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Condemnation - Newspaper Publication Insufficient Notice Under Due Process Clause

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CASE NOTES

CONDEMNATION–NEWSPAPER PUBLICATION INSUFFICIENT NOTICE UNDER DUE PROCESS CLAUSE

Plaintiff brought an action to enjoin the city and its agents from entering or trespassing on his property, and for such other and further relief as the court deemed equitable. The city of Hutchinson, Kansas instituted a proceeding to condemn part of plaintiff's property under the authority of the Kansas statute[1] which required that landowners be given at least ten days' notice of the time and place of the proceedings. Such notice could be given either "in writing . . . or by one publication in the official city paper. . . ."[2] Plaintiff here was not given notice in writing but publication was made in the official city paper of Hutchinson. The court appointed, pursuant to the statute,[3] three commissioners to determine compensation for the property taken and for any other damage suffered. The commissioner fixed plaintiff's damages at $725. The statute authorized an appeal from the award of the commissioners if taken within thirty days after the filing of their report.[4] Plaintiff took no appeal within the prescribed period. Some time later, however, he brought an action in the Kansas District Court and alleged that he had never been notified of the condemnation proceedings and knew nothing about them until after the time for appeal had passed. Plaintiff charged that the newspaper publication authorized by the statute was not sufficient notice to satisfy the due process requirements of the Fourteenth Amendment to the federal constitution. The District court denied relief and the landowner appealed. The Supreme Court of Kansas[5] affirmed the judgment and the landowner appealed. The Supreme Court of the United States held that where the landowner was a resident of Kansas and his name was on the official records of the city, newspaper publication alone of notice of condemnation proceedings against his property did not measure up to the quality of notice the due process clause of the Fourteenth Amendment required as a prerequisite to proceedings to fix compensation for condemnation of his property. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

That due process requires giving a man notice before he can be deprived

[1] Kan. Stat. Ann. (1949) Art. 2, c. 26.

[2] Kan. Stat. Ann. (1949) Art. 2, 26 § 202.

[3] Kan. Stat. Ann. (1949) Art. 2, c. 26 § 201.

[4] Kan. Stat. Ann. (1949) Art. 2, c. 26 § 205.

[5] Walker v. City of Hutchinson, 178 Kan. 263, 284 P. 2d 1073 (1955).

of his liberty or property is well established.[6] In *Grannis v. Ordean*,[7] the Supreme Court of the United States said, "the fundamental requisite of due process of law is the opportunity to be heard."[8] It was decided long ago that when property is taken by eminent domain without giving the owner such notice as would give him an opportunity to be present at the hearing, the taking is invalid.[9] Such notice must be reasonable and adequate for the purpose.[10]

The majority of the court[11] in the instant case cited *Mullane v. Central Hanover Bank & Trust Co.*,[12] in which the same Kansas statute[13] was involved, wherein the Supreme Court said:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[14]

Such notices must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[15]

The question of whether or not a particular type of notice complies with the Due Process Clause of the Fourteenth Amendment has been considered many times by the Supreme Court, and it has repeatedly held that the adequacy of that notice must be tested as it relates to the particular circumstances.[16]

> What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case.[17]

And in *Dohany v. Rogers*[18] the court said that the requirements of the Due Process Clause are satisfied if one has reasonable notice, "due regard

[6] Roller v. Holly, 176 U. S. 398 (1900); United States v. Jones, 109 U. S. 513 (1883).

[7] 234 U.S. 385 (1914).

[8] Ibid., at 394.

[9] Turpin v. Lemon, 187 U.S. 51 (1902); United States v. Jones, 109 U.S. 513 (1883).

[10] Roller v. Holly, 176 U.S. 398 (1900).

[11] Mr. Justice Burton and Mr. Justice Frankfurter dissented; Mr. Justice Brennan took no part in the consideration or decision of this case.

[12] 339 U.S. 306 (1950).

[13] Kan. Stat. Ann. (1949) Art. 2, c. 26.

[14] 339 U.S. 306, 313 (1950).

[15] Ibid., at 314.

[16] City of New York v. New York, N. H., & H. R. Co., 344 U.S. 293 (1953); Chicago, M., St. P. & P. R. Co. v. Risty, 276 U.S. 567 (1928); Grannis v. Ordean, 234 U.S. 385 (1914); Jacob v. Roberts, 223 U.S. 261 (1912).

[17] Anderson Nat'l. Bank v. Luckett, 321 U.S. 233, 246 (1944).

[18] 281 U.S. 362 (1930).

being had to the nature of the proceeding and the character of the rights which may be affected by it."[19]

In the instant case, the state relied, in asserting that the taking in question was valid, on *North Laramie Land Co. v. Hoffman*[20] and *Huling v. Kaw Valley Ry. & Improvement Co.*[21] In these two cases similar notice requirements were upheld as being adequate under the Fourteenth Amendment. Mr. Justice Black, delivering the opinion of the court in the instant case, pointed out that such reliance was misplaced. In the *Huling* case, notice by publication in a condemnation proceeding was upheld on the ground that the landowner was a *non-resident*, in the *North Laramie case*,[22] the United States Supreme Court upheld the Wyoming statute[23] which provided for notice by publication in a newspaper and required that a copy of the newspaper must be sent to the landowner by registered mail.

