

The Administration of a Decedent's Estate as a Proceeding in Rem* ·

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FOR over a century American courts and text writers have referred to the administration of a decedent's estate as a proceeding in rem. Indeed, it has recently been asserted that a probate proceeding is "universally recognized as a proceeding in rem."¹ But more cautious persons have been content to suggest that it is at least "quasi in rem,"² or have carefully skirted the fog which is wont to envelop this area of the law and given it silent treatment. Thus, the American Law Institute *Restatement of the Law of Judgments* (which purports to include the law of probate decrees³) gives examples of judgments in rem,⁴ and mentions in that connection judgments of a court of admiralty, judgments under land registration statutes and proceedings for forfeiture of things used in violation of law, but does not refer to probate decrees. At a later point, after positively asserting that an admiralty proceeding to enforce a maritime lien on a vessel, or a proceeding for a registration of title to land is in rem, it continues with this guarded observation:⁵ "So, also,

* Originally printed as an article in 43 Mich. L. Rev. 675 (1945).

¹ Hopkins, "The Extraterritorial Effect of Probate Decrees," 53 YALE L. J. 221 at 225 (1944). A similar statement is made in Carey, "A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedents' Estates," 24 ILL. L. REV. 44 at 49 (1929).

² "The administration of an estate under the probate jurisdiction of a court, which involves the appointment of an administrator and culminates in a final decree of distribution, is a proceeding in rem, or, as said by some, quasi in rem." Carter v. Frahm, 31 S. D. 379 at 392, 141 N. W. 370 (1913). And see Campbell v. Drais, 125 Cal. 253 at 258, 57 P. 994 (1899).

³ "The Restatement of this Subject deals also with the determination of the court in other judicial proceedings, such as proceedings in admiralty, or in probate, or for divorce." RESTATEMENT, JUDGMENTS (1942) 3.

⁴ RESTATEMENT, JUDGMENTS (1942) 6, 7.

⁵ RESTATEMENT, JUDGMENTS (1942) § 32.

probate courts, acting within their jurisdiction, can give judgments in rem, binding on all the world."

In view of the uncertainty which still exists, this paper proposes to consider just what is meant by the proposition that the administration of a decedent's estate is a proceeding in rem. Since the *Restatement of Judgments* is believed to be the only satisfactory rationalization of our law of res judicata, and since the writer has to some extent followed its approach to problems in this field of the law, this discussion may be regarded as a kind of unsolicited appendix to that *Restatement*. Moreover, like the *Restatement of Judgments*, this paper deals primarily with the effect of decrees in the state in which they are rendered. While decisions involving problems in the field of conflict of laws as to the effect of foreign probate decrees cannot be ignored, this discussion does not address itself to an analysis of those problems. Indeed, it may be suggested that there has been, on the part of some writers and a few courts, altogether too much of a desire to shape the concept of a probate proceeding in rem with a view to permitting a court to administer assets outside the jurisdiction rather than for the purpose of attaining the simpler objective of avoiding a trial of the same cause or issue twice. In other words, it is believed that the legal implications which arise from affixing the in rem label to probate proceedings should be worked out primarily in accordance with the principles of res judicata and not distorted to enable the court to exercise jurisdiction over assets in another state, however laudable it may be to accomplish that result.

This discussion will be directed to the consideration of three questions. First, from a consideration of the American decisions on the subject, can it be concluded that the administration of a decedent's estate is a proceeding in rem? Second, if it is an in rem proceeding, what notice is necessary to prevent collateral attack on decrees rendered as a part of the proceeding? Third, what persons and what things are bound by a

valid decree in rem rendered in a proceeding for the administration of a decedent's estate?

I. ARE PROCEEDINGS FOR ADMINISTRATION IN REM?

It must be recognized that the proceeding in rem is but a procedural device arising from judicial necessity, and that, whatever form it may take, persons and not things are the interested parties. Nevertheless, if we are to determine whether probate proceedings are in rem, we must know what is meant by a proceeding in rem. For this purpose we can do no better than to quote from the *Restatement of Judgments*:⁶

"Where a thing is subject to the power of a State, a proceeding may be brought to affect the interests in the thing not merely of particular persons but of all persons in the world. Such a proceeding is called a proceeding in rem, as distinguished from a proceeding brought to affect the interests in the thing of particular persons only, which is called a proceeding quasi in rem. . . .

