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PROBATE PROCEEDINGS-ADMINISTRATION OF DECEDENTS' ESTATES- THE MULLANE CASE AND DUE PROCESS OF LAW

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PROBATE PROCEEDINGS—ADMINISTRATION OF DECEDENTS' ESTATES—THE MULLANE CASE AND DUE PROCESS OF LAW—In a recent decision by the United States Supreme Court, a new chapter has been added to the law on the requisites of notice under the due process clause of the Constitution. This case[1] held that publication of notice prior to a judicial settlement of accounts by the corporate trustee of a common trust fund does not afford due process of law to those beneficiaries with present interests whose addresses are known to the trustee. The court refused to classify the action as in rem or in personam but held that whatever its technical definition, the published notice was not reasonably calculated to reach known beneficiaries. Because of the apparent likeness between this trust accounting procedure and procedures employed by many of the states for the administration of decedents' estates, practitioners and writers are speculative as to whether the methods of notice now authorized by the various probate codes will be sufficient under the due process test applied in this case.[2]

I. *The Mullane Case*

In *Mullane v. Central Hanover Bank & Trust Co.*, a New York statute[3] providing the mechanism for the creation and investment of

[1] Mullane v. Central Hanover Bank & Trust Company, et al., 339 U.S. 306, 70 S.Ct. 652, decided April 24, 1950.

[2] Hayward, "The Effect of Mullane v. Central Hanover Bank and Trust Company Upon Publication of Notice in Iowa," 30 IOWA L. REV. 47 (1950); Tilley, "The Mullane Case; New Notice Requirements," 30 MICH. S.B.J. 12 (1951); 1950 WIS. L. REV. 688 (1950); 34 MARQ. L. REV. 120 (1950); 25 N.Y. UNIV. L. REV. 896 (1950); 25 WASH. L. REV. 282 (1950).

[3] N.Y. Banking Law, §100-c, L. 1937, c. 687 as amended by L. 1943, c. 602 and L. 1944, c. 158.

common trust funds by corporate trustees was considered by the Court. The legislation provided for an original accounting to be made within twelve to fifteen months after a fund was pooled and trienially thereafter. The corporate trustee involved in the case established such a common trust fund and gave notice of its original accounting to beneficiaries by publishing a citation in a local newspaper in accordance with the minimum requirements of the statute.[4] Appellant, who was appointed special guardian and attorney for the beneficiaries, made a special appearance and objected that the statutory notice was insufficient to give due process of law under the Fourteenth Amendment. Appellant's objections were overruled by the Surrogate and the trustee's accounts were approved.[5] The Surrogate's decree was affirmed by the Appellate Division of the Supreme Court of New York[6] and by the New York Court of Appeals.[7] Upon appeal to the United States Supreme Court, the judgment was reversed and the notice provisions of the statute were struck down as being inadequate to satisfy the Fourteenth Amendment.

Justice Jackson, writing for the majority of the Court,[8] refused to follow the general path of previous decisions in first classifying the proceeding as being one in personam or in rem as a prelude to defining the type of notice required by due process. He wrote:

> "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. But 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."[9]

After thus vaulting the in rem hurdle, he went on to evaluate the adequacy of published notice of hearings. It was concluded that publication alone is not a reasonable method of notification in such a proceeding and that something more is required. Although publication is

[4] N.Y. Banking Law, §100-c(12). The opinion recites the fact that the trustee had notified the beneficiaries of the original common investment by mail in accordance with Banking Law, §100-c(9). The trustee included a copy of the statute prescribing that notice be given of the original investment and the judicial settlements.

[5] 75 N.Y.S. (2d) 397 (1947). The opinion by the Surrogate relied on cases holding that publication of notice in probate proceedings is an adequate method of notice.

[6] In re Central Hanover Bank & Trust Co., 275 App. Div. 769, 88 N.Y.S. (2d) 907 (1949). Also see 274 App. Div. 772, 80 N.Y.S. (2d) 127 (1948).

[7] In re Central Hanover Bank & Trust Co., 299 N.Y. 697, 87 N.E. (2d) 73 (1949).

[8] Justice Burton registered a dissenting opinion on the ground that the Federal Constitution does not require more notice than the statute prescribed.

