NOTES

DUE PROCESS OF LAW AND NOTICE BY PUBLICATION

Numerous states statutorily permit notice of impending legal proceedings to be conveyed through the medium of newspaper publication.[1] Recent United States Supreme Court decisions indicate a change in the propriety of such notice as satisfying requirements of due process. The possible constitutional threat to state statutes permitting notice by publication, and the diversity of adjudications which may be affected, prompts an examination of the breadth of this change.

The most significant challenge to the constitutional validity of notice by publication was raised in *Mullane v. Central Hanover Bank and Trust Co.*[2] A New York statute authorized the trustee to give notice by publication of impending judicial settlements of common trust fund accounts.[3] The Supreme Court held that notice by publication did not fulfil the requirements of due process in regard to beneficiaries with present interests whose addresses were known to the trustee.[4] Such

1. The terms "personal" service, "substituted" service, and "constructive" service are unfortunately ambiguous, which, when further complicated by such terms as "personal" notice, "constructive" notice and "actual" notice, present a most perplexing problem to one attempting to examine cases and legislation in the law of notice. As used in the ensuing investigation of this area, the term "personal" service includes a "face to face" delivery of the notice to a defendant who is either within or without the territorial boundaries of the court. See Chicago, R.I. & P. RR. Co. v. Sturm, 174 U.S. 710 (1899). The term also shall include such deliveries of notice as, "face to face" to an agent or a relative of the defendant, leaving notice at the last known and usual place of residence, etc. In other words deliveries normally delineated as "substituted." This latter term is generally used for a lesser delivery than "face to face" in actions in personam. On the other hand "constructive" service includes mailing, posting, or publication. At times the latter methods of delivering notice are discussed as being "substituted" when they are used in an action in personam. See *e.g.,* Olberding v. Illinois Central RR. Co., 346 U.S. 338 (1953). It is hoped that by combining "substituted" with "personal" this ambiguity will be limited. Thus, as used in this discussion "constructive" service means either a posting, mailing, or a publishing of the notice.

2. 339 U.S. 306 (1950). Latent in this decision are two interrelated questions. When may a state validly dispense with personal service of notice and resort to constructive service; and further, assuming constructive service is permissible, what method of delivery may be employed? These questions must be distinguished in analyzing the effect of the decision.

3. The New York statute authorized the establishment of common trust funds, and provided for periodic judicial settlements of the fund accounts. The statute required notification by mail of the first investment in the fund to all interested parties. This notice included a copy of the provisions of the statute relating to the sending of the notice and to the judicial settlement of the trust accounts. The common trustee petitioned for a judicial settlement of its first account and strictly complied with the statutory notice by publication.

4. 339 U.S. 306 at 318.

notice was held not to be "reasonably calculated to reach interested parties."[5] The Court reasoned that a better alternative, the mails, was available, and that this method was more apt to give interested parties "actual" notice.[6] The Court acknowledged that the notice given was sufficient to beneficiaries whose interests or addresses were unknown to the trustee.[7]

Prior to the *Mullane* case, the determination of what notice satisfies due process of law was generally dependent upon whether the proceeding in question could be classified as an action in rem or in personam.[8] The Court generally has held that personal service of notice upon a defendant within the territorial jurisdiction of the state is necessary in order for a court to acquire jurisdiction to adjudicate his personal liability.[9] If the defendant is not within the territorial jurisdiction of the court, and there is no other basis of jurisdiction, the Supreme Court uniformly has held that a court cannot acquire personal jurisdiction by even the most reasonable mode of constructive service.[10]

On the other hand the due process standard of service of notice in

5. This test was an innovation into the law of notice with respect to actions affecting property. The standard of "notice reasonably calculated to reach interested parties" had been employed by the Supreme Court in testing modes of "substituted" service in prior decisions involving actions in personam. See *e.g.*, Millikan v. Meyer, 311 U.S. 457 (1940); Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Consolidated Flour Mills Co. v. Muegge, 278 U.S. 559 (1928); Wuchter v. Pizzutti, 276 U.S. 13 (1928); McDonald v. Mabee, 243 U.S. 90 (1917).

6. 339 U.S. 306 at 319. This evidenced further recognition by the Court of the adequacy of the mails as a means of serving notice. See also Travelers Health Association v. Virginia, 339 U.S. 643 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

7. 339 U.S. 306 at 318.

8. See *e.g.*, Grannis v. Ordean, 234 U.S. 385 (1914); Ballard v. Hunter, 204 U.S. 241 (1907). For an excellent discussion of the distinctions between actions in rem and in personam, see Fraser, *Actions in Rem*, 34 CORNELL L.Q. 29 (1948).

9. See *e.g.*, Dull v. Blackman, 169 U.S. 243 (1898); Hart v. Sansom, 110 U.S. 151 (1884); Pana v. Bowler, 107 U.S. 529 (1882); Brooklyn v. Insurance Co., 99 U.S. 362 (1878); Pennoyer v. Neff, 95 U.S. 714 (1877); Webster v. Reid, 52 U.S. 437 (1850).

10. See *e.g.*, Bell v. Bell, 181 U.S. 175 (1901); Freeman v. Alderson, 119 U.S. 185 (1886); Smith v. Woolfolk, 115 U.S. 143 (1885); Pana v. Bowler, 107 U.S. 529 (1883); Pennoyer v. Neff, 95 U.S. 714 (1877). If in an action in personam there is a basis of jurisdiction other than that of the most fundamental, presence of the defendant within territorial boundaries, such as: doing business, International Shoe v. Washington, 326 U.S. 310 (1945); consent to the particular mode of service, Doherty & Co. v. Goodman, 294 U.S. 623 (1935), Flexner v. Farson, 248 U.S. 289 (1919), Wilson v. Seligman, 144 U.S. 41 (1892); engaged in dangerous activities, Hess v. Pawloski, 274 U.S. 352 (1927), Kane v. New Jersey, 242 U.S. 160 (1916); or domicile, Williams v. North Carolina, 317 U.S. 287 (1942), Millikan v. Meyer, 311 U.S. 457 (1940), a mode of personal service—i.e. "substituted"—less than a "face to face" service may be employed if it meets the test of "reasonably calculated to inform." See Wuchter v. Pizzutti, 276 U.S. 13 (1928). However, publication has never been sufficient to meet this test. *Cf.* McDonald v. Mabee, 243 U.S. 90 (1917).

an in rem or quasi in rem action has never been so demanding.[11] The location of a res within the state gives a court a jurisdictional basis to proceed against it, subject to the due process requirement that interested persons be given an opportunity to be heard in the proceedings.[12] The object of notification in this class of cases is not to acquire jurisdiction over the parties involved, but rather to warn those interested in the res that it is under litigation.[13] Thus, personal service of notice is not necessary, and constructive service may be employed if authorized by the state.

The Court in the *Mullane* case refused to classify the proceeding before it as in rem or in personam in order to determine whether New York had the power to dispense with personal service and resort to constructive service.[14] The Court assumed there was a jurisdictional basis and proceeded from that assumption.[15] In doing so the Court held essentially that expedience and convenience rendered personal service dispensable in the circumstances, so long as the constructive service was conveyed through the *best* means available.[16] The possible implications of the Court's rejection of the in rem-in personam classification are not readily apparent from the *Mullane* opinion, as the Court's rejection is phrased in qualified language.[17]

The fact that the New York courts had not classified the action to the satisfaction of the Court, or the fact that the type of proceeding involved did not readily fall into the historical in rem-in personam classification might lead to the conclusion that the Court's rejection of the

11. As used in the ensuing discussion actions in rem will include actions classified as quasi in rem. Although a "face to face" service of notice is the general rule in all actions, the Court has recognized that expedience and practicality are sufficient interests to permit the use of constructive service in actions in rem. See Christianson v. King County, 239 U.S. 356 (1915); Jacob v. Roberts, 223 U.S. 261 (1912); Ballard v. Hunter, 204 U.S. 241 (1907); Arndt v. Griggs, 134 U.S. 316 (1890).

