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Constitutional Law - Due Process - Service by Publication Insufficient for Condemnation of Local Resident's Property

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CASE COMMENTS

Constitutional Law—Due Process—Service by Publication Insufficient for Condemnation of Local Resident's Property

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Plaintiff, a Kansas resident, sued to enjoin the City of Hutchinson from taking his land following condemnation proceedings. The complaint questioned the sufficiency of a statute[1] which allowed notice of such proceedings to be given by publication in the official city newspaper. Although the plaintiff was a resident of the municipality, and his name was on the official city records, he never received actual notice of the action until after the time for appeal had expired. The Court declared the city's action unconstitutional, and *held* that where a landowner is a resident of a state and his name is known to the city and on its official records, mere newspaper publication of proceedings to condemn his property lacks the quality of the notice required under the fourteenth amendment due process clause. *Walker v. City of Hutchinson*, 77 Sup. Ct. 200 (1956).

The *Walker* case is not the first in which the Supreme Court has considered the quality of notice sufficient to meet the requirements of due process. In the 1888 case of *Huling v. Kaw Valley Ry.*,[2] a substantially identical predecessor of the same Kansas statute[3] was questioned by a plaintiff who was a non-resident and whose land was correctly described in the published notice. The Court held that under those circumstances the publication was sufficient to meet the requirements of due process.

A 1924 case, *North Laramie Land Co. v. Hoffman*,[4] involved condemnation proceedings by the United States. Notice of the proceedings had been published in a city newspaper in compliance with a Wyoming statute.[5] The landowner had actual notice of the proceedings before the time for appeal had expired, but instead of appealing, he brought an action to enjoin the land company from taking his property. In deciding that the statute met the requirements of due process, the Court said that although property may not be taken without reasonable notice to the landowner, a statute does not contravene the fourteenth amendment unless the property owner is denied the fundamental right to be heard.

United States v. Winn,[6] a 1949 case, questioned a similar statute[7] which allowed notice by publication of condemnation proceedings. The statute permitted such notice if the landowners were unknown, minors, or non-residents, and in cases where the owner refused for any reason to convey. Although the land in question was properly

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[1] Kan. Gen. Stat. Ann. § 26-202 (1949), provided that the commissioners were to give a landowner, "ten days notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city newspaper . . ." This statute was amended in 1955 subsequent to filing of the *Walker* case, to require that after publication, the notice must be mailed to the landowner unless his residence is unknown and cannot be ascertained. *Id.* § 26-202 (Supp. 1935).

[2] 130 U.S. 559 (1888).

[3] Kan. Comp. Laws art. 9, § 86 (1879).

[4] 268 U.S. 276 (1924).

[5] Wyo. Comp. Stat. Ann. § 2525 (1910).

[6] 83 F. Supp. 172 (W.D.S.C. 1949).

[7] S.C. Code Ann. § 2046 (1942).

described, the landowner's name was not mentioned in the notice, since no deed could be found conveying the land to him. It was held that because the proceedings were in *rem* to acquire land for public use, the statutory notice by publication was sufficient to meet the requirements of due process.

Without a closer examination of the above mentioned cases there would seem to be a direct conflict between them and the *Walker* case. However, upon comparing their respective facts, it will be observed that they can be reconciled. In the *Huling* case the landowner was not a resident of the state in which his property was located. In such circumstances the practice of giving notice by publication is universally recognized.[8] The Court pointed out that the statute allowing publication of notice rests upon the presumption that since the landowner is outside the state and cannot be served personally, a published notice, designed to attract the attention of all, takes the place of personal service. A landowner should not be allowed to escape the obligations which accompany the ownership of property merely because he resides outside the state in which his property lies. The "non-resident" situation found in *Huling* was obviously lacking in *Walker* where the landowner resided in the municipality.

The *Winn* case is readily distinguished from *Walker* in that the landowner in the former was unknown to the public officials. Furthermore, the plaintiff in the *Winn* case actually had seen the published notice. Obviously, in *Winn* the only practical means of giving notice was by publication, whereas in *Walker* the plaintiff was known to the city through its official records.

In *North Laramie Land Co.* the landowner received actual notice, but chose not to follow the normal procedure to protect his interest. This situation did not exist in the *Walker* case where the landowner had no actual notice of the proceedings until after the appeal time had expired.

In deciding the *Walker* case the Court based its conclusion upon *Mullane v. Hanover Bank and Trust Co.*[9] There the defendant had management of a common trust fund and petitioned for a settlement to be binding on everyone having an interest in the common fund. The only notice of the settlement proceedings was by publication in a local newspaper. The Court said that published notice to unknown or non-resident beneficiaries would be allowed since it is the only practical method of notification, but held that before depriving a known person of substantial property rights personal notice must be given. It should be observed that the facts in the *Mullane* case were quite unlike those in *Walker,* in that the former dealt with settlement of a trust fund. Trust actions are regarded by some courts as actions in personam.[10] In any event, they lack the true in rem character of condemnation proceedings.

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[8] See, e.g., Fed. R. Civ. P. 4(e); Via v. State Commission, 9 F. Supp. 556 (D.C. 1935); Colo. Rev. Stat. Ann. § 50-1-2 & 4 (1953)(allows publication only when the landowner is a non-resident or an unknown, or for any reason cannot or will not consent to the taking of his property); Colo. R. Civ. P. 4(g)(2)(iv)(provides for publication when the landowner is unknown or a non-resident); Gwinner v. Gary Connecting Rys., 182 Ind. 553, 103 N.E. 794 (1914).

[9] 339 U.S. 306 (1950).

[10] *Id.* at 312; Freeman, Judgments §§ 1517-22 (5th ed. 1925).

The practice of giving indirect notice in property actions is well recognized.[11] The authority to establish procedure for such notice has been left to the state legislatures.[12] This was emphasized by Mr. Justice Burton's dissenting opinion in *Walker* where he stated that such a notice provision is within the discretion of a state's law making body.[13] He argued that to deny this state power or to declare its exercise unconstitutional would be to fail to allow adequate scope to local legislation.

In deciding the *Walker* case, the Court emphasized the impossibility of setting up a rigid formula as to the type of published notice that must be given. Plainly, the Court did not declare unconstitutional all state statutes which allow notice by publication, nor did they declare the Kansas statute generally unconstitutional. Rather the Court pointed out that under certain circumstances indirect notification will not be allowed regardless of the character of the action. Apparently the decision was based solely on the peculiar facts and circumstances presented. Had the landowner received actual notice and come into court only for the purpose of questioning the sufficiency of the statute, the Court might well have decided that he had no ground to complain.

[11] See note 8 *supra*.
[12] Wight v. Davidson, 181 U.S. 371 (1901); *In re* New York, 99 N.Y. 569, 2 N.E. 642 (1885).
[13] 77 Sup. Ct. at 208 (1956)(dissenting opinion).