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Sufficiency of Notice by Publication in Foreclosure Proceedings

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is fairly certain to continue. Since the political realignment at the close of the war, reaction to all governmental regulation of business has been pronounced, and in that reaction, the Supreme Court has enacted a significant role.[24] Complacent acceptance of the catch-phrases of the incumbent political leaders augurs the continuance of judicial supremacy. Only a revision of personnel or, of what is less likely, perspective, will ensure patches of another hue.[25] Until then, much remediable exploitation will continue, and those who echo the demand for the *status quo* will unwittingly share the increased cost imposed by lack of foresight.

V. J. K.

SUFFICIENCY OF NOTICE BY PUBLICATION IN FORECLOSURE PROCEEDINGS.—In 1912, a resident of Virginia, executed a mortgage for $25,000. upon real property situated in Brooklyn, New York. Several years later, after the death of the mortgagor, foreclosure proceedings were instituted by the holders of the mortgage. Application was made to the Supreme Court for leave to serve the non-resident heirs of the mortgagor by publication and an order was thereafter duly entered directing that the summons be published for the requisite number of times in two local newspapers, the "Brooklyn Daily Times" and the "Brooklyn Citizen." The order also required the mailing of copies in accordance with the provisions of the statute.[1] Through an error of a clerk employed by the attorneys for plaintiffs in that action, the advertisement was inserted in the "Brooklyn Daily Eagle" instead of the "Brooklyn Daily Times," one of the two papers designated in the order for publication.

The heirs, all residents of Virginia, failed or neglected to appear and judgment of foreclosure was entered by default, the property bringing but $10,000. upon the sale. The mistake in publication was not discovered until much later and was not rectified until 1924, when plaintiffs in the foreclosure action procured an *ex parte* order amending *nunc pro tunc* the order of publication so that it read "Brooklyn Daily Eagle" instead of "Brooklyn Daily Times," as originally.

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[24] Professor Beard in his recent THE AMERICAN PARTY BATTLE has directed attention to the resultant conservatism of all branches of government, and particularly (p. 130) to the conservative leadership in the Court.

[25] Judge Hough's conclusion of but ten years ago, that "the courts, when invoked to-day under the due-process clause, are doing little more than easing the patient's later days," 32 Harv. L. Rev. at 233, is impossible of present application. An entirely reasonable observation at the fiftieth anniversary of the adoption of the Fourteenth Amendment has become unwarranted at the sixtieth, yet the Court insists that "standards" have been maintained.

[1] C. P. A., Sec. 232; General Rules of Practice, 50–52.

Since the date of sale the property has greatly increased in value. Improvements costing hundreds of thousands of dollars have been made and it has undergone several subdivisions. During all this time the non-resident heirs maintained a strict silence which was broken only after all the details connected with the sale were fully consummated and the property conveyed to new owners. Then for the first time they contested the validity of the sale, alleging that failure of the mortgagees to comply literally with the terms of the publication order, rendered the sale void and wholly ineffectual for all purposes.[2] They admitted that they received in due course the notices which were sent to them through the mails but contended that this did not amount to *legal* notice and hence their equity of redemption is still intact.[3] They further alleged that the Court failed therefore to acquire jurisdiction and unless the sale is set aside they will be deprived of valuable property rights without due process of law, in contravention of both Federal and State Constitutions.[4]

> "It is an established principle in all courts that the method of acquiring jurisdiction by publication is in derogation of the common law, and that the statutory requirements must be successively and accurately taken in order to confer on the court jurisdiction over the defendant." "Recognizing this fact, the courts quite uniformly hold that all of the statutory requirements for the institution and prosecution of such proceedings and especially such as are of a jurisdictional character, must be strictly and literally observed, in order that the judgment entered thereon shall be of legal force and validity. Jurisdiction is not to be assumed and exercised in such cases on the general ground that the subject matter of the suit is within the power of the Court. The inquiry must be as to whether the requisites of the statute have been complied with, and such compliance must appear on the record." [5]

Natural justice requires "that before the rights of an individual can be bound by judicial sentence, he shall have notice." [6] The mere fact that a defendant has knowledge of a suit pending against him is not sufficient to give the court jurisdiction.[7]

Legal notice according to the definition given in Words and Phrases means something more than a mere knowledge of given facts. "It is knowledge brought home to party in a prescribed form." But "when its terms are so unambiguous that the meaning cannot without negligence or inattention be misunderstood, the notice is sufficient.