[9] 339 U.S. 306 at 312.

sufficient notice to those beneficiaries whose whereabouts are unknown to the trustee or whose interests are "either conjectural or future or, although they could be discovered upon investigation, do not, in due course of business come to the knowledge of the common trustee,"[10] the Court prescribed that known present beneficiaries of known places of residence must at least be given personal notice by ordinary mail.

A reading of this opinion leaves one seriously in doubt as to the possible extension which this new doctrine may be given by the Court in the future. The rejection of the in rem-in personam classification for determining the type of notice required surely suggests that the doctrine may have far-reaching effects. However, some of the language also suggests that the holding will not be projected into fields of procedure where published notice has long been the standard method. Justice Jackson stated:

> "Without disparaging the usefulness of distinctions between actions in rem and 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."[11]

Significant language is also to be found later in the opinion, where the Court discusses the balance of interests between the state and persons interested in the property:

> "The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us."[12]

Thus it seems clear that the Court does not intend that this case shall impose a wide-scale change in the notice requirements of proceedings in rem; it means to disturb none of the established rules on sufficiency of notice.

[10] Id. at 317.
[11] Id. at 312. (Italics added).
[12] Id. at 314.

II. *The In Rem Aspects of Probate Proceedings*

An action in rem is a proceeding directed against property rather than persons.[13] Its purpose is to determine the interests of all persons, known or unknown, in the res rather than the interests of specific persons. A state has the power to determine the title, disposition, and status of any property within its jurisdiction and a valid judgment in rem upon those matters will be effective to "bind the whole world." Even so, the power may not be arbitrarily exercised; it is limited by the assurances of the due process clause that notice of the suit and an opportunity to defend must be afforded to persons interested in the res. The standard of notice necessary to confer jurisdiction in rem need not equal that notice for actions in personam since the former notice does not function as a form of process for acquiring jurisdiction over the body of a defendant. Its object is merely to warn those interested in the property to appear and defend the property. In actions in personam, the Supreme Court has adhered to the rule that although personal service is the normal mode for acquiring personal jurisdiction, when personal service may be dispensed with, notice should be given by the method most likely to give the defendant actual notice of the suit.[14] In actions in rem, on the other hand, it has always been held that the type of notice need only be a reasonable form of notice, not the *most* reasonable method available.[15] Prior to the *Mullane* case, no particular form of notice was required to meet due process.[16] Various methods of notification have been utilized in the past, including publication, posting in public places, mailing of notice, and combinations of these forms.[17]

[13] See Fraser, "Actions In Rem," 34 CORN. L.Q. 29 (1948) for an excellent yet concise treatment of the facets of in rem jurisdiction. Also see WAPLES, PROCEEDINGS IN REM, Book I (1882); JUDGMENTS RESTATEMENT §32 (1942); 2 PAGE, WILLS §560 (1941); 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3d ed., §148 (1923).

[14] In McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343 (1917), published notice was held insufficient to support a personal judgment against a person who left the state intending not to return. The Court stated: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." Also see GOODRICH, CONFLICT OF LAWS, 3d ed., 193 (1949).

[15] Arndt v. Griggs, 134 U.S. 316, 10 S.Ct. 557 (1890); GOODRICH, CONFLICT OF LAWS, 3d ed., 171 (1949); Fraser, "Actions In Rem," 34 CORN. L. Q. 29 at 43 (1948). But see JUDGMENTS RESTATEMENT §32, comment *f* (1942) to the effect that although notice by publication or posting would be sufficient where claimants are unknown, a form of notice better calculated to reach them *may* be necessary; in People v. One 1941 Chrysler 6 Touring Sedan, (D.C. Cal. 1947) 180 P. (2d) 780, hearing den. 81 Cal. App. (2d) 18, 183 P. (2d) 368 (1947), a California district court of appeals applied the McDonald v. Mabee test, supra note 14, to an in rem action.

[16] Ibid. Also see WAPLES, PROCEEDING IN REM §23 (1882); 2 PAGE, WILLS §596 (1941).

[17] JUDGMENTS RESTATEMENT §32, comment *f* (1942); 2 PAGE, WILLS §§596, 597 (1941); Fuller et al. v. Sylvia et al., 243 Mass. 156, 137 N.E. 173 (1922).