"Proceedings quasi in rem are of two types. In the first type the plaintiff asserts an interest in property and seeks to have his interest established as against the claim of a designated person or designated persons. . . .

"In the second type of proceeding quasi in rem the plaintiff does not assert that he has an interest in the property, but asserts a claim against the defendant personally, and seeks to compel to the satisfaction of his claim the application of property of the defendant, by attachment or garnishment."

These statements make it clear that a proceeding in rem has at least two characteristics: first, it concerns a thing within the jurisdiction of the court; and, second, its decrees determine interests of all persons in the thing. If the proceeding is quasi in rem, the first characteristic is present; but, unlike the proceeding in rem, its decrees determine only the interests of one or more specific parties in the thing.

⁶ RESTATEMENT, JUDGMENTS (1942) § 32, comment a.

Before applying these definitions to the American case law on the question of the *in rem* character of probate proceedings, it is desirable to consider briefly just what was the character of English proceedings relative to the administration of decedents' estates. Nowhere in the early English cases has been found a categorical statement that administration proceedings in ecclesiastical courts were *in rem*. However, in the first edition of Smith's *Leading Cases*, the author, in commenting on the *Duchess of Kingston's Case*, makes this observation:⁷

"Judgments of the *courts ecclesiastical* are of two sorts—*in rem* and *inter partes*. A grant of *probate* or *administration* is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, such grant of probate or administration is conclusive against all the world."

Attention should also be called to the elaborate review of the English authorities in Hargrave's *Law Tracts*,⁸ in which the author seeks to show that a grant of administration or the probate of a will is conclusive in the courts of law and equity. He does not state that it is *in rem*, but his whole argument implies that.

It must, however, be conceded that administration in equity⁹ could scarcely have been thought of as *in rem* in view of the fact that courts of equity are almost universally regarded as acting in *personam*. Since there was no probate of wills of land in England prior to the middle of the nineteenth century, it is clear that the actions commonly brought to test the validity of devises,—namely, trespass or ejectment—were in *personam*. Doubtless, also actions in courts of law

⁷ 30 LAW LIBRARY (1837-1840) 110. This statement also appears in later editions of the work and is cited by American courts.

⁸ HARGRAVE'S LAW TRACTS (1787) 457.

⁹ In general as to the administration of a decedent's estate in equity, see Atkinson, "Brief History of English Testamentary Jurisdiction," 8 MO. L. REV. 107 at 118 (1943); LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) arts. VI and VII; MAITLAND, EQUITY (rev. ed. 1936) 248-257.

against the executor or administrator in his representative capacity to satisfy contract claims against the decedent were in personam.

In order to give any adequate picture of the American case law on the question of whether a proceeding to administer a decedent's estate is in rem, it is necessary to consider one by one the various important decrees normally rendered in the course of an administration. Thus the modern American probate court may, in the course of the administration, admit a will to probate, grant letters to personal representatives, sell real or personal property to pay debts or legacies, pass upon creditors' claims, settle the accounts of the personal representative, decree distribution of the estate, and perhaps render final orders as to still other matters. Hence, it is entirely possible that some of these decrees may have strictly in rem operation and that others do not.

That the order admitting the will to probate is in rem is universally concluded.¹⁰ This question has arisen in a variety