12. See American Land Co. v. Zeiss, 219 U.S. 47 (1911); Hassal v. Wilcox, 130 U.S. 493 (1889); Windsor v. McVeigh, 93 U.S. 274 (1876).

13. See Leigh v. Green, 193 U.S. 79, 91 (1904).

14. 339 U.S. 306 at 312-13.

15. Actually the issue of jurisdiction was not directly discussed by the Supreme Court. Necessity, i.e. "balancing the interests" involved, seems to have been the basis for the Court's assumption that the New York courts had jurisdiction to settle the trust accounts. 339 U.S. 306 at 313. The *Mullane* case stands for nothing new in recognizing necessity as a jurisdictional basis. See Fraser, *Jurisdiction by Necessity*, 100 U. PA. L. REV. 305 (1951). See also International Shoe v. Washington, 326 U.S. 310 (1945).

16. 339 U.S. 306, at 318-19. Undoubtedly practicality, because of the great number of trust accounts and parties involved in the *Mullane* case, was the basis for the Court's reasoning.

17. 339 U.S. 306 at 312 where Justice Jackson stated: "Without disparaging the usefulness of distinctions between actions *in rem* or those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service *in this proceeding* upon how its courts or this Court may regard this historic antithesis." (Emphasis added.)

classification is limited to the type of case before it.[18] Moreover, it is possible that the Court merely was saying that to label a proceeding does not fully answer the question of when resort may be had to constructive service. This is logically sound, and if this is the proper conclusion, the *Mullane* case represents no substantial alteration in the law of notice in this respect;[19] rather it is further recognition by the Court that the more complex the basis of jurisdiction, the more complex the problem of notice becomes.

However, the general language used by the Court in the *Mullane* case could support the conclusion that the constitutional sufficiency of service of notice is independent of the in rem-in personam classification.[20] If this is the proper conclusion, the *Mullane* rule that service of notice must be conveyed through the *best* means available in the circumstances could lead to a somewhat paradoxical result. Subsequent decisions support the proposition that the *Mullane* rule imposes a more rigid standard of serving notice in actions in rem.[21] If the *Mullane* case can be said to have completely separated the concept of notice from the in rem-in personam classification, then it is arguable that, concurrent with this imposition of a higher standard of serving notice in actions in rem, there may be a relaxation of the standard in actions in personam. Thus, assuming that there is a basis of jurisdiction and that it is impossible to achieve personal service, presumably it would be permissible for a court to grant a valid judgment in an action in personam based on constructive service. A domiciled defendant in a divorce action who is residing in another state could have a valid alimony judgment rendered against him after notice by publication if his whereabouts are unknown; or, a non-resident motorist whose present whereabouts are unknown could be served by publication in an action for personal injuries. In both examples the *Mullane* rule would be satisfied.

However, even if the decision stands for the separation of the question of notice from the in rem-in personam classification, the circumstances of the *Mullane* case leave open the question of how the Court

18. See 339 U.S. 306 at 312 where the Court stated: "It is not readily apparent how the courts of New York did or would classify the present proceeding which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*." One state court reached the above conclusion, see *In re* Shew's Estate, 48 Wash.2d 732, 296 P.2d 667 (1956).

19. See Leigh v. Green, 193 U.S. 79 (1904).

20. 339 U.S. 306 at 312 where the Court stated: ". . . in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state."

21. See *e.g.*, Walker v. City of Hutchinson, 352 U.S. 112 (1956).

would apply its holding to an action in personam. The Court's past adherence to well-settled doctrines leads to the probable conclusion that the *Mullane* case will not effect a substantial relaxation of the standard of serving notice in actions in personam.[22] However, it is submitted that the possible implications of a disjunction of notice from the in rem-in personam classification cannot be ignored in an examination of the second phase of the concept of notice involved in the *Mullane* case, viz., assuming constructive service to be permissible, what form of constructive service in particular circumstances is sufficient to satisfy due process of law.

The *Mullane* case represents the first clear holding by the Supreme Court on the question of the constitutional sufficiency of alternative forms of constructive service of notice. The Court squarely held that the means *most* likely to give actual notice of the proceeding is the minimum standard required by the fourteenth amendment.[23] The Court held that notice by publication does not meet this standard when a party's address is known, as the mails are more certain to afford actual notice.

The most significant application of this reasoning arose in the recent case of *Walker v. City of Hutchinson.*[24] A Kansas statute authorized the city to appropriate private property by eminent domain for the opening, widening, or extending of streets and alleys, and permitted notice of the proceedings to be given by publication.[25] Walker, a resi-

22. On the other hand, even if the *Mullane* case can be said to stand for the demise of the in rem-in personam classification with respect to notice, it is doubtful if the case will have the effect of requiring the rigid standard of "face to face" service in actions in rem even though that method of delivery may be in fact the *best* means available. The *Walker* case, *supra* note 21, provides an apt illustration and also lends support to this reasoning. In that case one party was involved, and he was a resident of the city; yet, the Court did not require a "face to face" service. Instead constructive service by mail was sufficient for the Court. Thus, it is submitted that even if there has been a complete separation of the in rem-in personam classification, the Supreme Court did not intend to alter the customary view that constructive service of some kind satisfies due process in typical actions in rem. Moreover, a "necessity" or "balancing of interests" test has inherent limitations which will permit the Court to condition the possible effect of both the test "*best* means available in the circumstances," and the separation of the in rem-in personam classification from notice.

23. 339 U.S. 306 at 315. Justice Jackson stated: "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."

24. 352 U.S. 112 (1956).

25. It is well-settled that due process requires a hearing to be given the owner of land taken by eminent domain upon the question of just compensation. See North Laramie Land Co. v. Hoffman, 268 U.S. 276, 284 (1925); Bragg v. Weaver, 251 U.S. 57 (1919). Hence it follows that the owner is constitutionally entitled to notice of this

dent of the city, contended that such notice was not sufficient to satisfy due process of law. The Court upheld this contention on the basis of the *Mullane* case.[26]

The significance of the *Walker* case is in its application of the *Mullane* rule to a typical action in rem. It is in this area that the question of the constitutional sufficiency of notice by publication generally has been raised. Modes of delivering constructive service, especially publication, had been almost uniformly upheld by the Supreme Court without a determination of whether the method employed was the *best* available means of affording actual notice.[27] The *Walker* case manifests clearly the Court's intention to make such a determination in actions in rem, and this poses a serious constitutional threat to the extensive practice of notifying by publication in this class of cases.

Prior to the *Mullane* case the Court generally had been more prone to permit notice by publication in the case of a known non-resident party than where a known resident was involved.[28] Numerous states likewise

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hearing, see *e.g.*, Scott v. Toledo, 36 Fed. 385 (C.C. N.D. Ohio 1888). Typically notice by publication is statutorily authorized in such proceedings. See *e.g.*, ME. REV. STAT. ANN. c. 52 § 14 (1954); OHIO REV. CODE ANN. §§ 5553.11, 5555.09 (Page 1954); N.Y. GEN. MUNIC. § 72-a; N.Y. RAPID TRANSIT § 55; W. VA. CODE ANN. § 5374 (1955). Such notice has been held constitutionally adequate by the Supreme Court. See No. Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Arndt v. Griggs, 134 U.S. 316 (1890).