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[2] Valz v. Sheepshead Bay Bungalow Corp., 249 N. Y. 122 (1928).
[3] 7 R. C. L. 1039.
[4] United States Constitution, Art. 14, Sec. 1; Constitution of the State of New York, Art. 1, Sec. 6.
[5] 21 R. C. L. 1293 and cases cited.
[6] *Supra,* note 3 at 1031 and cases cited.
[7] *Supra,* note 5.

Defects in form, by which a party is not misled to his injury, do not render a notice invalid." [8]

The law respecting notice and the effect of irregularities is well stated in the following extract from Corpus Juris—Cyc.

> "The general rule in respect to notices is that mere informalities do not vitiate them so long as they do not mislead, and give the necessary information to the proper parties." [9]

Of course where the statute prescribes a particular form of notice, then as a general rule, the form of notice required must be followed with reasonable strictness. But "if the notice required by the statute emanates from an authentic source and is such as to apprise the party to be notified fully of the whole substance of the matters concerning which the statute required notice to be given, the notice is ordinarily held sufficient."[10]

In Mishkind-Feinberg Realty Company v. Sidorsky,[11] an action to obtain judicial construction of a will, the summons was served by publication. Instead of using the statutory words "Complaint hereto annexed," the order was made to read, "Notice of object of action hereto annexed." The Court in ruling out the objection to this deviation from the requirements of the statute said: [12]

> "An action is commenced by the service of a summons and by it a defendant is notified that his rights are challenged. Service of the summons, that is, notice of the commencement of the action and an opportunity for the defendant to appear and defend his rights and interests, are the important prerequisites to jurisdiction by a court." "Unimportant and unessential variations from the form of notice prescribed not affecting the substantial rights of the defendant are irregularities which may be cured by amendment pursuant to the general authority of the court to amend a process, pleading or other proceeding in furtherance of justice."

In Loring v. Binney,[13] a similar case, the proper papers were mailed to each of the non-resident defendants and the summons with a notice attached was published in the designated papers. This notice was defective in two respects. It was not directed solely to the defendants who were to be served by publication and it erroneously

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[8] 5 Words and Phrases, 4066.

[9] 29 Cyc. Law Procedure, 1117.

[10] 43 Utah 515, 520, 136 Pacific 965, 966 (1913). This was an action involving the right to appeal from a judgment. A letter addressed to plaintiff's attorney giving the particulars of the judgment was held to be sufficient compliance with a statute requiring notice of entry; citing Fry v. Bennett, 7 Abb. Prac. (N. Y.) 352 (1858).

[11] 189 N. Y. 402, 82 N. E. 448 (1907).

[12] *Ibid.*, 406.

[13] 38 Hun. 152, *aff'd* 101 N. Y. 623 (1885).

stated that it was served pursuant to section 443 of the Code instead of 442.

The Court held these irregularities to be immaterial because:

> "The substantial objects intended to be accomplished by the notice were accordingly secured even if the defendant relied upon the publication itself, for it clearly appeared from it that the publication was made under and by virtue of the authority vested in the judges of the court over this subject * * * failure literally to comply with the directions concerning the form of the notice which was to be published, but not in fact served or required to be served, upon either of the defendants, was no more than an irregularity which would not deprive the Court of the jurisdiction obtained by the service of the summons in compliance with the directions of the order for its publication." [14]

The situation in this case is analogous. In fact there is not any practical difference between the two since the question presented is, in both cases, identical. This error could by no possibility affect any substantial right of these plaintiffs, for notwithstanding the defect in notice, they were supplied with complete information either by the summons and notice as they were published or by the copies of the papers which were mailed to them, that their rights were being challenged by an action against them in which judgment would be obtained by default if they failed to appear.[15]

> "The administration of justice should be free from traps, and technical obstacles ought not to be thrown in the path of those who in good faith rely upon the judicial machinery which they find in operation." [16]

But precedent, always a strong factor in any case, is a very difficult thing to overcome. Tradition dies hard and until recently—"most of our States have done nothing to ameliorate the absurd and frightful consequences flowing from a want of jurisdiction over the subject matter." [17] The concept of jurisdiction became a judicial taboo. The rule of strict construction, having once found its way into the law, was not to be questioned. Let it once be known that a party to a suit had failed to follow the procedure outlined by the statute and his case was lost. Good faith, diligence, economic advantage, all these counted for nothing in the face of this devastating logic. By steadfast adherence to the narrow interpretation of legis-

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[14] *Ibid.*, 155.

[15] *Ibid.*, 156.

[16] Sunderland's Problem of Jurisdiction, 4 Texas Law Review 429, 434 (1926).

[17] *Ibid.*, 437.

lative intent, the courts lost sight of the true purpose of process and service.

