls of the town, but a significant footnote appeared in the opinion to the effect that Somers, New York, has a population of two hundred.[36] Thus, where the municipal body is small in area and population, the general knowledge of the community will be imputed to the governing authorities.

In another recent case, *Standard Oil v. New Jersey*,[37] New Jersey's Escheat Act was attacked. The contention was that it operated to deny due process. Stock dividends, wages and other claims were declared to escheat to the state if the owner were unknown or had not been heard from for fourteen years. The only provision for notice

[34] 351 U.S. 141 (1956); Note, 55 MICH. L. REV. 287 (1956).
[35] 351 U.S. at 146.
[36] See 100 L.Ed.Advance, p. 573 (1956). The permanent U.S. report does not carry this particular footnote.
[37] 341 U.S. 428 (1951).

was personal notice to the holder of the claim, and published notice to the world at large. This was held not to violate due process. The decision may be explained on the basis that the Court viewed the escheat as being only a change in depositories, since the claims could be regained from the state for a period of two years following the seizure. Further, the corporate depository had made at least one attempt to reach the owner, and therefore the state could validly presume that the owner was an unknown or absentee.[38]

A companion case to *Walker* evidences that the state is not an absolute insurer that actual notice will be received. In *Nelson v. City of New York*,[39] the exact counterpart of the statute in the *Covey* case was before the Court.[40] Notice of foreclosure was posted, published, and mailed after the plaintiff failed to pay his taxes. The property was sold, and the plaintiff contested the proceeding relying on *Mullane* and *Covey*. It was held that, while the plaintiff's bookkeeper wrongfully had concealed the tax bills and notice of foreclosure, these facts were of no aid to the plaintiff since the city could not be charged with the careless and wrongful conduct of the plaintiff's servants.

Thus, the whole approach is pragmatic. Whether or not the notice given shall withstand an attack based on due process grounds must be determined by answers to the following questions. If published notice has been made, is it reasonably calculated to inform persons that their rights will be affected with finality? Is it feasible to give personal notice under the circumstances?

WASHINGTON STATUTES[41] AND CASE AUTHORITIES

EMINENT DOMAIN

Washington's eminent domain statutes[42] seem to comply with the requirements of the *Walker* and *Mullane* decisions. Personal service must be made on every person who is known to the state as an owner, encumbrancer, tenant, or otherwise interested therein. Ten days notice must be given before presenting a petition for condemnation.[43] The provision dealing with nonresidents raises a danger signal. The statute reads:

> In all cases where the owner or person claiming an interest in such real estate [that property which is the subject of the condemnation

[38] See dissent, City of Newark v. Yeskel, 5 N.J. Super. 313, 74 A.2d 883, 891 (1950); see also Security Savings Bank v. California, 263 U.S. 282 (1923).

[39] 77 S.Ct. 195 (1956).

[40] See note 34 *supra*.

[41] RCW 4.28.100 may cut across the statutes discussed. This statute is entitled "Commencement of Actions," and reads to the effect that when a defendant cannot be

> proceeding] or other such property is a nonresident of this state, . . . and an affidavit of the attorney general shall be filed that such owner or person is a nonresident of this state, . . . service may be made by publication thereof in any newspaper published in the county where such lands are situated once a week for two successive weeks.[44]

It is possible that some reliance could be placed on the *Huling* decision for the proposition that personal notice to a nonresident is not required, and that published notice would accord a nonresident his due. However, to resort to publication alone would be most precarious indeed, in the light of the language of the *Walker* decision.

Even if the *Walker* decision overrules *Huling,* another argument is possible. All service under the statute need not be considered defective because of the statute's failure to provide for personal notice to nonresidents, since the Washington Court in *State ex rel. Thomas v. Superior Court*[45] construed a similar statute to the effect that personal service on a known nonresident, service being made out of the state of Washington, would be deemed the same as service by publication. Also, RCW 4.28.180 reads to the effect that personal service on a defendant out of state shall be the equivalent of service by publication.[46] Thus, personal service on nonresidents would satisfy both the statute and the due process clause.

In determining who is entitled to notice, the general rule is that one need only examine the record titles before commencement of condemnation.[47] It might be well, however, for the person charged with the duty of giving notice to consider what influence, if any, *Covey v. Town of Somers,* and *City of New York v. New York, N.H. & H. Ry. Co.* will exert in this area.