Personal service of notice generally has been held unnecessary in eminent domain proceedings, even as to known, resident owners. See *e.g.*, Georgia v. City of Chattanooga, 264 U.S. 472 (1924); United States v. Winn, 83 F. Supp. 172 (W.D. S.C. 1949); *In re* Condemnation Suits, 234 Fed. 443 (E.D. Tenn. 1916); McIntyre v. Marine, 93 Ind. 193 (1883); Lancaster v. Augusta Water District, 108 Me. 137, 79 Atl. 463 (1911). The *Walker* holding would not abrogate this reasoning, see note *22 supra*, and using the *Mullane* "balancing of interests" test, this would appear sound. The exercise of eminent domain is of great public necessity requiring a quick and final judgment. See Georgia v. City of Chattanooga, 264 U.S. 472 (1924); United States v. Jones, 109 U.S. 513 (1883). This interest overrides the suggestion of requiring personal service of notice. For a discussion of the due process clause in regard to condemnation, see 1 NICHOLS, EMINENT DOMAIN § 4.103 (3d ed. 1950).

26. 352 U.S. 112 at 115-16. Prior to the *Walker* case, the Supreme Court had never passed on the sufficiency of alternative forms of constructive service in eminent domain proceedings; although notice by publication had been upheld as to non-residents. See Georgia v. City of Chattanooga, *supra* note 25; Arndt v. Griggs, *supra* note 25, Huling v. Kaw Valley, 130 U.S. 559 (1889). The *Walker* case represents the first holding by the Supreme Court on the sufficiency of notice by publication to residents. The Court held that such notice was not adequate as to known residents, and reasoned that use of the mails was the better alternative. 352 U.S. 112 at 116.

27. See Anderson National Bank v. Luckett, 321 U.S. 233 (1944), escheat of unclaimed bank deposits; Goodrich v. Ferris, 214 U.S. 71 (1909), probate; Wight v. Davidson, 181 U.S. 371 (1901), street extension; Arndt v. Griggs, 134 U.S. 316 (1890), quiet title; Huling v. Kaw Valley, *supra* note 26, condemnation; Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895), tax assessment; Lent v. Tillson, 140 U.S. 316 (1890), street widening. *But cf.* Hart v. Sansom, 110 U.S. 151 (1884), quiet title action.

28. See *e.g.*, Ballard v. Hunter, 204 U.S. 241 (1907); Huling v. Kaw Valley, *supra* note 26.

employ such a distinction in their notice statutes.[29] This distinction seemingly is no longer valid. In an action in rem, jurisdiction for the proceeding is based upon the state's power over a res located within its territorial boundaries and not on the residence of persons interested in the res. In the *Mullane* case many of the beneficiaries of the common trust fund were non-residents. The Court recognized this fact, and ignored its effect in reaching a result. Thus, it is submitted that the Courtt implicitly rejected any effect a claimant's place of residence might have on the question of adequate constructive service of notice. In the *Walker* case the Court refused to extend its holding to known non-residents, as that question was not before it.[30] However, the non-resident-resident distinction would appear to be antithetical to the Court's holdings in the *Walker* and *Mullane* cases. If notice by publication is permissible in the case of a known claimant merely because he is a non-resident, the means *most* likely to afford actual notice would not be employed. It would seem that all persons with a known interest should have the same right to adequate notice regardless of their place of residence. Thus, renunciation of such a distinction seems clearly proper.

Many actions in rem involve proceedings by the state government, or its local counterpart, for public purposes. Generally the Supreme Court has distinguished this class of cases from those where a private litigant is seeking an adjudication, and has been more lenient in allowing notice by publication as to both known residents and non-residents.[31] The *Walker* case clearly indicates that no such distinction is to be made in the application of the *Mullane* standard.[32] It is illogical that any such distinction should be made. The general purpose of the fourteenth amendment is to protect the individual from arbitrary state action. There is no sound reason in allowing a state government, or its local counterpart, to employ a mode of constructive service which would be constitutionally

29. See *e.g.,* IND. ANN. STAT. § 3-1703 (Burns 1946), OHIO REV. CODE ANN. § 2703.14 (Page 1954); W. VA. CODE ANN. § 5520 (1955). The claim has been made that this distinction offends due process on the grounds of discrimination, but this was rejected by the Supreme Court. See Ballard v. Hunter, *supra* note 28.

30. 352 U.S. 112 at 116.

31. See *e.g.,* Ballard v. Hunter, *supra* note 28; Leigh v. Green, 193 U.S. 79 (1904). *Compare* Castillo v. McConnico, 168 U.S. 674 (1898) *with* Priest v. Las Vegas, 232 U.S. 604 (1914).

32. 352 U.S. 112 at 117 where Justice Black said: "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. In too many instances notice by publication is no 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."

prohibited if used by a private litigant.

As stated previously, the holding of the *Mullane* decision permits notice by publication in regard to unknown claimants. The Court also indicated by way of dictum that notice by publication may be sufficient when it is reinforced by other "steps likely to attract the parties' attention to the proceeding," such as attachment, entry on realty, or seizure of property.[33] This reasoning is not new to the law of notice. At one time the Court had indicated that physical seizure of property in a proceeding in rem was alone sufficient notice to interested parties.[34] However, in subsequent decisions, some form of constructive service was held to be necessary to supplement the seizure in order to give interested parties essential information of the impending proceeding against the seized property.[35] Publication usually has been held to be sufficient, the rationale being that all property is in the possession of its owner, or his agent, and that its seizure will operate to give some notice, which, when coupled with a subsequent published notice, will afford due process.[36]

It is not readily apparent from the *Mullane* decision just what type of seizure or action will suffice to attract attention of interested parties so as to permit notice by publication. If the Court meant literal seizure—and this generally has been the rule[37]—the effect of the Court's dictum is limited. In actions against real property, such as eminent domain, generally there is no dramatic physical change in possession. There is a "legal" seizure by the institution of an action and a filing either in a lis pendens record or in some other appropriate record.[38] This is not likely to result in notice to the landowner, unless, of course, he, or his agent, either checks the lis pendens record, or is held to a duty to know what is placed on the records. With respect to actions in rem directed toward personal property, the situation may be different, as generally there is a seizure in the sense of a physical change in possession.[39] Thus, apparently if seizure means a physical change in possession, the propriety of published notice generally would be limited to proceedings affecting personalty.

But even if the "reinforcing steps," such as seizure, are not limited to dramatic physical acts, notice by publication should not be regarded as

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33. 339 U.S. 306, at 316.

34. See Cooper v. Reynolds, 10 Wall. 308 (U.S. 1870). This reasoning apparently was derived from Chief Justice Marshall's dicta in The Mary, 9 Cranch 126 (U.S. 1815), a case involving a seizure and forfeiture of a ship by the government.

35. See *e.g.*, Hassall v. Wilcox, 130 U.S. 493 (1889); Windsor v. McVeigh, 93 U.S. 277 (1876); Earle v. McVeigh, 91 U.S. 503 (1875).

36. See *e.g.*, Ballard v. Hunter, 204 U.S. 241 (1907).

37. *Supra* note 35.

38. See *e.g.*, N.J. REV. STAT. § 20:1-4 (Supp. 1950).

39. See generally, Fraser, *Actions in Rem*, 34 CORNELL L. Q. 29, 37-40 (1948).

ipso facto adequate when such steps are present. A seizure of the res is not a requirement of due process in actions in rem; its importance, if any, is jurisdictional.[40] The important due process requirement is an adequate notice to parties interested in the res. The seizure, if known at all, conveys no essential information as to why or when the proceedings will commence. Therefore, the law rightly requires some form of notice to convey this information. Since some notice is required, there would seem to be no logical reason why it should not be conveyed through the medium *most* likely to convey actual notice. Perhaps if the circumstances of a particular proceeding show conclusively that a seizure did operate to give notice, a court might justifiably uphold notice by publication. However, the seizure should not be the controlling factor in permitting notice by publication; rather it should be the court's last resort. Regardless of what steps are taken against property, real or personal, a person with an interest in the property is constitutionally entitled to the *best* notice possible in the circumstances.