The Legislature in enacting the statute involved did not require that notice be published in certain specified newspapers but left the matter of selection to the discretion of the trial courts.[18] The purpose of the statute, namely, that notice may reach the party intended should be kept in view.[19] No merely formal objection of any kind should be tenable and the substantial and only question in any case should be whether the purpose was sufficiently well served. It ought to be a matter of indifference as to how a notice arrives if the fact of its delivery is the substantial end to be accomplished.[20] "The inquiry must be as to whether the *requisites* of the statute have been complied with * * *." [21] There is not, nor could there with propriety be, a claim that this avowed purpose has not been fulfilled by publication in a journal other than the one selected. The "Brooklyn Daily Eagle" has its offices and is printed in the same vicinity as the "Brooklyn Times" and enjoys a wider, larger circulation over practically the same territory. The plaintiffs have received actual notice of the commencement of the action; they were therefore fairly and fully apprised that their rights would be cut off by a judgment against them if they did not appear and defend the action. Realizing, however, that the equity of redemption was then valueless they chose to remain silent and did not take any steps whatever to preserve their interests. Now after a lapse of years they claim that because of a purely technical defect in service of the summons they have been deprived of property in violation of their constitutional rights.

There is little, if any merit to the complaint but plaintiffs seeing an opportunity to reap a rich financial harvest endeavored to take advantage of an irregularity by contesting defendants' title. How near they came to succeeding is best shown by the divided opinion of the Court of Appeals, which affirmed the judgment for defendant by a four to three vote, Cardozo, *Ch. J.*, Pound and Kellogg, *JJ.*, dissenting upon the ground that the trial Court did not acquire jurisdiction.[22]

There is no equitable right that can be urged in plaintiff's behalf, in fact Judge Lehman's opinion very clearly indicates that the circumstances of the case were a decisive factor in the determination of the appeal. However, if the Court failed to acquire jurisdiction, then of course, no amount of tardiness in preserving their rights

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[18] *Supra,* note 1, Sec. 234.

[19] *Supra,* note 5 at 1302, citing Lynn v. Allen, 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779 (1896).

[20] *Supra,* note 16 at 444.

[21] *Supra,* note 5.

[22] *Supra,* note 2 at 139.

would constitute laches and plaintiffs could not be estopped from pleading their claim.[23]

> "There can be no estoppel based upon failure of the non-resident defendants, named in the foreclosure action, either to appear in that action or to take other steps to assert their rights to the property under foreclosure unless some duty to act * * * was placed upon such defendants. If they received legal notice * * * then the Court had jurisdiction * * *. If they had no such notice then it seems clear that they were under no duty to assert their rights until they chose to do so." [24]

In the light of the authorities cited it would seem that plaintiffs had not only actual but *legal* notice and that their rights were properly disposed of by a court of competent jurisdiction. There is little likelihood that they even knew of the defect until it was called to their attention long after the matter was closed.

State courts have very broad powers of jurisdiction regarding property within their territorial limits.[25] "In order to determine the questions of title to real estate lying within their jurisdiction, conforming to such statutory procedure as may have been enacted, they may include as parties non-residents and aliens, and may make decrees disposing of their rights whether they appear or not." [26]

Since it is the province of the Court to determine the periodicals in which the notices are to be inserted, there is no just reason why it cannot correct a defect by amending its order so that a newspaper which it might have chosen in the first instance is substituted for the one originally named. No injustice is done to plaintiff by reason thereof; failure or refusal to do so would work a very great hardship upon defendants and subject them to a huge financial loss.

Plaintiffs, in a vain attempt to strengthen their case, point out to the Court that if the verdict of the trial Court and of the Appellate Division is sustained, persons may then without fear disregard the instructions of the trial Judge and use papers of their own choice. The danger of abuse in this regard is, however, very slight and is materially lessened, if not wholly dispelled by Judge Lehman's opinion which is so worded that it may be relied upon as authority to frustrate any attempt in this direction.

This commendable decision is consistent with the "tendency of modern decisions to enlarge the definition of jurisdiction to make it include not only the power to hear and determine in a certain class of cases, but also the power to render judgment in the particular case." [27]

J. A. M.

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[23] 15 Corpus Juris 737 "* * * if neither the person nor the subject-matter is within the jurisdiction of the court, it has no power over them."

[24] *Supra*, note 2 at 132.

[25] *Supra*, note 3 at 1042, citing Smith v. Eaton, 36 Me. 298, 58 Am. Dec. 746 (1853); Wimer v. Wimer, 82 Va. 890, 5 S. E. 536 (1886).

[26] Barry, Jurisdiction over Non-Residents, 13 Va. Law Rev. 175, 176 (1927).

[27] *Supra*, note 3 at p. 1029.