Since the *Mullane* case holds that publication is reasonable notice to unknown persons but inadequate as to known beneficiaries, the case has brought the "most reasonable notice" test into the area of in rem jurisdiction, at least as to the specialized proceeding before the Court.

That proceedings for administering the estates of decedents are proceedings in rem is well settled.[18] The property left within a state by a decedent is under the power of the state and the state may assert jurisdiction in rem over it.[19] The state may provide procedures for its disposition and substantive law as to the successorship in interest.

> "The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claim, should at once devolve to a new and competent ownership; and consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual."[20]

The in rem nature of probate proceedings has been recognized by the Supreme Court in a long line of cases dating from a famous statement by Justice Baldwin in *Grignon's Lessee v. Astor et al.*:

> ". . . in cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties; but on a proceeding to sell the property of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land; . . . they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject-matter before them, without regard to the persons who may have an interest in it; all the world are parties. In the Orphans' Court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate, a purchaser claims not their title, but one paramount. . . . The estate passes to him by operation of law. . . . The sale is a proceeding *in rem* to

[18] Simes, "The Administration of a Decedent's Estate as a Proceeding In Rem," 43 MICH. L. REV. 675 at 676 (1945), published also in SIMES, MODEL PROBATE CODE 491 (1946); Fraser, "Actions In Rem," 34 CORN. L.Q. 29 at 35 (1948); 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., §148 (1923); WAPLES, PROCEEDINGS IN REM, c. 54 (1882); THOMPSON, WILLS, 3d ed., §194 (1947); ROOD, WILLS, 2d ed., §792a (1926).

[19] In Wilson v. Hartford Fire Ins. Co., (8th Cir. 1908) 164 F. 817 at 819 the court stated: "The property within the jurisdiction is the defendant, the executor or administrator is its representative, and all claiming any interest in that property under the deceased are parties to the proceeding."

[20] Case of Broderick's Will, 21 Wall. (88 U.S.) 503 at 509 (1874).

which all claiming under the intestate are parties, . . . which directs the title of the deceased."[21]

The court has never retreated from this logic.[22] On the other hand, statutory provisions for the pooling of trust funds by corporate trustees are of recent vintage.[23] The common law permitted no such devices because of the ancient prohibition against the mingling of separate trust funds. The early 1930's saw statutory sanction for common trust funds appear and, as the *Mullane* case suggests, more than thirty states have adopted such legislation.[24] Although the trustee operates under the supervision of the Surrogate by the New York statute, and is required to secure judicial settlement of his accounts in much the same manner as does an administrator or executor, this proceeding has never been defined by the Supreme Court as in rem or in personam. It was not difficult for the court to refuse to classify this newly created procedure and thereby to circumvent the result of imposing its new notice standard on in rem proceedings in which lesser notice has long been assumed to be reasonable.

III. *History and Due Process of Law*

Even a cursory examination of the development of American judicial procedures for administering decedents' estates demonstrates the extremely close relationship between them and the methods shaped by English jurisprudence. In seventeenth century England, the ecclesiastical courts had jurisdiction over the administration of the personal estates of deceased persons.[25] Under the practice of those courts, the Ordinary possessed authority to probate wills, grant letters testamentary and of administration, and to supervise in other ways the management

[21] 2 How. (43 U.S.) 319 at 338 (1844).

[22] Florentine v. Barton, 2 Wall. (69 U.S.) 210 (1864); Gaines v. Fuentes et al., 92 U.S. 10 (1875); Overby v. Gordon, 177 U.S. 214, 20 S.Ct. 603 (1899); Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580 (1909); Christianson v. King County, 239 U.S. 356, 36 S.Ct. 114 (1915); Riley et al., Executors v. New York Trust Co., Administrators, et al., 315 U.S. 343, 62 S.Ct. 608 (1942).

[23] See Fenninger, "Now Is The Time," 64 TRUST COMPANIES 415 (1937); 37 COL. L. REV. 1384 (1937); 3 BOGERT, TRUSTS AND TRUSTEES §677 (1946).

[24] A footnote by the Court in the principal case cites the common trust fund legislation enacted by the various jurisdictions.