As recognized in the *Mullane* opinion, the law imposes a duty on the owners of property, especially non-resident owners, to take measures to know when their property is being proceeded against.[41] This is particularly true where the government is instituting the proceedings.[42] Indeed this duty is the basis for permitting notice by publication in cases where other steps likely to attract attention to the proceedings are present. A property owner is held to know that there is a possibility that his property may be condemned, assessed for public improvements, taxed, sold for delinquent taxes, etc.[43] Thus, the owner should take steps to keep informed, and if he does not, he has no reason to complain, provided that notice is given in some manner. Notice by publication generally has been held to be sufficient;[44] and Justice Jackson indicated in the *Mullane* opinion that this was valid reasoning.[45]

The Court in the *Walker* case significantly ignored any such duty, at least in regard to a resident landowner. It would seem to be illogical to distinguish the imposition of this duty on the basis of an owner being a resident. If the duty is to prevail at all, it should hold true regardless

40. See Windsor v. McVeigh, 93 U.S. 274, 278 (1876). See also Fraser, *supra* note 39.

41. See *e.g.*, Ballard v. Hunter, 204 U.S. 241 (1907); Huling v. Kaw Valley, 130 U.S. 559 (1889).

42. See *e.g.*, North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); San Augustine County v. Cameron County District, 202 F.2d 932 (5th Cir. 1953).

43. *Supra* notes 41 and 42.

44. See *e.g.*, Securities Savings Bank v. California, 263 U.S. 282 (1923); Huling v. Kaw Valley, 130 U.S. 559 (1889).

45. 339 U.S. 306 at 316.

of the owner's residence.[46] Thus, implicit in the Court's reasoning is an abrogation of this duty. Moreover, in actions against real property, such as eminent domain, it is difficult to see how this duty may be discharged. Generally there is no overt physical action against the property as in the case of a seizure of a ship. A shipowner is practically certain to know of the ship's seizure through his agents. No such certainty prevails in an action against real property. The "seizure" is generally in the form of an institution of an action and a filing of a notice in the lis pendens record. It is doubtful if landowners keep "caretakers" on their land, and even if they do, it is impractical to assume that an owner, or his "caretaker," will diligently watch the lis pendens record and the small print of legal notices on the back pages of a local newspaper.

However, it may be that a property owner should keep informed; and, if he is a non-resident, he should maintain a "caretaker" for his property. At least it would seem that the state validly could assume that a property owner will take some steps to protect his property. On the other hand the property owner has a right to assume that he will be afforded his constitutional right to adequate notice of the impending proceedings. There would seem to be no reason why the notice given should not be the *best* in the circumstances, notwithstanding the property owner's duty to keep informed of actions jeopardizing his property. It is submitted that the duty—if one does exist after the *Walker* case—placed upon the property owner does not affect the constitutional duty upon the state to afford the *best* alternative form of constructive service of notice.[47]

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46. Perhaps, however, such a duty still exists in the law of notice in regard to "direct" proceedings against the land such as condemnation, escheat, or taxes. However, the logic of this duty would seem to be questionable if it extends to include "collateral" proceedings against the property, such as attachment to satisfy a tort judgment or any judgment lien. Moreover, persons other than the landowner may be known interested parties. See *e.g.*, Board of Directors v. Whiteside, 87 F. Supp. 69 (W.D. Ark. 1949), mortgagee of condemned lands. The "caretaker-duty" theory seemingly would not affect them.

47. This reasoning is substantiated by the recent case of City of New York v. N.Y., N.H. and H. R.R. Co., 344 U.S. 293 (1953); although the case did not involve a governmental activity. In a railroad reorganization under the Bankruptcy Act notice by publication of the proceeding was conveyed to non-appearing creditors. The plaintiff city was such a creditor of the railroad and protested the bar order of its liens. The argument was made that notice by publication was sufficient because the city had had knowledge of the original reorganization proceeding, and therefore, it should have taken steps to keep informed of subsequent developments, viz., the bar order. Basing its opinion on the *Mullane* case, the Court answered this argument, at 297: "Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." There would seem to be no logical reason for distinguishing between the duty in the instant case and the duty of a landowner, as

The *Mullane* case, and subsequent decisions applying the *Mullane* rule, explicitly or implicitly limit or abrogate previous automatic tests of adequate service of notice such as resident-non-resident, government-private litigant, and in rem-in personam. Instead these cases employ the test of known-unknown in determining whether the notice given meets the due process standard imposed by the *Mullane* decision.[48] Latent in such a test is the concept of duty.

As indicated previously the concept of notice is interrelated with the concept of duty placed upon the party who is the object of the notice. Generally a duty also has been placed upon the notifier. Statutes permitting a private litigant to resort to notice by publication require the litigant to show the necessity for resorting to publication, and to exercise "due diligence" in ascertaining the whereabouts of his adversary.[49] An affidavit showing these requirements generally is prescribed.[50] It is uncertain, whether in the absence of such statutory requirements, the fourteenth amendment requires a showing of diligence before resort may be had to constructive service.[51] The direct question apparently has not

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the Court's reasoning in regard to the bankruptcy provision for "reasonable notice" certainly would apply with respect to the *Mullane* constitutional standard of "reasonable notice." *Accord,* Gillespie v. Fort Dodge, D.M. & S. Ry. Co., 203 F.2d 119 (8th Cir. 1953).

A case somewhat similar in regard to the concept of duty arose in Griffin v. Griffin, 327 U.S. 220 (1946). No notice was given of a judgment for arrears of alimony. The argument was made that since the defendant husband knew of the original divorce and alimony decree, he was apprised of the possibility of a subsequent action for alimony arrears; therefore, no notice was necessary. The Court rejected this argument and held further that notice was constitutionally necessary, at 229-30.

These cases are factually dissimilar from the usual situation involving the "caretaker-duty" rationale in that no governmental activity was involved. However, the gist of the duty rejected in these cases is very similar to the "caretaker-duty." See notes 41 and 42 *supra.* And there would seem to be no reason for distinguishing these cases on the basis that no governmental activity was involved.

Likewise, the theory that notice is imparted by the statute which authorizes condemnation or escheat, and that this coupled with publication is enough, see Anderson National Bank v. Luckett, 321 U.S. 233 (1944); Paulson v. Portland, 149 U.S. 30 (1893); New York v. Gebhardt, 151 F.2d 802 (2d Cir. 1945), would seem to be abrogated by the *Mullane* and *Walker* decisions.

48. The test of unknown-known was hinted at in prior decisions. See Blinn v. Nelson, 222 U.S. 1 (1911), appointment of a receiver for an absentee; Cunius v. Reading School District, 198 U.S. 458 (1925), administration of an absentee's estate; Hamilton v. Brown, 161 U.S. 256, 274 (1896), determining succession of property. However, its effect was apparently limited, *e.g.,* Tyler v. Judges, 175 Mass. 71, 55 N.E. 812 (1900).

49. See *e.g.,* CAL. CODE CIV. PROC. § 412 (1953); IND. ANN. STAT. § 3-1703 (Burns 1946); OHIO REV. CODE ANN. § 2703.15 (Page 1954); W. VA. CODE ANN. § 5548 (1955).

50. *Supra* note 49. For an extensive discussion of the affidavit duty and cases connected with it, see generally, Annot. 21 A.L.R.2d 929 (1952).