¹⁰ *Hall's Heirs v. Hall*, 47 Ala. 290 (1872); *Dickey v. Vann*, 81 Ala. 425, 8 So. 195 (1886); *McCann v. Ellis*, 172 Ala. 60, 55 So. 303 (1911); *Griffin v. Milligan*, 177 Ala. 57, 58 So. 257 (1912); *Estate of Carpenter*, 127 Cal. 582, 60 P. 162 (1900); *Estate of Relph*, 192 Cal. 451, 221 P. 361 (1923); *Farmers' & Merchants' Nat. Bank of Los Angeles v. Superior Court* (Cal. App. 1944) 148 P. (2d) 445, aff'd on rehearing, 150 P. (2d) 241; *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337 (1910); *In re Will of Storey*, 20 Ill. App. 183 (1886); *Crippen v. Dexter*, 79 Mass. 330 (1859); *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265 (1886); *Bonnemort v. Gill*, 167 Mass. 338, 45 N. E. 768 (1897); *In re Estate of Meredith*, 275 Mich. 278, 266 N. W. 351 (1936); *Woodville v. Pizzati*, 119 Miss. 442, 81 So. 127 (1919); *State ex rel. Mitchell v. Gideon*, 215 Mo. App. 46, 237 S. W. 220 (1922); *State ex rel. Ruef v. District Court*, 34 Mont. 96, 85 P. 866 (1906); *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902 (1913); *Bogardus v. Clark*, 4 Paige (N. Y.) 623 (1834); *Matter of Horton*, 217 N. Y. 363, 111 N. E. 1066 (1916); *In re Wohlgenuth*, 110 App. Div. 644, 97 N. Y. S. 367 (1906); *In re Eno's Will*, 94 Misc. 100, 157 N. Y. S. 553 (1916), aff'd 172 App. Div. 124, 158 N. Y. S. 234 (1916); *Olney v. Angell*, 5 R. I. 198 (1858); *Saunders v. Link*, 114 Va. 285, 76 S. E. 327 (1912); *Culpeper Natl. Bank v. Morris*, 168 Va. 379, 191 S. E. 764 (1937); *Will of Dardis*, 135 Wis. 457, 115 N. W. 332 (1908); *Tompkins v. Tompkins*, 24 Fed. Cas. No. 14,091, 1 Story 547 (1841); *Broderick's Will*, 21 Wall. (88 U. S.) 503 (1874). See also elaborate dicta in *Deslonde v. Darrington's Heirs*, 29 Ala. 92 (1856); *State v. McGlynn*, 20 Cal. 233 at 269 (1862); *Woodruff v. Taylor*, 20 Vt. 65 (1847).

of forms where an heir or devisee who had no notice of the proceeding came in subsequently and sought to attack the decree collaterally in another proceeding in the same state. Invariably he has been unsuccessful if jurisdictional requirements of notice and a fair hearing are complied with.¹¹ It should be observed that, since in nearly all states probate is now necessary for a devise of land, the decree has in rem operation with respect to dispositions of land as well as of personalty.

A little more difficulty has been experienced in the case of the will contest in some jurisdictions, although the conclusion has generally been the same.¹² Thus in some jurisdictions statutes permit probate or contest in chancery, and it has been argued that, since equity acts in personam, the proceeding cannot be in rem. But the courts have replied that this is a statutory proceeding; and while it happens to be in a court of equity, for purposes of the operation and binding effect of the decree, it is in rem.¹³ At one time American statutes were in force permitting a contest to be effected by asking the court to direct the framing of an issue *devisavit vel non* to be sent to a court of law for trial before a jury.¹⁴ Indeed, this pro-

¹¹ Of course, other jurisdictional requirements should be complied with also. And if the person whose estate is being administered is not dead, the entire proceeding is void because the requirements of due process are not complied with as to him, since he is not a party to the proceeding and cannot be a party. *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894).

¹² *McCann v. Ellis*, 172 Ala. 60, 55 So. 303 (1911); *In re will of Storey*, 20 Ill. App. 183 (1886); *People ex rel. Frazer v. Wayne Circuit Judge*, 39 Mich. 198 (1878); *In re estate of Sweeney*, 94 Neb. 834, 144 N. W. 902 (1913); *Hutson v. Sawyer*, 104 N. C. 1, 10 S. E. 85 (1889); *Taylor v. Dinsmore*, (Tex. Civ. App. 1938) 114 S. W. (2d) 269. See also cases cited in notes 13 to 22 inclusive, *infra*. Dictum: *Estate of Carpenter*, 127 Cal. 582, 60 P. 162 (1900). Contra, on statute then existing: *McArthur v. Scott*, 113 U. S. 340, 5 S. Ct. 652 (1885).

¹³ *Ex parte Walter*, 202 Ala. 281, 80 So. 119 (1918); *Woodville v. Pizzati*, 119 Miss. 442, 81 So. 127 (1919); *Connolly v. Connolly*, 32 Gratt. (73 Va.) 657 at 664 (1880); *Dower v. Seeds*, 28 W. Va. 113 at 134 (1886); *Dower v. Church*, 21 W. Va. 23 (1882).

