Marquette Law Review

Volume 34
Issue 2 *Fall 1950*

Article 4

Constitutional Law - Sufficiency of Notice Under Requirement of Due Process

Eugene F. Kobey

COMMENTS

CONSTITUTIONAL LAW—SUFFICIENCY OF NOTICE UNDER REQUIREMENTS OF DUE PROCESS

Previous to *Mullane v. Central Hanover Bank and Trust Company*,[1] notice by publication was the only notice given in many probate and related proceedings. This decision undoubtedly will require changes in notice procedure.

The Central Hanover Bank and Trust Company established a common trust fund. One hundred and thirteen trusts participated in the common trust fund, the gross capital of which amounted to nearly three million dollars. In the proceeding settling the trustee's account, the only notice given resident and non-resident beneficiaries was by publication in a local newspaper. Mullane was appointed guardian and attorney for all beneficiaries not appearing. He objected that the notice and the statutory provisions[2] governing notice were inadequate to afford due process under the Fourteenth Amendment, and argued that the New York Court was without jurisdiction to render a final and binding decree.

The Supreme Court of the United States held that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their claims and objections.[3] Where the names and addresses are at hand, the reasons disappear for resort to means less likely than the mails to apprise the beneficiaries of the pendency of the action. The trustee had on its books the names and addresses of the income beneficiaries, and the Court found no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by mail to the record addresses.[4]

The Court drew some distinctions between *in rem* and *in personam* actions. Some actions have been classed *in rem* because personal service was not required, and others have held personal service not required because the action was *in rem*. Without unduly criticising the usefulnes of the distinctions between *in rem* and *in personam* actions, the Court held notice to be insufficient regardless of the class of the particular action.

---

[1] 70 S.Ct. 652 (1950).
[2] Banking Law of New York, § et seq., 100-c subds. 9, 12.
[3] See Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339 (1940); Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779 (1913).
[4] Compare Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259 (1928), with Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927).

Judgments *in personam,* without personal service, obtained *ex parte* against parties, if upheld and enforced would be subject to abuse. A proceeding without proper notice may cut off rights to have a trustee answer for negligence, or may diminish interests by fees and expenses to someone acting for the beneficiaries, but without their knowledge or authority. Beneficiaries certainly may be deprived of property rights, thus the notice and hearing must meet the standards of due process.

As far back as *Pennoyer v. Neff*[5] the Supreme Court said that a personal judgment is without validity if rendered against persons not personally notified. Substituted service and notification by publication is sufficient when real property is under control of the court; when the action is *in personam,* such service by publication is ineffectual for any purpose.

Even where a proceeding may be brought *in rem* or *quasi in rem,* service by publication against a non-resident cannot support a personal judgment. Statutes declaring such judgments binding have been declared unconstitutional.[6] A judgment *in rem* cannot be made the basis of a judgment *in personam,* at least without giving the notice required for a judgment *in personam.*[7]

The *Mullane* case is startling and revolutionary to the Wisconsin lawyer. Many lawyers in matters of probate, trust, and related proceeding have listed heirs, beneficiaries, or all interested parties and published in a legal periodical. This was the only notice given in many cases and was allowed by the Courts. Under Wisconsin Statutes[8] the court *may* order copies of notice mailed to known interested parties, but is not required to do so. Statutes controlling other proceedings refer to the same notice statute.[9]

In future proceedings notice by mail to all interested known parties will be necessary. Published notice is sufficient for those whose interests and addresses are unknown. It seems plausible that the rule of the *Mullane* case should apply to all trust, probate and similar proceedings. The statutes and proceedings must be construed and conducted according to the requirements of due process set forth by the Supreme Court in the *Mullane* case.

Past proceedings may also be affected by this decision. Many decrees have been issued where the only notice given known interested parties was by publication. These proceedings may be reopened. A curative or a limitation statute is needed to settle arising difficulties regarding such proceedings.

---

[5] 95 U.S. 714, 24 L.Ed. 563 (1877).
[6] Smith-Hurd Stats., c. 120, §§ 812, 816, 818, 820, 822 (Ill.).
[7] Barnett v. Cook County, 373 Ill. 516, 26 N.E. (2d) 862 (1940).
[8] Wis. Stat. § 324.18 (1949).
[9] Wis. Stats. §§ 310.04, 315.03, 316.35, 317.11, 318.12 (1949).

A curative statute is a retrospective law passed by a legislature which affects past cases and existing rights.[10] A curative act may not be constitutional. The legislature can cure by subsequent legislation defects or irregularities which it might have dispensed with or made immaterial by prior law. It is familiar law that the legislature may validate an act or proceeding only if it could have authorized it in the first instance.[11] Curative statutes are particularly applicable to irregularities in procedure, but they are ineffectual where want of authority or jurisdiction to act is lacking. Jurisdictional defects cannot be cured. Generally the want of sufficient notice to satisfy due process is a jurisdictional defect which cannot be cured.[12]

The legislature may enact a statute of limitations to halt contest of defective proceedings if a reasonable time is allowed for the assertion of rights before the statute operates as a bar. The principle mentioned above ts to curative statutes does not necessarily apply to a statute of limitations. Such a statue will bar any right if a reasonable time is afforded an interested party within which to enforce his right. Such a statute relating to these defective proceedings would seem not to violate any requirements of due process set forth by the Supreme Court.[13]

There are various holdings as to what periods of limitation have been held reasonable and unreasonable.[14] The Supreme Court has held a six month limitation to be reasonable in some cases.[15] The majority of cases listed in the A.L.R. notes cited infer that a six month limitation would not be unreasonable or repugnant to any provision of the Constitution of the United States. If all actions contesting closed proceedings where there were defects in sufficiency of notice were subject to a six month limitation statute, it would seem to be a reasonable limitation and should cure the proceedings made defective by the decision in the *Mullane* case. For sufficient notice in future proceedings the word *may* in our Wisconsin notice statute[16] should be changed to *shall.*

EUGENE F. KOBEY

---

[10] 140 A.L.R. 959.
[11] Kimball v. Town of Rosendale, 42 Wis. 407, 24 Am. Rep. 421 (1877); State ex rel Neacy v. Milwaukee, 150 Wis. 616, 138 N.W. 76 (1912); State ex rel Ervin v. County Board, 163 Wis. 577, 158 N.W. 338 (1916).
[12] See 128 A.L.R. 1405; 134 A.L.R. 791; 171 A.L.R. 1352.
[13] See Swanson v. Pontralo, 238 Ia. 297, 27 N.W. (2d) 21 (1947).
[14] 49 A.L.R. 1263; 120 A.L.R. 758.
[15] Wheller v. Jackson, 137 U.S. 245, 11 S.Ct. 76 (1890); Turner v. New York, 168 U.S. 90, 18 S.Ct. 38 (1897).
[16] Supra, Note 8.