51. *Cf.* Jacob v. Roberts, 223 U.S. 261 (1912); Blake v. Zittrouer, 1 F.2d 496 (S.D. Fla. 1924). See also Security Savings Bank v. California, 263 U.S. 282 (1923), involving a proceeding to escheat unclaimed bank deposits. The Supreme Court stated that an affidavit is not "constitutionally indispensable," at 288. However, it is doubtful if the case can be said to stand for the broad proposition that diligence is not con-

been before the Court.[52]

The effect of the *Mullane* case is to impose a duty upon one instituting proceedings to inquire as to the whereabouts of adversaries. However, it is a duty in a different sense than the affidavit duty. The duty latent in the *Mullane* rule is not directed toward discovering whether personal service may be dispensed with, but is directed toward the permissible alternative form of constructive service. Prior to the *Mullane* case no such constitutional duty was recognized. Thus, it appears that generally there are two duties imposed upon the party instituting proceedings and seeking to notify adversaries constructively: the statutory duty to show cause why personal service cannot be had; and a constitutional duty, assuming constructive service is permissible, to show that the notice sought to be given is the *best* means of notification available in the circumstances.

However, to say that there is a constitutional duty to diligently seek out interested parties is to state only a result. It does not answer the numerous critical questions involved, such as what is "due diligence," what is the extent of the duty of inquiry, will a showing of good faith discharge the duty, who are the interested parties, what facts the notifier is held to know, is the knowledge of the notifier held to a subejctive or objective test, and what is the duty of the party who is the object of the notice to keep his interest and address known. The answers to such questions are not presently apparent.[53]

One general conclusion may be drawn from *Mullane* and subsequent decisions. If there are records or files available, the notifier must inquire into them, and he is held to know facts which may be found in them. Thus, in the *Walker* case the Court indicated that in actions

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stitutionally required before personal service may be dispensed with. The case involved a California statute whereby unclaimed bank deposits were transferred to the state treasury. Personal service of notice was given to the bank of deposit, and published notice was given to the unknown depositors. There was no change in the property rights of the depositors, only a change in the place of deposit. Thus, the question remains if due process requires such a showing of diligence by the notifier if a substantial change in property rights is imminent.

52. *Cf.* Thompson v. Thompson, 226 U.S. 551 (1913). See generally, Annot. 91 A.L.R. 226 (1934).

53. Answers to such questions, and other problems latent in the change in the law of notice effectuated by the *Mullane* decision, undoubtedly will have to be "wrestled" with by legislative draftsmen and courts. It is, of course, reasonably arguable that a decision injecting into the law so much uncertainty is a doubtful innovation. On the contrary much can be said for any change in the law which would enhance the meaning of due process of law and the words of Justice Jackson: "'The fundamental requisite of due process of law is the opportunity to be heard.' [citing Grannis v. Ordean, 234 U.S. 385 (1914)] This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. 306 at 314.

against real property, the notifier is held to know the names and addresses of interested parties which could be found on official records.[54] If the party could be known from an inquiry into these records, notice by publication is insufficient. On the other hand if a party allows shares of stock and unpaid dividends to remain unclaimed for fourteen years, and the owner, or owners, are not to be found on the corporation's books, the state may validly employ notice by publication of impending escheat proceedings.[55] If the party has the names and addresses of his adversaries, such as beneficiaries of a trust fund or creditors, in his files, notice by publication is inadequate.[56] However, the Court has not indicated clearly the extent of the inquiry the notifier must make into these records or files, or if the duty of diligent inquiry is completely discharged by such an inquiry. It seems likely that the breadth of this constitutional duty will be dependent upon the particular fact situation before the Court, and the balancing of the interests involved.

Prior to an examination of state statutes in regard to the due process requirements of notice applied in the *Mullane* and *Walker* cases, it is necessary to examine the scope of state remedies to determine whether there is an adequate remedy for one who has been deprived of the *best* means of notification available in the original proceedings. State statutes may provide a period of time before the judgment becomes final during which the proceedings may be attacked. Such a period is in the form of a statute of limitations or a period of grace. Thus, for example, a tax foreclosure act may provide a period for the delinquent taxpayer to redeem his land;[57] a probate code may provide a period for interested parties to challenge the proceedings;[58] an abandoned property statute may provide a period during which a person may claim assets escheated to the state;[59] or, a statute may provide a period during which a divorce decree may be reopened.[60]

State procedure also may provide for remedies whereby one may obtain relief by a belated attack on an unjust judgment within a prescribed time limit.[61] Presumably these remedies would be available after

54. 352 U.S. 112 at 116.
55. Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) at 432-36.
56. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).
57. *E.g.*, ILL. REV. STAT. c. 120 § 734 (1955); OHIO REV. CODE ANN. § 5721.25 (Page 1954); W. VA. CODE ANN. §§ 979 (93), 999(102) (1955).
58. *E.g.*, ARIZ. REV. STAT. ANN. § 14-371 (1956); CAL. PROB. CODE §§ 380, 384 (Deering 1953).
59. *E.g.*, IND. ANN. STAT. § 7-112 (1953); N.J. REV. STAT. § 2A: 37-38, 37-40 (1951); PA. STAT. ANN. tit. 20 § 301 (1930) and tit. 27 § 334 (Supp. 1956).
60. *E.g.*, IND. ANN. STAT. §§ 3-1207, 3-1224 (Burns 1946).
61. For an example of the procedural techniques of such remedies, see Note, 32 IND. L.J. 205 (1957).

the statutory period previously discussed had expired. These remedies may be of several types. For example, the state may allow the use of historic ancillary common law and equitable writs;[62] it may provide remedies similar to those of Rule 60(b) of the Federal Rules of Civil Procedure;[63] or, it may provide for belated attacks on default judgments as a matter of right if a party received no actual notice of the original proceedings,[64] or received no notice other than by publication.[65]

The grounds for taking advantage of such remedies, and the scope of these remedies, vary from state to state. Courts generally seek to avoid constitutional questions if a case can be decided on other grounds.[66] If one disregards an applicable state remedy, and seeks to proceed on the constitutional question, most likely his claim will be ignored. This result would seem to be logical in the majority of situations. If a remedy is available which will adequately provide a party with relief, in effect he has no constitutional controversy, as he has been afforded due process. Moreover, generally one incurs no substantial burden because he is required to exhaust his statutory remedies. Thus, a state's procedure and the scope of its remedies must be thoroughly investigated before an attempt is made to raise the constitutional sufficiency of statutory notice provisions.[67]

It is apparent from preceding discussion that the issues involved in the *Mullane* case are still developing. Recent decisions manifest the Court's intention that the *Mullane* case is not to be confined to its facts; therefore, the case represents a significant change in the constitutional propriety of notice by publication.[68] Various state statutes permitting

62. See generally, 1 FREEMAN, JUDGMENTS §§ 256, 257 (5th ed. 1925).

63. *E.g.*, CAL. CODE CIV. PROC. § 473 (Deering 1953); ME. REV. STAT. ANN. c. 123 § 1 (1954).

64. *E.g.*, ME. REV. STAT. ANN. c. 171 § 51 (1954); OHIO REV. CODE ANN. § 2325.01 (Page 1954).

65. *E.g.*, ILL. REV. STAT. c. 110 § 50 (8) and c. 77 §§ 83-84 (1955); IND. ANN. STAT. § 2-2601 (Burns 1946); OHIO REV. CODE ANN. § 2325.02 (Page 1954); W. VA. CODE ANN. § 5551 (1955).