¹⁴ For a description of the practice in Virginia and a comparison with the English practice, see *Wills v. Spraggins*, 3 Gratt. (44 Va.) 555 (1847).

cedure is not entirely obsolete at the present time.¹⁵ Now, if this were regarded as analogous to the English chancery practice of ordering an heir or devisee to go over into a court of law and frame an issue of *devisavit vel non* to be tried in an action of trespass or ejectment,¹⁶ the courts would have been forced to conclude that it was an in personam proceeding. But, again, obvious considerations of public policy and good sense caused them to conclude that this too was a proceeding in rem.¹⁷ In some states, such as California, statutes expressly provide that, in a contest, the contestant shall be plaintiff and the proponent defendant.¹⁸ From this it has been argued that such statutes make the proceeding adversary and hence in personam; that an in rem proceeding is necessarily ex parte. But this argument has not been accepted by the courts.¹⁹ Indeed, it should be observed that because some of the parties to a proceeding are adverse to others does not prevent it from being in rem. It may be that the designation of certain persons as plaintiffs or defendants in some statutes gives such persons a slightly different status as to burden of proof and perhaps as to some other procedural matters.²⁰ But doubtless all persons in the world who have an interest in the estate

¹⁵ See, for example, Pa. Stat. Ann (Purdon, Supp. 1943) t. 20, § 1961.

¹⁶ For a brief description of this practice in England, see 2 STORY, EQUITY JURISPRUDENCE (1st ed. 1836) 671.

¹⁷ *Wills v. Spraggins*, 3 Gratt. (44 Va.) 555 (1847).

¹⁸ Cal. Prob. Code (Deering, 1941) § 371.

¹⁹ *Estate of Relph*, 192 Cal. 451, 221 P. 361 (1923). See particularly the discussion at page 458 of the California report.

²⁰ In *Estate of Relph*, 192 Cal. 451 at 459, 460, 221 P. 361 (1923), the court said:

"The contest of a will, on the other hand, while a proceeding *in rem*, is at the same time an adversary proceeding, the parties to which consist, on the one hand, of those persons interested in the estate who have appeared and filed written grounds of opposition to the probate of the will (commonly referred to as the contest); and, on the other hand, those persons interested in the will who have appeared and filed written answer thereto. . . .

"In the proceeding upon the contest of the will the petitioner for the probate thereof is not even a necessary party litigant thereto." But compare *Estate of Carpenter*, 127 Cal. 582, 60 P. 162 (1900), denying the settlement of a contest by arbitration because of the fact that the proceeding is in rem.

as successors to the decedent are potential if not actual parties, may appear and be heard, and are bound by the decree.

Provisions in will contest statutes extending the time within which contests may be brought for persons under a disability have caused some difficulty. The question is asked: If the order admitting the will to probate is set aside only as to the person under a disability, but not as to other persons, how can it be in rem, for a decree in rem is said to bind all the world? Sometimes it has been held that the decree can be set aside as to the persons under a disability and not as to others;²¹ sometimes that it must be set aside, if at all, as to all persons.²² But whichever view is taken (and this would seem to be purely a matter of statutory interpretation) it would not detract from the essentially in rem character of the decree. For it can be binding as to all the world except the incompetents, and still no difficulty should be experienced in calling it in rem.

There is little dissent from the proposition that the order appointing the executor or administrator is in rem.²³ That is to say, it is not subject to collateral attack in another proceeding on the ground of lack of notice, if the requirements of notice and a fair hearing for a proceeding in rem have been complied with. A curious Alabama decision²⁴ provides almost the only dissent from this proposition. In that case it was held that, although in respect to the grant of letters the

²¹ *Security Trust & Savings Bank v. Superior Court*, 21 Cal. App. (2d) 551, 69 P. (2d) 921 (1937); *Spencer v. Spencer*, 31 Mont. 631, 79 P. 320 (1904).

²² *McCann v. Ellis*, 172 Ala. 60, 55 So. 303 (1911).

²³ *Matter of Olcese*, 210 Cal. 262, 291 P. 193 (1930); *Coca-Cola International Corp. v. New York Trust Co.*, 22 Del. Ch. 344, 2 A. (2d) 290 (1938) (dictum); *Gibbs v. Beckett*, 229 Iowa 619, 295 N. W. 165 (1940); *Anderson v. Qualey*, 216 Mass. 106, 103 N. E. 90 (1913); *Fridley v. Farmers' & Mechanics' Savings Bank*, 136 Minn. 333, 162 N. W. 454 (1917); *State ex rel. Gott v. Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927); *Quindort's Admr. v. Pergeau*, 18 N. J. Eq. 472 (1867); *In re Reilly's Estate*, 165 Misc. 214, 300 N. Y. S. 1285 (1937); *Denny v. Searles*, 150 Va. 701, 143 S. E. 484 (1928).