[25] For discussions of the English traditions in general, see Simes, "The Organization of Probate Courts in America," 42 MICH. L. REV. 965, 43 MICH. L. REV. 113 (1944), published also in SIMES, MODEL PROBATE CODE 385 (1946); REPPY AND TOMPKINS, HISTORY OF WILLS, 7, 101, 112 (1928); 2 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3d ed., §§137-140 (1923); 2 POLLOCK AND MAITLAND, HISTORY OF THE ENGLISH LAW, 2d ed., 360-363, 331-348 (1911); 2 PAGE, WILLS §§562, 565 (1941).

and disposition of the estate. A will could be admitted to probate before the Ordinary either in common form or solemn form. Common form was an ex parte proceeding, consisting of the executor's presentation of the will and his testifying that it was duly executed by the decedent. No notice was given of the proceeding and it was essentially an administrative function, speedily accomplished. English law provided a thirty year period during which the probate could be contested by interested persons. When a caveat was presented, the probate of the will was contested in a formal hearing in solemn form wherein citations were issued to heirs, legatees, and devisees. This procedure was carried to the American colonies and was employed in the system of probate courts which came to be established in the states.[26] The distinction between probate in common form and solemn form has been preserved in several states up to the present day and differs little from the procedures before the Ordinaries in England.[27] Other states made various changes in the procedures, such as requiring notice to be issued before proving the will.[28] One of the commonly adopted deviations was that which provided for notice by publication prior to the hearing to prove the will and a period after probate during which a will contest might be instituted.

In the early English practice it seems that the granting of letters of administration for the estate of an intestate was an extremely informal procedure accomplished without formal notice when an application was made by the person entitled by law to the administration. This procedure was also adopted in many of the states, while others have required some form of notice to be given of the application for letters.[29]

[26] A detailed analysis of the assumption of the ecclesiastical procedures by American courts is to be found in REPPY AND TOMPKINS, HISTORY OF WILLS 159 et seq. (1928); 2 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3d ed., §§141, 216, 217 (1923); also see In The Matter of the Probate of The Will of David Goldsticker, Deceased, 192 N.Y. 35, 84 S.E. 581 (1908) and Hubbard et al. v. Hubbard, 7 Ore. 42 (1879).

[27] Williams v. Crabb et al., (7th Cir. 1902) 117 F. 193; Mills et al. v. Mills, 195 N.C. 595, 143 S.E. 130 (1928); Irwin v. Peek et al., 171 Ga. 375, 155 S.E. 515 (1930); Wilder v. Federal Land Bank of Columbia et al., 182 Ga. 551, 186 S.E. 196 (1936); Ropar et al. v. Ropar et al., 78 W.Va. 228, 88 S.E. 834 (1916); In re Knutson's Will, 149 Ore. 467, 41 P. (2d) 793 (1935); Dunn v. Bradley et al., 175 Ark. 182, 299 S.W. 370 (1927); Security Trust Co. et al. v. Swope, 274 Ky. 99, 118 S.W. (2d) 200 (1938). Also see 2 PAGE, WILLS §569 (1941); 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., §§215, 216 (1923).

[28] Simes, "The Administration of a Decedent's Estate as a Proceeding In Rem," 43 MICH. L. REV. 675 at 693 (1945), also published in SIMES, MODEL PROBATE CODE 512 (1946); 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3d ed., §§215-217 (1923).

[29] Simes, "The Organization of the Probate Courts in America," 42 MICH. L. REV. 965 at 969 (1944), also published in SIMES, MODEL PROBATE CODE 389 (1946); 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3d ed., §§243, 262, 263 (1923).

It is apparent, then, that the English procedures have formed the core of the American probate law. The common law theories on probate matters have been transplanted into the American statutes. Some of the states have changed the ecclesiastical practices but little, while extensive revisions have been thought expedient in other states. Notice by publication has been utilized quite generally in probate procedures and this method of citation has become deeply imbedded.

Upon considering the theory of due process of law which has been outlined in many decisions by the Supreme Court, it is extremely unlikely that the traditional procedures which had their beginnings in England can be construed as a denial of due process of law.