66. See generally, Bernard, *Avoidance of Constitutional Issues,* 50 MICH. L. REV. 261 (1951).

67. The case of Covey v. Town of Somers, 351 U.S. 141 (1956), represents an excellent example of the necessity for such an examination. The case was remanded to the New York Court of Appeals by the Supreme Court, and in Town of Somers v. Covey, 2 N.Y.2d 250, 140 N.E.2d 277 (1957), that court followed essentially Justice Frankfurter's dissent in the Supreme Court opinion, *supra* at 147. Thus, relief was denied because the committee for the incompetent tax delinquent had selected the wrong remedy in attempting to attack constitutionally the notice given of a tax foreclosure proceeding.

68. Wisconsin Electric Power Co. v. City of Milwaukee, 352 U.S. 948 (1956) (per curiam), tax assessment; Walker v. City of Hutchinson, 352 U.S. 112 (1956), condemnation; Covey v. Town of Somers, *supra* note 67, tax foreclosure; City of New York v. N.Y., N.H. & H. R.R. Co., 344 U.S. 293 (1953), reorganization in bankruptcy; Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) escheat.

such notice are now faced with a possible constitutional threat, as they are almost certain to be scrutinized in the light of the *Mullane* case. These statutes, and the types of actions in which notice by publication is authorized, must be examined in an attempt to determine the future effect of the *Mullane* case.

The *Walker* case represents the extension of the *Mullane* standard to include eminent domain proceedings. There apparently is no reason why this standard will not be extended to apply to other types of proceedings where interests in real property are affected.[69]

One such action in rem likely to be tested by the *Mullane* holding is that of foreclosure proceedings to enforce tax liens on real property.[70] Typically state statutes authorize notice by publication of such proceedings to be given to either non-residents and residents,[71] or to simply non-residents.[72] Generally statutes provide for notice by publication to the taxpayer that his taxes are delinquent.[73] After a period of time a subsequent notice is published warning of the foreclosure action and sale.[74] The Court has uniformly upheld such notice without discussing

69. Notice by publication has been statutorily employed in a variety of proceedings affecting real property and such service has generally been held to satisfy due process requirements: specific performance of land contracts, Boswell v. Otis, 9 How. 336 (U.S. 1850), Light v. Doolittle, 77 Ind. App. 187, 133 N.E. 413 (1921), only if such notice is statutorily authorized, Hart v. Sansom, 110 U.S. 151 (1883), Hollingsworth v. Barbour, 4 Pet. 466 (U.S. 1830); suits to quiet title, Jacob v. Roberts, 223 U.S. 261 (1912); American Land Co. v. Zeiss, 219 U.S. 47 (1911); reformation of a deed to real property, Corson v. Shoemaker, 55 Minn. 386, 57 N.W. 134 (1893); ejectment, *cf.* Staffon v. Zeust, 10 App. D.C. 260 (1897); partition, Grannis v. Ordean, 234 U. S. 385 (1914), Mason v. Messenger, 17 Iowa 261 (1864); suits to enforce mechanics liens, Heidritter v. Elizabeth Oil Cloth Co., 112 U.S. 294 (1884), Bernhardt v. Brown, 118 N.C. 700, 24 S.E. 527 (1896); foreclosure of other liens, Roller v. Holly, 176 U.S. 398 (1900); proceedings to collect taxes on lands, Longyear v. Toolan, 209 U.S. 414 (1908), Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895); tax assessments, Ballard v. Hunter, 204 U.S. 241 (1907), Lent v. Tillson, 140 U.S. 316 (1890), *but cf.* Wisconsin Electric Power Co. v. City of Milwaukee, 272 Wis. 575, 76 N.W.2d 341 (1953) *remanded per curiam*, 352 U.S. 948 (1956); and, forcible entry and detainer, Weber v. Grand Lodge, 169 Fed. 527 (6th Cir. 1909).

70. Personal service of notice has never been regarded as constitutionally indispensable; the rationale being that such proceedings are in rem; and also that the owner of realty, once taxes have been levied so as to satisfy due process, is presumed to know that his land may be sold if he does not pay taxes. See Leigh v. Green, 193 U.S. 79 (1904); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895). Using the *Mullane* test of "necessity" or "balancing the interests," there would appear to be no public interest in an efficient and expedient method for collecting taxes which outweighs requirement of "face to face" service of notice in such proceedings. There is a high the private interest involved.

71. *E.g.*, ILL. REV. STAT. c. 120 § 706 (1955); IND. ANN. STAT. § 64-2202 (Burns 1946).

72. *E.g.*, ME. REV. STAT. ANN. c. 92 § 155 (1954).

73. *E.g.*, ILL. REV. STAT. c. 120 § 706 (1955); OHIO REV. CODE ANN. § 5721.03 (Page 1954).

74. *E.g.*, ILL. REV. STAT. c. 120 § 697 (1955); IND. ANN. STAT. § 64-2203 (Burns 1946); OHIO REV. CODE ANN. § 5721.18 (Page 1954).

whether it was the *most* reasonable method available.[75] In the recent case of *Covey v. Town of Somers,* the Court applied the *Mullane* rule to a tax foreclosure proceeding involving an incompetent delinquent taxpayer.[76] There is nothing to indicate that the *Mullane* test will not be applied generally to actions to foreclose tax liens. The taxing power is an indispensable power of government, and should not be complicated by complex and time-consuming procedures.[77] This interest would not be impaired by a requirement of the *best* available method of providing notice. Notice by publication does not meet this standard where the delinquent taxpayer's address is known. The states expend much time and money to keep adequate land and tax records. It would require little effort, time, or expense for a state to search these records for addresses of delinquent taxpayers.[78] At least no more burden would be imposed than that required in the *Walker* case. If the delinquent's address could be found by a reasonable search, publication would be a "mere gesture" regardless of his place of residence.[79] Moreover, some states statutorily require notice by mail to such parties.[80] Implicit in this fact is a recognition that the constitutional requirements of the *Mullane* rule would not impose a substantial burden on the public interest in expediency.

A similar situation is involved in state statutes permitting notice by publication of proceedings to foreclose a delinquent owner's right of redemption, or other proceedings to perfect the tax sale purchaser's title.[81] Generally states provide a period after foreclosure during which the delinquent, or another interested party, may redeem the land by paying the charges upon it.[82] The statute may provide for foreclosure by the mere passage of time, or it may require the tax sale purchaser to proceed to foreclose the right, and thereby perfect his title. In the former situation

75. *E.g.,* Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895).

76. 351 U.S. 141 (1956). The town of Somers proceeded to foreclose a tax lien on property owned by a known incompetent. The statute requiring notice by mail, posting, and publication was complied with; however, the incompetent failed to answer within the prescribed time limit. The Supreme Court, emphasizing the *Mullane* rule that "notice must be conveyed by the *best* means possible" held that there was a deprivation of due process, as a committee should have been appointed in the incompetent's behalf.

77. See Wize v. Herzog, 114 F.2d 486 (D.C. Cir. 1940) where a similar argument was rejected in a case involving the Small Claims Court.

78. See the dissenting opinion in City of Newark v. Yeskel, 5 N.J. 313, 329, 74 A.2d 883, 891 (1950).

79. See Opinion of the Justices, 139 Me. 420, 38 A.2d 561 (1943).

80. *E.g.,* N.Y. TAX LAW §§ 163, 165-b.

81. Such notice has generally been held to satisfy due process. See *e.g.,* McCash v. Penrod, 131 Iowa 631, 109 N.W. 180 (1906); Gathwright v. City of Baltimore, 181 Md. 362, 30 A.2d 252 (1943); Napier v. Springfield, 304 Mass. 174, 23 N.E.2d 157 (1939); Buffalo v. Hanks, 226 App. Div. 480, 236 N.Y.S. 89 (1929) *aff'd* 251 N.Y. 588, 168 N.E. 438 (1929).