²⁴ *White v. Hill*, 176 Ala. 480, 58 So. 444 (1912).

proceeding was in rem, it was in personam as to the determination of the person who was nearest of kin and thus entitled to first consideration as an appointee.

Decisions are also numerous to the effect that the final decree of distribution has in rem operation, and cannot be collaterally attacked merely because an interested party was not served or did not have notice.²⁵ Here the significance of the decree itself varies considerably from state to state. Thus in many jurisdictions there is a final decree specifically declaring what interests the distributees take in personalty and in realty. In others the decree of distribution does not deal with real estate, but title is regarded as passing to the heir or devisee by virtue of the statute of descent or by the will. In some states the personal representative's distribution of per-

²⁵ *Wm. Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323 (1897); *Estate of Ross*, 185 Cal. 8, 195 P. 674 (1921); *Edlund v. Superior Ct.*, 209 Cal. 690, 289 P. 841 (1930); *Estate of Madsen*, 31 Cal. App. (2d) 240, 87 P. (2d) 903 (1939); *Connolly v. Probate Ct.*, 25 Idaho 35, 136 P. 205 (1913); *In re Estate of Togneri*, 296 Ill. App. 33, 15 N. E. (2d) 908 (1938); *Loring v. Steinman*, 1 Metc. (42 Mass.) 204 (1840); *Cleaveland v. Draper*, 194 Mass. 118, 80 N. E. 227 (1907); *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99 (1895); *In re Estate of Eklund*, 174 Minn. 28, 218 N. W. 235 (1928); *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861 (1917); *Starkey v. Kingsley*, 69 N. H. 293, 39 A. 1017 (1897); *Exton v. Zule*, 14 N. J. Eq. 501 (1861); *In re Estate of Riley*, 92 N. J. Eq. 567, 113 A. 485 (1921); *Roseman v. Fidelity & Deposit Co. of Md.*, 154 Misc. 320, 277 N. Y. S. 471 (City Court of New York, 1935); *Barrette v. Whitney*, 36 Utah 574, 106 P. 522 (1909); *Carter v. Skillman*, 108 Va. 204, 60 S. E. 775 (1908); *Krohn v. Hirsch*, 81 Wash. 222, 142 P. 647 (1914); *In re Nilson's Estate*, 109 Wash. 127, 186 P. 268 (1919); *Farley v. Davis*, 10 Wash. (2d) 62, 116 P. (2d) 263 (1941); *Hendricksen v. Baker-Boyer Nat. Bank (C. C. A. 9th, 1944)* 139 F. (2d) 877; *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1 (1907); *Christianson v. King County*, 239 U. S. 356, 36 S. Ct. 114 (1915).

See also *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (1938); *Shriver v. State*, 65 Md. 278, 4 A. 679 (1886); *State ex rel. Gott v. Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927); *Wolff v. Rager*, 326 Mo. 222, 30 S. W. (2d) 1005 (1930) (probate proceedings said to be not strictly in rem, but somewhat in the nature of proceedings in rem).

Dictum: *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370 (1913) (said to be in rem or quasi in rem).

Contra: *Wood v. Myrick*, 16 Minn. 494 (1871) (but see later cases reversing this holding, cited in this note); *First Nat. Bank v. Chandler*, 133 N. J. Eq. 335, 32 A. (2d) 455 (1943) (decided on basis of statute requiring notice); *Ruth v. Oberbrunner*, 40 Wis. 238 at 267 (1876) (notice held to be jurisdictional).

sonalty may be adjudicated by the final accounting, so that, in effect, the final accounting determines the distribution. But whatever the subject matter or character of the decree of distribution, its in rem operation is generally conceded.

