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In Rem Tax Foreclosure—Notice

Robert J. Lane

established in the *Hoffman* case, the district court determined that the witness merely seized upon the privilege as a last ditch means to avoid answering questions which would prove valuable to the special grand jury investigating the garment district in New York.

It appears obvious that if the courts excuse witnesses from testifying where their lawyers can unearth a possible stautory violation after refusal, then grand jury investigations will be severely hindered. Contempt will not then turn on whether in fact the witness believed he would be incriminated by his statements, but rather whether a higher tribunal can supply the necessary statute which could presumably be violated. No longer will the judge, faced with the witness, aware of any facts revealed during the course of his questioning, be able to give full weight to the entire surroundings in determining whether the witness in good faith believes himself in danger of self-incrimination. Such a sweeping effect reached through the approach of the majority in the instant case cannot lightly be overlooked, and the privilege itself is open to a severe question whether, on close inspection and study, it in truth serves the public interest.

Thomas T. Basil

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Property owner was known by the town officials to be an unprotected incompetent. The town had fulfilled the requirements of section 165-b of the New York Tax Law by posting, publishing and mailing notice of an action to foreclose a tax lien on the incompetent's property. Since the taxpayer neither answered within twenty days nor paid her back taxes within seven weeks, a default judgment of foreclosure was entered and a deed was executed to the town. Held (8-1): Such notice was not sufficient to satisfy the requirements of due process. *Covey v. Town of Sommers,* 351 U. S. 141 (1956).

No person may be deprived of his property without due process of law, U. S. CONST. amend. XIV; N. Y. CONST. art. 1, §6. One of the basic requirements of this undefined concept is that notice, reasonably calculated to inform the party of a pending action, must be given. *Milliken v. Meyer,* 311 U. S. 457 (1940). The notice which is required will vary with the circumstances and conditions peculiar to the particular situation. *Walker v. City of Hutchinson,* 351 U. S. 200 (1956).

Although the Constitution does not specify any one particular method of notice, that which is given must be calculated to be actual and effective. *Milliken v. Meyer,* 311 U. S. 457 (1940). A state legislature may establish a method of

notice but if it is in fact only a sham or gesture, it will not suffice. *Mullane v. Central Hanover Bank and Trust Co.,* 339 U. S. 306 (1950). The constitutional validity of any chosen method will depend on whether it was reasonably calculated to inform the interested parties. *Wuchter v. Pizzutti,* 276 U. S. 13 (1927).

In *Nelson v. City of New York,* 351 U. S. 930 (1956), the Court held that notice by publication, posting and mailing, as required by the New York City counterpart of the state statute involved in the instant case, was sufficient. However, in a case decided on the same day, it was held that where the property owner's name was known as a matter of record, a statute which only required publication of a condemnation proceding against the property did not provide for adequate notice. *Walker v. City of Hutchinson,* 351 U. S. 200 (1956). The notice which was given in the instant case was therefore not sufficient; for as to a known unprotected incompetent, it was not calculated to be either actual or effective.

Mr. Justice Frankfurter expressed doubt, in a separate opinion, that the New York Court of Appeals would sanction such an obvious and flagrant denial of due process. A hypothesis which he posed in that opinion was confirmed as being the true situation upon re-hearing before the Court of Appeals. *Covey v. Town of Sommers,* 2 N. Y. 2d, 250, 159 N. Y. S. 2d 196 (1957).

The New York court did not hold that the notice provided for by the statute satisfied the requirements of due process as to a known unprotected incompetent. It merely held that the incompetent's committee was proceeding in an improper manner. Two years after the deed has been rcorded, a conclusive presumption exists that the action and the proceedings were in accordance with the law and no action to set aside the deed may be commenced after the presumption becomes conclusive. N. Y. TAX LAW §165 - h (7).

Since the appellants proceeded by means of a motion rather than by a separate action, as is provided for in the statute, their motion was properly denied. The appellants are now left without a remedy for when a statute operates as a statute of limitation, a person may be barred from any action after a reasonable time has lapsed. *Saranac Land & Timber Co. v. Comptroller of New York,* 177 U. S. 318 (1899). It was implied in the Court of Appeal's latest decision that the appointment of the committee, while a sufficient time remained to commence an action, cured any constitutional defect which might have existed.

The fact that the Supreme Court seemingly decided the wrong issue in the instant case does not deprive it of its noteworthy effect. It is now firmly established that notice served on a known unprotected incompetent in an in rem tax foreclosure will not be sufficient to satisfy the requirements of due process. As a

practical matter, the effects of this decision will be limited to areas with a small population. The Court of Appeals readily accepted this proposition, but has left the result in doubt if a committee, appointed after the presumption became conclusive, attempted to bring an action to set aside the deed.

Robert J. Lane

Right of Licensed Practitioner to Enjoin Unlicensed Practice in His Profession

In an action by licensed chiropractors to enjoin the defendants from practicing chiropractic without a license, held (5-2): the right to practice a profession is a "valuable interest" and, since unlicensed practice infringes upon this interest, equity may enjoin such practice despite the fact that it also constitutes a breach of the criminal law. *Burden v. Hoover,* 9 Ill. 2d 114, 137 N. E. 2d 59 (1956).

It is well settled that equity has no jurisdiction where an adequate remedy at law exists. *Lewis v. City of Lockport,* 276 N. Y. 336, 12 N. E. 431 (1938); *County of Cook v. Davis,* 143 Ill. 151, 32 N. E. 176 (1892). However, the fact that the acts of a defendant subject him to prosecution under the criminal law does not of itself deny equitable jurisdiction. If there is an independent ground for equitable relief, the criminality of the act is only a factor to be considered by the courts in determining whether equitable intervention is necessary. *People ex rel. Bennett v. Laman,* 277 N. Y. 368, 14 N. E. 2d 439 (1938); 4 POMEROY'S EQUITY JURISPRUDENCE §1347 (5th ed. 1941).

Also, it is generally accepted that a license to practice a profession is a property right in the sense that state actions which affect it must satisfy due process of law. *People v. Love,* 298 Ill. 304, 131 N. E. 809 (1921); *Bender v. Board of Regents of State of New York,* 262 App. Div. 627, 30 N. Y. S. 2d 779 (3d Dep't 1941). However, whether this property interest is sufficient to enable a licensed practitioner to enjoin an unlicensed individual from practice is a question which finds the courts in conflict. Those which answer in the affirmative point to the extensive training which is a prerequisite to obtaining a professional license (as the court did in the instant case), *Doworken v. Apartment House Owners' Ass'n of Cleveland,* 380 Ohio App. 265, 175 N. E. 577, (1931), or take as granted that a sufficient property right exists. *Ezell v. Ritholz,* 188 S. C. 39, 198 S. E. 19 (1938); *Siefert v. Buhl Optical Co.,* 276 Mich. 692, 268 N. W. 784 (1936). Where relief has been denied, the courts have generally based their decisions either on the theory that the licensing statutes were enacted for the public benefit and do not operate to give individual licensees any rights which equity will protect, *New Hampshire Board of Registration in Optometry v. Scott Jewelry Co.,*