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Personal And Real Property—Notice By Publication—Posting Sufficient In Condemnation Proceeding

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with the instant case, means that if the mortgagee voluntarily pays subsequent local taxes, the federal government's lien will take preference over such payments, but if the mortgagee orders foreclosure, local taxes will be paid just as expenses thereby protecting the interest of the mortgagee, although the purpose of the Civil Practice Act Section 1087 is to protect the purchaser at the foreclosure sale.[25] A consideration of the above leads to the conclusion that the controlling authorities support the view of the dissenting judges and that the Supreme Court will adopt their conclusion in reversing the instant case.[26]

R. W. S.

NOTICE BY PUBLICATION—POSTING SUFFICIENT IN CONDEMNATION PROCEEDING

In 1952, the City of New York, pursuant to the Water Supply Act,[1] acquired the right to divert the Neversink River. In accordance with the notice provisions of the Act, defendant published notice of the diversion in two newspapers located in the county in which the affected real estate was situated for the statutory period and posted handbills in the vicinity of the affected land. In 1959, after the three-year limitation in which claims might be filed expired, plaintiff, a riparian owner of a parcel situated twenty-five miles downstream from the diversion, brought an action to enjoin the diversion on the ground that not until 1959 did plaintiff actually learn of the proceedings. Plaintiff asserted a right to file a claim, based on her property damage and lack of notice and challenged the notice provisions as constitutionally inadequate in failing to satisfy due process requirements.[2] Plaintiff appealed from an Appellate Division judgment dismissing the complaint on the ground it was barred by the expiration of the statutory period.[3] *Held,* affirmed with two judges dissenting. Constructive notice provided for by the Water Supply Act satisfied the demands of due process in that it reasonably apprised the interested parties of the pendency of the action and afforded complainant an opportunity to file her claim. Personal service was not necessary in this type of case. *Schroeder v. City of New York,* 10 N.Y.2d 522, 180 N.E.2d 568, 225 N.Y.S.2d 210 (1962).

The type of notice which would satisfy the constitutional requirement of due process is not translatable into a neat, self-defining judicial formula. This was well stated by the Supreme Court in *Mullane v. Central Hanover Bank &*

& Loan Assoc. v. Lewis, 14 A.D.2d 150, 218 N.Y.S.2d 857 (2d Dep't 1961); Metropolitan Life Ins. Co. v. United States, 9 A.D.2d 356, 194 N.Y.S.2d 168 (1st Dep't 1959).

25. Wesselman v. The Engel Co., 309 N.Y. 27, 127 N.E.2d 736 (1955).

26. Cert. granted, sub nom. United States v. Buffalo Savings Bank, supra note 1.

1. Administrative Code of City of New York, ch. 41, tit. K.

2. U.S. Const. amend. XIV, § 1 "Nor shall any State deprive any person of life, liberty, or property, without the due process of law. . . ."; N.Y. Const. art. I, § 6. "No person shall be deprived of life, liberty or property without due process of law."

3. 14 A.D.2d 183, 217 N.Y.S.2d 975 (3d Dep't 1961).

Trust Co.,[4] and *Walker v. City of Hutchinson*:[5] notice required will vary with circumstances and conditions, but it must be reasonably calculated to inform the parties of proceedings which may directly and adversely affect their interests. The fundamental requisite of due process of law is the opportunity to be heard.[6] This right to be heard has little value unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.[7]

The much discussed *Mullane*[8] case arose when the Central Hanover Bank & Trust Co., in compliance with the applicable statute, published notices of judicial hearings concerning the settlement of accounts of the trustee of a common trust fund. The notices appeared once a week for four successive weeks in a newspaper designated by the court. None of the interested parties were named in the publications despite the fact that their names and addresses were known. Mullane, the attorney who represented the interests of the beneficiaries in the income of the common trust fund, objected that the notice so given was inadequate to afford due process under the Fourteenth Amendment. The resulting doctrine of the *Mullane* case is that publication affords sufficient notice where the names and addresses of interested persons are unknown but does not afford notice compatible with the requirements of due process when the names and addresses of interested persons are known or could be ascertained with reasonable diligence. In the *Walker* case,[9] the Supreme Court struck down a Kansas statute which required either constructive notice or personal notice to fix compensation in a condemnation proceeding where the notice actually given was by publication. The Court said: "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. . . . Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value."[10]

The question of the adequacy of notice by publication was before the Supreme Court again in *City of N.Y. v. N.Y., N.H. & H.R.R.*[11] In this decision the court held that notice under provisions of the Bankruptcy Act was inadequate because the name and address of an interested party were known. This decision indicated that the *Mullane* doctrine could be applied in situations other than those involving common trust funds. Such a broad application has been made or discussed by some courts in cases of divorce,[12] foreign corporations,[13]