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. . . . A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law. . . . However desirable it is that old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform."[30]

Many reiterations of this definition of the due process clause are found in later opinions by the Court.[31] Holmes said: "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ."[32] Cardozo recognized that the due process clause "keeps its exactions within the bounds of long inherited traditions."[33]

In 1944, the Court approved an ancient Kentucky statute prescrib-

[30] Ownbey v. Morgan et al., Executors of Morgan, 256 U.S. 94 at 110, 41 S.Ct. 433 (1921).

[31] Otis Company v. Ludlow Mfg. Co., 201 U.S. 140, 26 S.Ct. 353 (1906); Jackson v. Rosenbaum Company, 260 U.S. 22, 43 S.Ct. 9 (1922); The Corn Exchange Bank v. Coler, 280 U.S. 218, 50 S.Ct. 94 (1930); Greenough et al., Trustees v. Tax Assessors of Newport et al., 331 U.S. 486 at 499, 67 S.Ct. 1400 (1947); Foster et al. v. Illinois, 332 U.S. 134, 67 S.Ct. 1716 (1947). Also see Murray's Lessee et al. v. Hoboken Land and Improvement Co., 18 How. (59 U.S.) 272 (1855) which deals with the Fifth Amendment.

[32] Jackson v. Rosenbaum Co., 260 U.S. 22 at 31, 43 S.Ct. 9 (1922).

[33] Coler v. The Corn Exchange Bank, 250 N.Y. 136 at 143, 164 N.E. 882 (1928), affirmed 280 U.S. 218, 50 S.Ct. 94 (1930).

ing the posting of notice of abandoned bank deposits. The Court stated:

> "Posting on the court house door as a method of giving notice of proceedings affecting property within the county, is an ancient one and is time-honored in Kentucky. . . . The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process for 'Not lightly vacated is the verdict of quiescent years.' "[34]

It is clear from a resume of the cases that the Court does not view the due process clause as a completely dynamic doctrine. Its function is negative and its command does not invalidate aged procedures, practiced since antiquity. A statute which retains the procedures of probate in common and solemn form, therefore, certainly cannot be held to deprive persons of the constitutional guaranties of the Fourteenth Amendment. What other procedure in our law can better qualify as "a procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs"?[35] Nor can a statute prescribing notice by publication in probate be said to violate the Fourteenth Amendment if it has been long practiced in that state. The due process clause is not a yardstick which the Court may use upon every legal device to require constant adjustment to the prevailing standard of justice and reasonableness. Toward new devices, its command is much more exacting than toward those procedures which have long been considered effective to accomplish substantial justice.

IV. *The Court's Attitude Toward Notice in Probate Proceedings*

If, as Justice Jackson stated, the Court is unwilling to disturb the settled rules on the amount of notice required in a particular proceeding, it is of prime importance to ferret out the Court's past expressions on the notice afforded by probate proceedings. The reports show meager evidence of its attention to this constitutional question, most probably because the sufficiency of the modes of notice employed by the various states was never seriously challenged as inadequate. There are some significant expressions by the Supreme Court, sometimes in the form of dicta, which may well be considered to demonstrate that the members

[34] Anderson National Bank et al. v. Luckett, Commissioner of Revenue, et al., 321 U.S. 233 at 244, 64 S.Ct. 599 (1944). Chief Justice Stone quoted Cardozo's opinion in Coler v. The Corn Exchange Bank, 250 N.Y. 136, 164 N.E. 882 (1928).

[35] Supra note 30.

of that bench have regarded the American system of probate law as meeting all the demands of due process of law.

In *Farrell v. O'Brien*,[36] the Court squarely held that probate in common form followed by a one year period during which the will might be contested is a procedure adequate under the Fourteenth Amendment. In that case, the heir-at-law of a decedent challenged the probate of a nuncupative will on the ground that no notice was given to them as required by statute. Justice White said:

> "As the theory of the bill was, and as undoubtedly it was also the law of Washington, that despite the mere preliminary admission to probate, there was full right to assail the existence of the will and its probate, which was not lost by the failure to give notice, it must follow that such omission did not deprive of the right to a hearing, which right was adequately conferred by the statute, wholly irrespective of whether notice on the preliminary probate had or had not been given. Indeed the contention made on this subject amounts to asserting that every state law which provides for a probate in common form is repugnant to the due process clause of the constitution even although under the state statutes full and adequate remedies are provided by which interested parties may subsequently within a time prescribed by law, be heard in the probate proceedings to question the existence of a will or its probate. When the result of the proposition is thus ascertained, it becomes obvious that it . . . is so in conflict with the adjudications of this court . . . that it is devoid of all foundation in reason. . . ."[37]