In holding the notice inadequate, the court in the instant case said:

> It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property.[24]

And in *Mullane v. Central Hanover Bank & Trust Co.*,[25] the court said:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.[26]

As a background for these words is a statement by the court in the well-known case of *McDonald v. Mabee*.[27] "[G]reat caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."[28] In referring to the adequacy of substituted service, the Supreme Court has said it must be "reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard."[29]

An examination of recent prior Supreme Court decisions on the adequacy of notice by publication as to a resident might have enabled one to reasonably predict the decision in the instant case. In *City of New York*

[19] Ibid., at 369.
[20] 268 U.S. 276 (1925).
[21] 130 U.S. 559 (1889).
[22] Ibid.
[23] Wyo. Comp. Stat. (1945) c. 3 § 1101.
[24] Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956).
[25] 339 U.S. 306 (1950).
[26] Ibid., at 315.
[27] 243 U.S. 90 (1917).
[28] Ibid., at 91.
[29] Milliken v. Meyer, 311 U.S. 457, 463 (1940).

v. New York, N.H., & H.R. Co.,[30] the court said: "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. . . ."[31] "When notice is a person's due, process which is a mere gesture is not due process."[32]

In holding that the notice by publication fell short of the requirements of due process, the court in the instant case stated that there seemed to be no compelling or even persuasive reasons why personal notice could not have been given. Plaintiff's name was known to the city and was on the official records. A letter would have apprised him of the proceedings.[33] Finally, the court said: "In too many instances notice by publication is not notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use."[34]

Mr. Justice Frankfurter dissented for the reason that the only constitutional question raised by plaintiff was whether failure to give adequate notice of the hearing of itself invalidates the taking, apart from any claim of loss. The state may take land prior to payment without violating the Due Process Clause, so long as adequate provision for payment of compensation is made.[35] The compensation was not alleged to be inadequate.

Mr. Justice Burton dissented on the grounds that the statutory provision for a ten-day notice by publication is within the constitutional discretion of the State legislature; that just compensation is constitutionally necessary, but the length and kind of notice of proceeding to determine such compensation is a matter of legislative discretion. He cited *Collins v. City of Wichita*,[36] which upheld the same ten-day notice, wherein the court stated:

> While there is some authority to the contrary, the great weight of authority supports the proposition that a condemnation proceeding is . . . in rem and that constructive notice meets the requirement of due process.[37]

An examination of the *Collins* case reveals that the opinion cites *Walker v. City of Hutchinson* as a case where the ten-day notice was upheld.

[30] 344 U.S. 293 (1953).

[31] Ibid., at 296.

[32] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

[33] Section 202, Article 2, Chapter 26 was amended in 1955, after the decision of the Supreme Court of the United States in the *Mullane* case, to require that the city must give notice to property owners by mailing a copy of the newspaper notice to their last known address, unless such residence could not be located by diligent inquiry. Kan. Stat. Ann. (1949) (Supp., 1955) Art. 2, c. 26 § 202.

[34] Walker v. City of Hutchinson, 352 U.S. 112, 117 (1956).

[35] Bragg v. Weaver, 251 U.S. 57 (1919); North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925).

[36] 225 F. 2d 132 (C.A. 10th, 1955), cert. denied 350 U.S. 886 (1955).

[37] Ibid., at 135.

This latter decision is the one which the majority of the court in the instant case reversed and remanded.

The Illinois statutes provide for notice to a resident by publication only where the defendant has gone out of the state, or on due inquiry cannot be found, or is concealed within the state, so that he cannot be served.[38] Thus it can be seen that the notice requirement in Illinois complies with the Due Process Clause as interpreted by the Supreme Court in the instant case.

[38] Ill. Rev. Stat. (1955) c. 47, §§ 4, 5, c. 110 §§ 14, 15.

CONTRACTS–FRUSTRATION INAPPLICABLE TO RESTRICTIVE ZONING LAWS EXISTING WHEN PREMISES LEASED

Plaintiff obtained a judgment by confession for rent pursuant to an executed lease. Defendant sought to vacate the judgment on the grounds that when the lease was executed, both the plaintiff and the defendant contemplated that the premises would be used for the manufacturing of automotive parts; and that after the execution of the lease and occupation of the premises by the defendant, the defendant was notified by a city building inspector that the use being made of the premises violated an existing zoning ordinance; and that the foregoing facts constituted impossibility of performance on the part of the defendant. The court held that the primary promise of a lessee is to pay rent and there is nothing legally impossible about paying such rent; therefore, the doctrine of commercial frustration was not applicable because the zoning ordinance was in existence at the time of the making of the lease. *Warshawsky v. American Automotive Products*, 12 Ill. App. 2d 178, 138 N. E. 2d 816 (1956).

Although the doctrine of frustration has been mentioned in cases throughout the United States, there is not, as can best be determined, a court of last resort which has expressly applied it or Section 288 of the *Restatement of Contracts*[1] in determining the final outcome of a contracts case.[2] Here, an intermediate court in Illinois, in a rare instance, mentions the doctrine but does not apply it, pursuant to the vast majority of decisions of courts throughout the United States.

[1] Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears. Rest., Contracts § 288 (1932).

[2] Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933), was a case where the court based its authority on § 288 of the Restatement of Contracts but actually used real property and equity principles without mentioning the doctrine of frustration.