4. 339 U.S. 306 (1950).
5. 352 U.S. 112 (1956).
6. Grannis v. Ordean, 234 U.S. 385 (1914).
7. Milliken v. Meyer, 311 U.S. 457 (1940).
8. Supra note 4.
9. Supra note 5.
10. Supra note 5, at 116.
11. 344 U.S. 293 (1953).
12. See, e.g., McLean v. McLean, 233 N.C. 139, 63 S.E.2d 138 (1951).
13. See, e.g., Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

and class actions.[14] Other courts, however, including those in New York, have taken a narrow view of the rule in the *Mullane* case and have been more hesitant to invoke the doctrine beyond the common trust fund situation. If the rule of the *Mullane* case is restricted to its narrowest view, a common trust fund situation, its importance is small. If not so restricted, but instead given a broad and general application, it means that the validity of existing notice provisions should be the subject of serious consideration. It will be interesting to note what disposition the Supreme Court will place on the instant case when it hears the argument this term.[15]

In the present case, the plaintiff's property on the Neversink River is near Cuddebackville, near the City of Port Jervis, New York. Yet, these two cities were bypassed for publication in small newspapers published in Chester and Warwick, New York, the same having no circulation whatever in the taking area. Twenty posters were also attached to trees in the area of the taking, but they were placed there in January when the plaintiff was residing in New Jersey. Even though the majority here decided that the riparian owners were adequately notified, the truth is that the publications and postings did not reach most of the owners. It is significant to note that only eighteen of the ninety-six property owners of parcels in Neversink Riparian section 4 filed their claims in sufficient time.[16] Apparently the damage to the riparian owners' property was considerable, for those who did file claims within the allotted time limit received awards ranging from $1,000 to $57,500. Were the effects of the water diversion really patently visible to the riparian owners within the three years as the Court of Appeals seemed to suggest? The plaintiff's property, in this case, was located twenty-five miles downstream from the site of the water diversion. A layman, having no understanding of the technical reasons for the effects of the diversion, knowing that the stream fluctuated greatly in its pre-diversion state, could not be expected to conclude that there had been an artificial diversion for which he is entitled to be compensated. This should have been considered by the Court along with the fact that most of those riparian owners who did not file for claims were only summer residents of the area. When there is any question as to whether constructive notice will be sufficient, why not require personal notice? This would not place too great a burden on any government in the administrative process. When the State of New York constructed the Thruway, the State, under section thirty of the Highway Law, was required to give personal notice to all the property owners involved. The New York State Thruway involved more than four hundred miles of highway. The diversion of the Neversink River involved a strip of

14. See, e.g., Behrman v. Egan, 9 N.J. Super. 171, 75 A.2d 627 (1950).
15. Appeal docketed, No. 763, 1961 Term, No. 75, 1962 Term, March 2, 1962.
16. For other dismissals see: Matter of Huie (Riehle), 6 A.D.2d 838, 176 N.Y.S.2d 197 (2d Dep't 1958); Matter of Huie (Nielson), 6 A.D.2d 837, 176 N.Y.S.2d 193 (2d Dep't 1958); Matter of Huie (Bruckman), 28 Misc. 2d 708, 221 N.Y.S.2d 689 (Sup. Ct. 1956); Application of Huie (Rollin), 204 Misc. 945, 125 N.Y.S.2d 925 (Sup. Ct. 1953).

river only thirty-five miles in length. Mr. Justice Eager seemed to summarize the view of the New York courts when he replied in an unreported decision which denied a claimant's application that "It is true that the result is an inequitable one, but the enforcement of a statute of limitations ofttimes results in inequity."[17]

M. A. K.

POWER OF EMINENT DOMAIN EXERCISED FOR THE TAKING OF NON-SLUM LAND FOR PRIVATE REDEVELOPMENT

One of the increasingly important problems facing our generation is that of the physical deterioration of our cities and its expensive burden upon society. Various measures and programs have been instituted at different levels of government to alleviate this problem. One such attempt can be found in section 1 of article XVIII of the Constitution of the State of New York, wherein is provided legislative authority for slum clearance and the construction of decent housing facilities for citizens of low income, and "for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto." For some time the frontal attack on urban deterioration has proceeded along broad, general lines calling for the destruction of slums and their replacement with new housing. Today, however, it is becoming increasingly apparent that this is not enough; that there is need of a complementary program of commercial, industrial, institutional, recreational, and educational urban redevelopment, if existing patterns of deterioration are to be checked and reversed. New York State embarked upon such a course with the passage of a statute that gives cities the power of eminent domain for reclaiming and redeveloping urban areas that are predominantly vacant and economically dead, such that their continued existence impairs the sound economic growth of the community, with the resultant development of slums and blighted areas.

Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903 (1962), was an action instituted in the Supreme Court, Special Term, Kings County, for a judgment declaring this statute, section 72-n of the General Municipal Law,[1] unconstitutional on its face. The action was brought by sixty-eight home owners in the Canarsie section of Brooklyn whose land is to be condemned and acquired by the city through a procedure authorized by the statute. The homes of the plaintiffs are, for the most part, located in one section of the total area to be condemned, but they were considered by the New York City Board of Estimate and the City Planning Commission to be

17. Brief for Respondent, Schroeder v. City of New York, 10 N.Y.2d 522, 180 N.E.2d 568, 225 N.Y.S.2d 210 (1962).

1. N.Y. Gen. Munic. Law, § 72-n, Laws 1958, repealed and re-enacted in modified form in Article 15.