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found within the state, and that after a search is made, the plaintiff may file an affidavit that the defendant cannot be found. He then is authorized to make service by publication after he has mailed a copy of summons to the defendant at his last known address. The mailing of a summons would supply notice that certain legal interests will be put in issue, and give notice and opportunity to be heard, thus fulfilling the requirements of due process.

[42] RCW 8.04. (State); RCW 8.08. (Counties); RCW 8.12. (Cities); RCW 8.16. (School Districts); RCW 8.20. (Corporations); RCW 8.24. (Private Ways of Necessity).

[43] RCW 8.04.010, .020.

[44] RCW 8.04.020.

[45] 42 Wash. 521, 85 Pac. 256 (1906).

[46] See Lawyer Land Co. v. Steel, 41 Wash. 411, 83 Pac. 896 (1906); Roznik v. Becker, 68 Wash. 63, 122 Pac. 593 (1912).

[47] Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991 (1909). For examples as to who is not entitled to notice, see North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750 (1896); State *ex rel.* Suksdorf v. Superior Court, 169 Wash. 195, 13 P.2d 460 (1932); State *ex. rel.* Long v. Superior Court, 80 Wash. 417, 141 Pac. 906 (1914). The exact type of service called for should be given. Should the statute call for a summons, a show-cause order will not suffice. See State *ex. rel.* Hopman v. Superior Court, 88

SUMMARY TAX PROCEEDINGS
REAL PROPERTY

The area of summary tax enforcement and collection procedures has offered a fertile ground for the delinquent taxpayer to raise the issue of due process.[48]

In Washington, the statutory methods of enforcing collection of delinquent taxes against real property are spelled out in RCW 84.64. Alternative methods may be employed by the county treasurer to enforce a tax lien.[49] He may give actual notice of the foreclosure proceeding, thereby creating no due process problem, or he may serve both summons and notice by publication in one general notice.[50] After judgment, and after notice of sale is given by posting in three public places,[51] the property can be sold.[52] The employment of publication alone does create a due process problem.

The rule in Washington is that tax foreclosure proceedings are *in rem,* and that published notice is sufficient notice to acquaint the taxpayer that he is in danger of losing his property.[53] Justification for the rule is given by explanations that the taxpayer is bound to know that this would happen,[54] that the interest of the state in raising revenue demands that " . . . the methods at the disposal of the state . . . must be swift and simple . . . ,"[55] or that the state has graciously given the taxpayer more time than he deserves.[56]

This method of making notice must be suspect if the United States Supreme Court in *Mullane, Walker* and *Covey* meant that as to known persons, whether the proceeding is *in rem* or *in personam,*

> . . . if feasible, notice reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests must be given.[57]

Wash. 612, 153 Pac. 315 (1915); Davis v. Woolen, 191 Wash. 379, 71 P.2d 172 (1937); Muscek v. Equitable Savings and Loan Assoc., 25 Wn.2d 546, 171 P.2d 856 (1946).

[48] *Cf.* Whatcom County v. Black, 90 Wash. 280, 155 Pac. 1071 (1916); Williams v. Pittock, 35 Wash. 271, 77 Pac. 385 (1904); Eldridge, *Property Tax Collection Procedure in Washington,* 17 WASH. L. REV. 123 (1942).

[49] RCW 84.60.020 reads that upon failure to pay taxes, a tax lien arises. See RCW 84.64.010, .030, .050.

[50] RCW 84.64.050.

[51] RCW 84.64.080—.100.

[52] RCW 84.64.070, .100.

[53] Napier v. Runkel, 9 Wn.2d 246, 114 P.2d 534 (1941); Colby v. Himes, 171 Wash. 83, 17 P.2d 606 (1932); See McAllister, *Taxpayers' Remedies—Washington Property Taxes,* 13 WASH. L. REV. 91 (1938).

[54] See Williams v. Pittock, 35 Wash. 271, 77 Pac. 385 (1904).

[55] Note, 55 MICH. L. REV. 287, 289 (1956); See Devitt v. Milwaukee, 261 Wis. 276, 52 N.W.2d 872 (1952).

[56] See note 54 *supra.*

[57] 77 S.Ct. at 202.