82. *E.g.,* ILL. REV. STAT. c. 120 § 734 (1955); W. VA. CODE ANN. § 999 (109) (1955).

generally no notice is required and none is given when the right to redeem is barred. However, in the latter situation the purchaser is usually required to give notice to the delinquent.[83]

A recent New Jersey case involving a foreclosure of a statutory right of redemption distinguished *Mullane* and upheld the statutory provision of notice by publication.[84] One of the bases for the decision was that the right to redeem and the right to receive notice of redemption exist merely as a matter of legislative grace; therefore, the state can "enlarge, curtail or withhold" either.[85] It may be that the right to redeem is a matter of legislative grace.[86] Likewise, the state can provide or withhold notice. However, it does not follow that there is no constitutional standard which this notice must meet once it is given. The right of redemption is a valuable property right, and once given, the state should not be able to arbitrarily withhold it or curtail it. Once a state provides notice in order to prevent this result, that notice should meet the standard imposed by the fourteenth amendment. Thus, this notice must be conveyed through the means *most* likely to give the delinquent actual notice.[87]

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83. Generally the notice is conveyed by publication. *E.g.*, ILL. REV. STAT. c. 120 § 747 (1955).

84. City of Newark v. Yeskel, 5 N.J. 313, 74 A.2d 883 (1950). The defendant tax sale purchaser had agreed to buy the foreclosed property. However, when the time came for payment, he refused to pay, contending that his title would not be marketable because the notice requirements of the New Jersey statute were unconstitutional. The New Jersey Supreme Court rejected this contention and implicit in its holding was that published notice given was sufficient even as to known parties.

85. *Supra* note 84 at 884.

86. *Cf.* Keely v. Sanders, 99 U.S. 441 (1879).

87. Another area in which constructive service is employed which is likely to be affected by the *Mullane* rule is that of probate proceedings. See generally, Case of Broderick's Will, 88 U.S. 503 (1874); Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH L. REV. 675, 687 (1945). Notice by publication is often statutorily authorized. *E.g.*, CAL. PROB. CODE § 283 (Deering 1953); ILL. REV. STAT. c. 3 §§ 215, 216 (1955); W. VA. CODE ANN. § 4235 (1955). Such notice has generally been held constitutionally adequate. Cunius v. Reading School District, 198 U.S. 458 (1925); Goodrich v. Ferris, 214 U.S. 71 (1909). Because of the similarity of probate proceedings with judicial settlement of trust accounts, considerable speculation arose as to the propriety of such notice after the *Mullane* decision. *Compare* Comment, 50 MICH. L. REV. 124 (1951) *with* Tilley, *The Mullane Case: New Notice Requirements*, 30 MICH. S.B.J. 12 (1951) *and* Note, 32 NEB. L. REV. 440 (1953). No sound reason is apparent why the *Mullane* rule would not apply to probate proceedings. *But cf. In re* Pierce's Estate, 245 Iowa 25, 60 N.W.2d 897 (1953); *In re* Shew's Estate, 48 Wash.2d 732, 296 P.2d 667 (1956); New York Merchandise Co. v. Stout, 43 Wash.2d 828, 264 P.2d 863 (1954).

A somewhat similar area to proceedings for the administration of estates is that of proceedings for the escheat of property for want of legal heirs, or escheat of abandoned property. Typically notice of such proceedings is given by publication. *E.g.*, N.J. REV. STAT. § 2A: 37-4; N.Y. ABAND. PROP. § 202; PA. STAT. ANN. tit. 27 § 281 (1930) and tit. 27 § 282 (1956 Supp.). Generally such notice has been upheld. *E.g.*, Anderson National Bank v. Luckett, 321 U.S. 233 (1944). The Supreme Court has applied the *Mullane* rule to a proceeding escheating unclaimed corporate shares and dividends, Standard Oil Co. v. New Jersey, 341 U.S. 428, 435 (1951); and there is no valid reason

Another proceeding likely to be affected by the *Mullane* decision is that of divorce.[88] Where a plaintiff is within the jurisdiction of the court and has satisfied domicile requirements, the court has power to adjudicate the status of the marriage.[89] Typically states permit notice by publication where the defendant is a non-resident or unknown,[90] and some states further require a mailing of notice to supplement the publication where the non-resident is known.[91] The Supreme Court has not passed on the constitutional sufficiency of the various modes of constructive service in this area. However, there is no logical reason why the *Mullane* rule will not include divorce actions.[92] Thus, if the defendant's address is known, notice by publication alone would be a deprivation of due process. There are no steps taken which could be said to reinforce a published notice in a simple divorce proceeding. Therefore, a more direct method of delivery must be employed.[93]

States generally require the plaintiff to execute an affidavit showing that due diligence was exercised to find the defendant before notice

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why the rule will not be applied generally to escheat proceedings. See Application of the People of the State of New York, 138 F.Supp. 661 (S.D. N.Y. 1956). Presumably few situations will arise where there will exist known claimants. See Territory of Alaska v. First National Bank, 41 F.2d 186 (9th Cir. 1930). However, the court should still require the notifier to exercise the necessary degree of diligence in inquiring as to the claimant's whereabouts. For a compilation and analysis of cases involving notice in escheat proceedings, see generally, Annot. 95 L.Ed. 1092 (1950); Annot. 48 A.L.R. 1342 (1927).

88. "Face to face" service of notice on the defendant has not been considered as constitutionally indispensable in divorce actions, although some notice is necessary, Williams v. North Carolina, 317 U.S. 287 (1942); Atherton v. Atherton, 181 U.S. 155 (1901), so long as the constructive service employed satisfies due process. See Atherton v. Atherton, *supra; cf.* Rice v. Rice, 336 U.S. 674 (1949). Notice by publication generally has been held sufficient. *E.g.,* Thompson v. Thompson, 226 U.S. 551 (1913). The rationale behind permitting constructive service generally has been that the proceeding is an action in rem or essentially in rem. See *e.g.,* Atherton v. Atherton, *supra.* It is uncertain if such a classification is still justified. See Williams v. North Carolina, *supra;* Haddock v. Haddock, 201 U.S. 562 (1906); *cf.* Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953). However, using the *Mullane* "balancing of interests" test such service would still seem to be permissible. There is an important public interest in an efficient mode of dissolving marriages. If the state could acquire jurisdiction over a non-resident only by a "face to face" service, generally it could not acquire jurisdiction at all. Thus, there must be resort to a method of constructive service.

89. *E.g.,* Williams v. North Carolina, *supra* note 88.

90. *E.g.,* N.Y. Dom. Rel. § 7-a; W. Va. Code Ann. § 4710 (1955).

91. *E.g.,* Ohio Rev. Code Ann. § 3105.06 (Page 1954).

92. See Rediker v. Rediker, 35 Cal.2d 803, 221 P.2d 1 (1950); Van Grundy v. Van Grundy, 244 Iowa 491, 56 N.W.2d 43 (1953).