In an earlier case,[38] the Court had faced the problem whether or not the probate of a will by a Virginia court was conclusive in another jurisdiction when the Virginia statute permitted probate in common form and a seven year contest period. As to the conclusiveness of the probate in Virginia, the Court stated:

> "It does not appear that the validity of the will of Moore, as probated in 1804 in the Hustings Court of Petersburg (Virginia), was ever afterwards contested in a Court of Chancery in Virginia. Its probate must, therefore, be deemed conclusive, so far as that state is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind."[39]

[36] 199 U.S. 89, 25 S.Ct. 727 (1905).
[37] Id. at 118.
[38] Robertson and Others v. Pickrell and Others, 109 U.S. 608, 3 S.Ct. 407 (1883).
[39] Id. at 611.

This statement, although dictum, evidences the Court's assumption that ex parte proceedings were adequate and standard procedures in the area of probate law.[40]

In *Bent v. Thompson*,[41] the Court once again considered the statutes of a state where common form probate was practiced. There, a petition to set aside the probate of a will was filed more than twenty years after the will had been proved. The New Mexico statute permitted an ex parte probate after the fashion of the civil law. The case held that the general statute of limitations applied to the probate decree and barred the contest after four years. In commenting on the procedure, the Court was of the opinion that the New Mexico legislature had the power to create the probate procedures for the state and that the enactment which the legislature had provided gave jurisdiction to the probate courts to admit wills upon ex parte hearings.[42]

As it has been heretofore mentioned, many of the American jurisdictions amended the ecclesiastical practice by requiring notice to be given by various statutory methods before the will could be proved. Very often the citation was permitted by publication of an advertisement in a newspaper or legal periodical of local circulation.[43] The often cited *Case of Broderick's Will*,[44] evaluated a California statute wherein notice of the hearing to probate a will should be given by citation to heirs residing in the county and by publication or posting to notify all other interested persons. The statute further provided a one-year period during which a contest might be brought by those not appearing at the original probate. The heirs-at-law of Senator Broderick instituted an equity suit to set aside the probate of his will and to have it declared a forgery. The complainants, residents of New South Wales, challenged the probate because they had received no actual notice of the probate until the one-year period had passed. Justice Bradley, after setting out the notice provisions of the statute,

[40] Also see Darby's Lessee v. Mayor and another, 10 Wheat. (23 U.S.) 465 at 468 (1825); Ellis v. Davis, 109 U.S. 485, 3 S.Ct. 327 (1883); Simmons v. Saul, 138 U.S. 439 at 453, 11 S.Ct. 369 (1891).

[41] 138 U.S. 114, 11 S.Ct. 238 (1890).

[42] Ibid. The Court stated at page 123: ". . . we are of opinion that the practice and procedure of the Probate Courts were matters of statutory regulation; that the probate judge had jurisdiction to admit wills to probate by receiving the evidence of the witnesses; and that his judgment was valid and, although reviewable on appeal, was conclusive unless appealed from and reversed." However, the Court qualified its opinion by stating that the record did not show that the heir was not cited to appear.

[43] 2 PAGE, WILLS §597 (1941); THOMPSON, WILLS, 3d ed., §194 (1947).

[44] 21 Wall. (88 U.S.) 503 (1874).

refuted the complainant's argument with an unequivocal approval of the California practice:

> "In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth. . . .
>
> "The only excuse attempted to be offered is, that they lived in a secluded region and did not hear of his death, or of the probate proceedings. If this excuse could prevail it would unsettle all proceedings in rem. . . .
>
> "Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem. . . ."[45]

In 1887, the Court had before it a case in which an ancillary probate proceedings was instituted in Michigan and the statutory notice of the hearing was given by publication. The Court stated:

> "We can see no defect of jurisdiction in the probate court of Marquette County (Michigan) sufficient to justify the rejection of this copy of the will, or to impeach the action of the probate judge in ordering it to be recorded. There is in the proceedings the full recital of the production of the copy of the will, and that the order for the hearing of the petition, made on the seventh day of October 'had been duly published as therein directed, whereby all parties interested in the premises were duly notified of said hearing'. . . Unless the necessary parties in such cases could be brought before the court by publication there would be in many cases an impossibility of doing it at all."[46]

It is to be noted that this case involved an ancillary probate and it is possible that all of the parties interested in the estate were nonresidents of Michigan. The Court's approval of published notice, however, was not qualified by distinctions between known and unknown persons, or residents and nonresidents. It is another example that the Court has always considered publication to be a valid method of notifying the heirs and legatees in a probate proceeding.[47] Innumerable

[45] Id. at 517-519.

[46] Culbertson v. H. Witbeck Co., 127 U.S. 326 at 333, 8 S.Ct. 1136 (1888).

[47] In Overby v. Gordon, 177 U.S. 214, 20 S.Ct. 603 (1900), the Georgia code provided that the Ordinary shall give notice of applications for grants of letters of administra-

decisions by the lower federal courts[48] and by the state courts[49] attest that this view has been universally accepted for many years.

In *Michigan Trust Company v. Ferry*,[50] the Supreme Court held that it was within the power of a state to make the administration of the estate of a decedent a single proceeding and that after notice has been given at the outset, the executor may be subjected to the order of the court until the estate is distributed. Therefore, it seems that when a state provides such a connected proceeding, notice at the outset should be sufficient to meet the requirements of due process of law. After original notice is given, interested persons should be charged with the duty of following the subsequent stages of the administration. Nevertheless, another development of American probate legislation, in several of the states, has been to require notice be given of later steps such as the settlement of the accounts of an executor or administrator, the sale of property from the estate, and the final distribution.[51] Publication is the popular method for giving notice of these stages and the Supreme Court has had occasion to weigh its validity.

In *Christianson v. King County*,[52] it was contended that a Washington procedure deprived heirs of an intestate of due process of law

tion by publication. The opinion states: "We are of the opinion that the De Kalb County (Georgia) Court possessed the power to determine the question of domicil of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such a fact in a proceeding in rem."

[48] In Henricksen et al. v. Baker-Boyer Nat. Bank, (9th Cir. 1944) 139 F. (2d) 877 at 881, the court said: "It has long been settled that a probate proceeding is one in rem, and that if the statutory provisions regarding constructive service and notice are observed, it is binding upon 'all persons in the world.' Seventy years ago the Supreme Court definitely endorsed the principle [quoting Case of Broderick's Will, supra note 44]. . . . That constructive service is sufficient in proceedings that are in rem is hornbook law, established many decades ago by Pennoyer v. Neff. . . ." Also see Christianson v. King County, (9th Cir. 1913) 203 F. 894 at 901 and Latta et al. v. Western Investment Co. et al, (9th Cir. 1949) 173 F. (2d) 99, cert. den. 337 U.S. 940, 69 S.Ct. 1516 (1949), rehearing den. 338 U.S. 840, 70 S.Ct. 35 (1949), 338 U.S. 863, 70 S.Ct. 96 (1949), 338 U.S. 899, 70 S.Ct. 181 (1949).

[49] Everett v. Wing, 103 Vt. 488, 156 A. 393 (1931) cert. den. 284 U.S. 690, 52 S.Ct. 266 (1932); Donnell v. Goss, 269 Mass. 214, 169 N.E. 150 (1929); In re Kelly's Estate, 103 Neb. 513, 172 N.W. 758 (1919), rehearing den. 103 Neb. 513, 175 N.W. 653 (1919); In re Estate of Sicker, 89 Neb. 216, 131 N.W. 204 (1911); Krohn v. Hirsch, 81 Wash. 222, 142 P. 647 (1914); 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3d ed., §148 (1923); THOMPSON, WILLS, 3d ed., §196 (1947); 35 L.R.A. (n.s.) 1058.

[50] 228 U.S. 346 at 353, 33 S.Ct. 550 (1913); also see Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580 (1909).

[51] Simes, "The Administration of a Decedent's Estate as a Proceeding In Rem," 43 MICH. L. REV. 675 at 695 (1945), also published in SIMES, MODEL PROBATE CODE 515 (1946).