The reasonableness of notification of pending action by means of publication has been and is being subjected to much well deserved criticism.[58] Therefore, the question would be whether or not it would be unfeasible to inform by personal service either a single taxpayer or a group of taxpayers that their interest in property is in jeopardy. Since the name and address of the taxpayer is upon the tax rolls of the treasurer,[59] and since this information may appear within the published summons and notice,[60] the burden imposed by requiring personal notice is without question reasonable in terms of expense and effort.

Personal Property

Summary procedures which may be employed against an owner of personal property, who is a delinquent taxpayer, are set forth in RCW 84.56. The distraint and seizure section[61] has been construed to require no notice to the taxpayer that his property is being seized, other than posting of notice of distraint on or near the property. Further, notice by posting is sufficient to acquaint an owner that his personal property is being sold. In construing the statute (RCW 84.56.070), great weight was placed on the fact that personal notice is to be given that taxes are due and payable.[62]

To employ the foregoing procedure is sufficient when the property is deemed movable by the county treasurer. However, if the property be considered stationary, or reasonably immovable, before seizure can be deemed complete the county treasurer must give the owner personal notice of the impending action and that a sale will be held of the property seized.[63] When property is deemed movable by the county treasurer, and he employs only notice by posting before seizure and sale, it is questionable whether or not such a procedure could stand if an attack were raised under the due process clause.

Summary tax proceedings have been classified as *in rem* to both

[58] Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. Pa. L. Rev. 305 (1951); Comment, *The Effect of Mullane v. Central Hanover Bank and Trust Company Upon Publication of Notice in Iowa*, 36 Iowa L. Rev. 47 (1950); Notes, 5 Miami L. Q. 153; 31 Wash. L. Rev. 170 (1956).

[59] Compare Spokane County *ex rel.* Sullivan v. Glover, 2 Wn.2d 162, 97 P.2d 628 (1940) with the present language in RCW 84.56.050 and with Eldridge, *Property Tax Collection Procedure in Washington*, 17 Wash. L. Rev. at 132 (1942).

[60] RCW 84.64.050, .030; Napier v. Runkel, 9 Wn.2d 246, 114 P.2d 534 (1941); Luff v. Gowan, 38 Wash. 504, 80 Pac. 766 (1905).

[61] RCW 84.56.070.

[62] Metzger v. Quick, 46 Wn.2d 477, 282 P.2d 812 (1955); Note, 31 Wash. L. Rev. 170 (1956).

[63] RCW 84.56.080.

real and personal property.[64] If *Covey v. Town of Somers* should not be restricted to incompetents, if *New York v. New York, N.H. & H. Ry. Co.* should not be restricted to bankruptcy proceedings, if *Walker v. City of Hutchinson* should not be restricted to eminent domain proceedings, and if *Mullane* should not be restricted to a trusteeship proceeding, but applicable to *in rem* proceedings in general, then seemingly, the requirement that

> . . . if feasible, notice reasonably calculated to inform parties of proceedings . . .[65]

has not been met.

Fairness to the taxpayer, as well as a desire to protect the county treasurer or a subsequent purchaser would demand some type of notice equal to that outlined by the procedure to be employed by the county treasurer in the distraint and sale of immovable property. Thus, actual notice should be given the offending taxpayer if he is known to the state. It is difficult to see what impelling interest of the state may be injured by requiring the treasurer to mail a letter acquainting the taxpayer of the status of affairs, thereby giving him an opportunity to act and to be heard. The name and address of the taxpayer are carried on the tax rolls.[66] This information is a part of the records of the county treasurer's office. It would seem neither unfeasible nor unreasonable to require the county treasurer to give such notice.

DECLARATORY JUDGMENTS OF LOCAL BOND ISSUES

A means of insuring the validity of local bond issues by the use of a declaratory judgment is set forth in RCW 7.25. No reported cases may be found in Washington in which this particular portion of the code has been tested or construed.[67] Briefly, it provides that if a municipal corporation should desire to test the validity of a local bond issue,[68] a complaint shall issue and all taxpayers within the boundary of the municipal corporation shall be named defendants. Service is to be made upon one or more taxpayers as a representative taxpayer of the district, but other taxpayers may intervene.[69]

[64] See People v. Skinner, 18 Cal.2d 349, 115 P.2d 488 (1941); Puget Sound Power and Light Co. v. Cowlitz County, 38 Wn.2d 907, 234 P.2d 506 (1951); Coolidge v. Pierce County, 28 Wash. 95, 68 Pac. 391 (1902).