93. Similar proceedings to that of divorce are those of annulment of marriages. See generally, Annot. 43 A.L.R.2d 1086 (1955). Likewise, notice by publication is authorized in other proceedings to determine status, such as guardianship, custody, and adoption. *E.g.,* W. Va. Code Ann. § 4757 (1955). When notice is necessary in such proceedings the objections to notice by publication enunciated in the *Mullane* opinion presumably would apply. See generally, Fraser, *Jurisdiction By Necessity,* 100 U. Pa. L. Rev. 305, 317-19 (1951).

by publication is allowed.[94] The *Mullane* case would require not only due diligence to discover the defendant's whereabouts within the state, but also due diligence to discover the non-resident's address without the state. If a plaintiff receives a divorce decree, and it is subsequently proven that the plaintiff actually knew of the non-resident's address, the plaintiff would have worked a fraud on the court so as to justify a setting aside of the decree.[95]

The situation is somewhat complicated where alimony is awarded in conjunction with a divorce decree. If the defendant has no property within the state's jurisdiction, an alimony judgment would be in personam; and therefore, under prevailing law a court could not enter a valid judgment without acquiring personal jurisdiction over him.[96]

However, different circumstances exist where the defendant has property located within the jurisdiction of the court. This gives the court a jurisdictional basis, and therefore it could constitutionally enter either an original alimony judgment, or a subseqeunt judgment for arrears of alimony on this property without personal service, provided adequate notice is afforded the defendant so as to give an opportunity to raise defenses.[97] There is no reason why the *Mullane* rule would not apply to such judgments. The Court has previously indicated that notice is constitutionally required.[98] To meet the *Mullane* standard, this notice should be the *best* means available; therefore, if the defendant's address is known, notice by publication alone is inadequate.

Often there is existing in an alimony judgment a seizure of the defendant's property. Perhaps this would indicate that notice by publica-

94. *E.g.*, IND. ANN. STAT. § 3-1206 (Burns 1946); OHIO REV. CODE ANN. § 3105.06 (Page 1954).

95. McLean v. McLean, 233 N.C. 145, 63 S.E.2d 138 (1951). For a discussion of collateral attacks on a divorce decree because the plaintiff failed to comply with the affidavit duty, see generally, Annot. 91 A.L.R. 225 (1934).

96. Estin v. Estin, 334 U.S. 541 (1948); Bunnell v. Bunnell, 25 Fed. 214 (C.C. E.D. Mich. 1885); Lytle v. Lytle, 48 Ind. 200 (1874). If the defendant is a non-resident and personal service is impossible, perhaps the *Mullane* rule could be extended to allow constructive service in this situation, assuming a jurisdictional basis such as domicile. The Supreme Court has indicated that in a subsequent personal judgment for arrears of alimony where the original decree and judgment was based on personal jurisdiction, a court can acquire jurisdiction over the defendant if notice is given of the subsequent proceeding. Griffin v. Griffin, 327 U.S. 220 (1946).

97. Generally the theory behind permitting constructive service was that the action is essentially in rem. See *e.g.*, Pennington v. Fourth National Bank, 243 U.S. 269 (1917); Holmes v. Holmes, 283 Fed. 453 (E.D. Mich. 1922); Bunnell v. Bunnell, *supra* note 96. Applying the *Mullane* "balancing of interest" test, this seemingly would not be altered. The state has an important public interest in preventing a divorced wife and her children from becoming public charges. This would seemingly outweigh the private interests involved.

98. Griffin v. Griffin, *supra* note 96. *Cf.* Pennington v. Fourth National Bank, *supra* note 97 where notice by publication was held to satisfy due process.

tion is adequate.[99] However, realistically in many instances a non-resident's property would be in the possession of his wife, or of a debtor, such as a bank. In such circumstances a seizure would import little, if any, notice to the non-resident defendant. The wife would be as much an "adversary" to the defendant's interest as the trustee in the *Mullane* case, and it would make little or no difference to a debtor who he pays, so long as he is assured that his liability is at an end.[100]

It is probable that the *Mullane* decision will have a limited future effect on the question of when resort may be had to constructive service. However, no limitation seemingly exists in the Court's answer to the question of the constitutional propriety of alternative modes of constructive service.[101] The Court phrased its rejection of notice by publication in regard to known interested parties in succinct and unqualified language.[102] There is nothing in the Court's opinion, or in subsequent decisions, to suggest that the Mullane rule will not apply to every type of adjudication.[103]

Perhaps the *Mullane* rule will not have this result. However, it is submitted that the better course for state legislatures is to proceed on the assumption that the rule will affect every situation. Several states have proceeded on this assumption and amended their notice statutes in an attempt to conform to the *Mullane* standard.[104] It is suggested that all states should make such an attempt. An examination and revision of questionable statutory notice provisions in the light of the *Mullane* case would insure a better means of providing notice, and also alleviate threat of constitutional attack.

The form of such amendments undoubtedly will vary. The *Mullane*

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99. *Cf.* Pennington v. Fourth National Bank, *supra* note 97.

100. *Cf.* Pennington v. Fourth National Bank, *supra* note 97.

101. *Cf. In re* Pierce's Estate, 245 Iowa 25, 60 N.W.2d 897 (1953).

102. 339 U.S. 306 at 315, Justice Jackson emphatically stated: "It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. 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."

103. There is a factor which may serve to limit the future effect of the *Mullane* rule. Notice by publication has become deeply imbedded as the customary procedure in a variety of proceedings. In the past the Supreme Court has been hesitant to use the due process clause of the fourteenth amendment to invalidate time-honored state procedures for conveying notice. See Anderson National Bank v. Luckett, 321 U.S. 233, 244 (1944); Coler v. Exchange Bank, 280 U.S. 218 (1930); Ownbey v. Morgan, 256 U.S. 94 (1921). See also Weber v. Grand Lodge, 169 Fed. 527 (6th Cir. 1909).

104. ILL. REV. STAT. c. 3 § 216(a), and c. 110 § 14 (1955); IND. ANN. STAT. §§ 2-801, 6-112 (1955 Supp.); IOWA CODE ANN. RULES CIV. PROC. 60.1 (1951).

case clearly holds that notice by publication is permitted only as a last resort. Where a claimant is unknown, no choice of modes of constructive service is available. Publication is the only possible method of delivery. Where a claimant is known, a limited choice of modes is present. The mails, or an equivalent, must be employed. This is true whether the claimant is a resident or non-resident. The new statutory provision should outline this position clearly. The statute also should require, at a minimum, a showing of diligent inquiry to ascertain a claimant's whereabouts, leaving it to the discretion of the courts whether such diligence has been made out.

The recent decisions applying the *Mullane* standard bear out the conclusion that the *Mullane* case represents a significant change in the law of notice. It is a change which manifests the underlying purpose of the fourteenth amendment, and gives greater substance to the due process requirement of an opportunity to be heard. Moreover, it is judicial acknowledgment that the relaxation of jurisdictional requirements necessarily must be augmented by a more demanding standard of service of notice.

REAPPORTIONMENT IN THE INDIANA LEGISLATURE: JUDICIAL COMPULSION OF LEGISLATIVE DUTY

I. *Introduction*

The concept of equality of representation has become basic to the American ideal of representative government.[1] Yet the problem of securing and preserving such equality has plagued representative governments from an early time.[2] It is apparent that the makers of the Federal

1. Perhaps the classic evidence of this evolution is to be found in Stiglitz v. Schardien, 239 Ky. 799, 40 S.W.2d 315, 321 (1931), where the court says, "Equality of representation in the legislative bodies of the state is a right preservative of all other rights. The source of the laws that govern the daily lives of the people, the control of the public purse from which the money of the taxpayer is distributed, and the power to make and measure the levy of taxes, are so essential, all-inclusive, and vital that the consent of the governed ought to be obtained through representatives chosen at equal, free, and fair elections. If the principle of equality is denied, the spirit, purpose, and the very terms of the Constitution are emasculated. The failure to give a county or a district equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the very vitals of democracy itself."

2. Thus in England many cities that were established during the Industrial Revolution found themselves with representation in Parliament woefully disproportionate to their population. Rural regions, on the other hand, found themselves with the same number of representatives in Parliament as they had before the growth of the cities. Those regions retaining representatives out of all proportion to their population were called