[52] 239 U.S. 356, 36 S.Ct. 114 (1915).

in that notice of the hearing for the administrator's final accounting and distribution was given by publication after a very informal proceeding wherein the letters were granted. The Court held that the probate decree which settled the accounts, found that there were no heirs, and declared the property escheated did not contravene the Fourteenth Amendment. It held that notice by publication was an appropriate form of notice to interested persons.[53]

Goodrich v. Ferris[54] was a case wherein a bill was filed to set aside an executor's final account and a distribution decree entered seven years before. The nonresident complainants argued that the whole proceedings were absolutely wanting in due process of law because of the absence of express notice to them and because the statute provided insufficient notice of the proceedings. The California probate code permitted notice of the final settlement and distribution to be given by publication or posting. The Court, holding that the notice provisions were not unconstitutional, said:

> "The distribution of the estate of Williams was but an incident of the proceeding prescribed by the laws of California in respect to the administration of an estate in the custody of one of its probate courts. Under such circumstances, therefore, and putting aside the question of whether or not the State of California did or did not possess arbitrary power in respect to the character and length of notice to be given of the various steps in the administration of an estate in the custody of its courts, we hold that the claim that the ten days statutory notice of the time appointed for the settlement of the final account of the executor and for action upon the petition for final distribution of the Williams estate was so unreasonable as to be wanting in due process of law, was clearly unsubstantial and devoid of merit, and furnished no support for the contention that rights under the Constitution of the United States had been violated. . . ."[55]

Thus, throughout the cases in which the Court tested the validity of publication in probate proceedings, there is to be found consistent approval. The conclusion is inescapable that the Court considered that

[53] Ibid. At page 372 of the opinion, Justice Hughes stated: "It is apparent that there was no deprivation of property without due process of law. The court, after appropriate notice, did determine that there were no heirs and its decree being the act of a court of competent jurisdiction under a valid statute bound all the world including the plaintiff in error."

[54] 214 U.S. 71, 29 S.Ct. 580 (1909).

[55] Id. at 81.

the nature of the procedures and the interest of the state in closing estates justified this constructive notice.

V. Conclusion

Upon considering the similarities between the judicial supervision of New York common fund trustees and that of executors and administrators, the holding of the *Mullane* case would seem to apply equally to both on the question of sufficiency of notice. However, too many decisions of the Court stand in the way of such a result. It is well settled that probate proceedings are in rem. In the cases where the probate notice problem was brought before the Court, the proceeding was first classified as in rem and then the Court upheld the type of notice afforded on the ground that the state has a prominent interest in closing the estate. Indeed, the Court has held that an ex parte probate followed by a one-year period for contest affords due process of law. It has held that publication of notice prior to probate with a one-year period for contest is valid. It has registered its approval of an ex parte procedure for granting letters of administration, and of publication of notice in later stages of probate proceedings. All the cases demonstrate that the Court has never doubted the constitutionality of these procedures.

Furthermore, the Supreme Court has construed the Fourteenth Amendment not to overturn aged practices. Although it may be well for the states to adjust their judicial procedures to the prevailing standards, this adjustment is left to the legislatures to accomplish; the Fourteenth Amendment does not force such revision. So long as a state wishes to retain the common form-solemn form procedures, the Constitution is no obstacle. Nor should the Constitution overturn statutes providing notice by posting or publication since these methods have long been used in this country. Since statutes requiring publication of notice generally provide a period for contest, they should certainly not be held more unjust than probate in common form.

Policy-wise, ex parte proceedings or those with published notice are not inconsistent with modern concepts of justice. By far the greater number of estates are administered with no necessity for a full scale trial of fact issues; seldom is there "contentious business" for determination. Ex parte proceedings afford a speedy, inexpensive, and efficient method of handling estates with the least amount of waste caused by a delayed administration. If a period for contesting the administration is prescribed, interested parties have an opportunity to challenge the action of the court or the person to whom the administration was en-

trusted. The long adherence to ex parte procedures is evidence of the fact that the efficiency of the method offsets the hardship presented in a small number of cases where heirs or legatees fail to learn of a decedent's death within the contest period.

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