[65] 77 S.Ct. at 202.

[66] RCW 84.56.050. See Pierce County v. Newbegin, 27 Wn.2d 451, 178 P.2d 742 (1947).

[67] But see the cases involving RCW 7.24.; Acme Finance Co. v. Huse, 192 Wash. 96, 73 P.2d 341 (1937).

[68] RCW 7.25.010.

[69] RCW 7.25.020.

The judgment is declared effective to determine the validity of the bonds.[70] Further,

> . . . all provisions of the laws of Washington relating to declaratory judgments shall apply.[71]

Under RCW 7.24.110 of the Declaratory Judgments Act, " . . . all persons who have . . . any interest which would be affected . . . " are necessary parties. While RCW 7.25.020 (Declaratory Judgment; Local Bond Issue - Complaint - Defendants - Service) does not speak of publication, authority for notice by publication to the unnamed defendant can be found.[72]

Under the provisions of the Local Bond Act, the question would be whether or not service by publication or service on the representative taxpayer only would suffice to bind those not personally served—the form of process not being subject to attack on due process grounds. In *Castevens v. Stanley County*[73] the North Carolina Court had this exact problem before it. Here, in a prior suit, a decree had been rendered that a bond issue and tax levy were valid. Actual service had been made upon a taxpayer sued in a representative capacity. Other taxpayers, including the plaintiff in the present suit, had been served by publication. The plaintiff contended that since he was not served personally, he was not bound by the prior decision. The court declared the attack unwarranted, and the plaintiff bound. Service by publication was deemed sufficient because the proceeding was " . . . in the nature of a proceeding *in rem*."[74]

From *Walker* and *Mullane*, the rule is that, if feasible, actual notice must be given. Where there is a proceeding in the nature of a class suit,[75] or where, as under the circumstances contemplated by the Declaratory Judgments statutes, a bond issue is being tested, it would be unreasonable and constitute an unnecessary expense to the taxing district to serve each taxpayer personally.

May it not be presumed that the representative taxpayer will act to protect the interest of the taxpayers not personally served?[76] Does

[70] RCW 7.25.030.
[71] RCW 7.25.040.
[72] See Felsinger v. Quinn, 62 Wash. 183, 185, 113 Pac. 275, 276 (1911), the publication would be disregarded as a mode of service.
[73] 211 N.C. 642, 191 S.E. 739 (1937).
[74] 191 S.E. at 744.
[75] See Kentucky Home Mutual Life Ins. Co. v. Duling, 190 F.2d 797 (6th Cir. 1951) to the effect that there must be protection of absent parties to comply with due process.
[76] See Behrman v. Egan, 9 N.J. Super. 171, 75 A.2d 627 (1950); Omaha Hotel Co. v. Wade, 97 U.S. 13 (1877).

not the opportunity to intervene exist if one should desire to avail himself of this remedy? Would not the usual widespread publicity of a pending bond issue sufficiently acquaint a taxpayer that his interest will be affected? To hold such a proceeding to be consistent with due process would not do violence to the recent line of cases beginning with *Mullane*.

PROBATE

Washington, in common with other jurisdictions, has not afforded *Mullane* a cordial welcome.[77] In *New York Merchandise Co. v. Stout*,[78] plaintiff, a creditor, attacked the Washington non-claim statute.[79] Very properly, he raised the issue of its constitutionality, contending that the only notice called for was that of publication; that the administratrix of the decedent debtor had published such notice; and that, as a result of the running of the non-claim statute, his rights had been cut off. The creditor cited *Mullane* as authority that the statute and the procedure followed denied him due process. The court answered that the creditor could not rest his case on due process because *Mullane* applied only where property rights were brought before the court for adjudication in a trusteeship proceeding!

The *New York Merchandise Co.* case result is untenable on the basis of the *Mullane, Walker* and *New York, N.H. & H. Ry. Co.* decisions. RCW 11.40.010 provides that if a creditor's claims against a decedent debtor be not filed within six months after publication of notice that claims are to be presented, then such claims are barred. The non-claim statute is constitutional as to creditors unknown or absent, but as to those creditors known to the personal representative, it would not be unreasonable nor unfeasible to expect more. Is it impractical or unreasonable for a personal representative at least to scan the records of a decedent and by letter make known to those individuals who are shown to be creditors that their rights are subject to being cut off? It is submitted that the burden imposed would not be burdensome, nor unreasonable.

In a later case, *In re Shew's Estate*,[80] plaintiffs were the known

[77] See City of Newark v. Yeskel, 5 N.J. Super 313, 74 A.2d 883 (1950); Collins v. City of Wichita, 225 F.2d 132 (10th Cir. 1955) *cert. denied*, 350 U.S. 886 (1955). *But see* Washington Toll Bridge Authority v. State, 149 Wash. Dec. 502, 304 P.2d 676 (1956).

[78] 43 Wn.2d 825, 264 P.2d 863 (1953).

[79] RCW 11.40.010.

[80] 48 Wn.2d 732, 296 P.2d 667 (1956).

heirs of the decedent. An award in lieu of homestead[81] was made of the widow of the decedent. Citing *Mullane*, the plaintiffs attacked the award and statute on the ground that they had been denied due process because the statute did not call for notice to them before granting the award. The court said that there had been no denial of due process because

> The Mullane case was a proceeding *in personam*. . . The proceeding herein is *in rem*.[82]

The result in the *Shew* case is consistent with *Walker* and *Mullane*, but the reasoning is at variance with the reasoning in those cases. RCW 11.76.040 requires that notice be given to known heirs and distributees within twenty days after the appointment of an executor or administrator. Twenty days before a hearing on the final report and petition for distribution, another notice must be given by the executor or administrator.[83] Certainly an heir or distributee must know that an award in lieu of homestead may be made as a matter of course during the probate of an estate, as here, and that a person who intends to object to such an award must be put to some duty to guard his own interests. This interest will receive adequate protection by the use of RCW 11.28.240 which requires that after request is made, the executor or administrator will extend personal notice of certain pending matters to the person requesting such notice.[84] Another reason is that an award in lieu of homestead is a statutory right of the widow. Further, unless the statutory grounds for setting the award aside are shown, the heir or distributee has no standing to challenge the award.[85]

CONCLUSION

The foregoing by no means exhausts the legal material concerning notice in Washington. The anachronism of posting and publication as a means of notification is destined to disappear except, perhaps, as a gesture for the sake of appearances. Thus, as to unknown persons, the necessity for any notice will disappear since publication is notoriously ineffective.

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[81] RCW 11.52.010.

[82] 48 Wn.2d at 734, 296 P.2d at 669.

[83] See Gose and Hawley, *Probate Legislation Enacted by the 1955 Session of the Washington Legislature*, 31 WASH. L. REV. 22 (1956). Attention is invited to page 34.

[84] See *In re* Pugh's Estate, 22 Wn.2d 514, 156 P.2d 676 (1945); Francon v. Cox, 38 Wn.2d 530, 231 P.2d 265 (1951).

[85] See Francon v. Cox, *supra* note 84; *In re* Gherra's Estate, 44 Wn.2d 277, 267 P.2d 91 (1954); RCW 11.52.016, .024.

In fairness, the appellate court in Washington has been zealous in safeguarding the interests of the individual against abusive state action. An indication that the court in Washington may change its position regarding *Mullane* is seen in the very recent case of *Washington Toll Bridge Authority v. Washington.*[86] An *in rem* statute being contested required notice by publication only. The statute was found to be unconstitutional on grounds other than due process. An encouraging sign was that several members of the court indicated their intention of abandoning the intellectual hiatus of *in rem - in personam* by saying that *Mullane* made questionable the provision that required notice by mere publication.[87]

[86] 149 Wash. Dec. 502, 304 P.2d 676 (1956).

[87] No attempt has been made to discuss whether or not the statutes considered may be declared void on their faces for failure to provide for actual notice. Note the technique employed in Justice Jackson's dissent in Kunz v. New York, 340 U.S. 290, 295 (1951). The ultimate legal effect of a statute which may be declared unconstitutional has not been considered in this comment. See ROTTSHAEFER, CONSTITUTIONAL LAW §§ 32-36 (1st ed. 1939).