The decree settling the account of the personal representative has been held to be in rem.²⁶ Apparently by that is meant that, assuming jurisdictional requirements for an in rem proceeding have been met, it is not subject to collateral attack by a person interested in the estate of the decedent in so far as it determines what the personal representative was justified in taking out of the estate and appropriating for the various purposes stated in the account. But suppose the executor's account is short and the decree surcharges him and directs him to make good a stated amount from his own assets. While under the old law an action by an administrator de bonis non to charge his predecessor probably could not be brought in the probate proceeding but had to be initiated by creditors and distributees in a separate action,²⁷ in many jurisdictions today this can be done in the probate proceeding.²⁸ If it is done in this way, is it in rem? And if it is in rem, what does that mean? In the case of *Michigan Trust Co. v. Ferry*,²⁹ where such a surcharge was made in the Michigan probate court, and an action was brought against the executor in Utah on the judgment, the court proceeded on the theory that it was a decree in personam to the extent that requirements of notice for an in personam proceeding were necessary to entitle it to recognition in Utah. Without doubt, this was a correct

²⁶ *Horn v. Cornwall*, (Idaho 1943) 139 P. (2d) 757; *In re Anderson's Estate*, 157 Ore. 365, 71 P. (2d) 1013 (1937) (dictum). But compare *In re Killian*, 172 N. Y. 547, 65 N. E. 561, 63 L. R. A. 95 (1902), where a statutory requirement of notice for a settlement of accounts was held to be jurisdictional, and therefore the decree was void as to interested parties who did not receive the statutory notice.

²⁷ See 3 WOERNER, ADMINISTRATION (3d ed. 1923) § 536.

²⁸ See ATKINSON, WILLS (1937) 610; *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 33 S. Ct. 550 (1912).

²⁹ 228 U. S. 346 (1912).

conclusion in so far as the facts of that case are concerned. But, did it not have in rem operation to the extent that a devisee who did not have personal service in Michigan could not have subjected it to collateral attack in another Michigan proceeding. In other words, did it not bind all other persons interested in the estate in so far as it decided that this amount, and no more, should go into the estate, though it had purely in personam operation as to the executor's duty to pay a sum of money?

Next to decisions concerned with decrees in matters of probate and contest and with decrees of distribution, perhaps the largest number of cases involve proceedings to sell land in connection with the administration of a decedent's estate. Here the holdings are conflicting, although the weight of authority is to the effect that decrees with respect to the sale are in rem.³⁰ Of course, under English law the land of the

³⁰ The following are to the effect that the proceeding is in rem: *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708 (1840); *Perkins' Exrs. v. Winter's Admrs.*, 7 Ala. 855 (1845); *Saltonstall v. Riley*, 28 Ala. 164 (1856); *Satcher v. Satcher's Admr.*, 41 Ala. 26 (1867); *Lyons v. Hamner*, 84 Ala. 197, 4 So. 26 (1887); *Neville v. Kenny*, 125 Ala. 149, 28 So. 452 (1899); *Sturdy v. Jacobway*, 19 Ark. 499 (1858); *Montgomery v. Johnson*, 31 Ark. 74 (1876); *Roundtree v. Montague*, 30 Cal. App. 170, 157 P. 623 (1916); *Good v. Norley*, 28 Iowa 188 (1869) (equally divided court); *McClay v. Foxworthy*, 18 Neb. 295, 25 N. W. 86 (1885); *Brusha v. Phipps*, 86 Neb. 822, 126 N. W. 856 (1910); *Sheldon v. Newton*, 3 Ohio St. 494 (1854); *Benson v. Cilley*, 8 Ohio St. 604 (1858); *McPherson v. Cunliff*, 11 Serg. & R. (Pa.) 422 (1824); *Heath v. Layne*, 62 Tex. 686 (1884); *Ryan v. Ferguson*, 3 Wash. 356, 28 P. 910 (1891); *Grignon's Lessee v. Astor*, 2 How. (43 U. S.) 319 (1844); *Magnolia Petroleum Co. v. Mayer* (C. C. A. 10th, 1932) 58 F. (2d) 48.

Contra: *Mickel v. Hicks*, 19 Kan. 578 (1878); *Seal v. Banes*, 168 Okla. 550, 35 P. (2d) 704 (1934); *Stadelman v. Miner*, 83 Ore. 348, 155 P. 708, 163 P. 585, 163 P. 983 (1917) (on rehearing the court determined that the requirement of notice had been sufficiently complied with so that no collateral attack would be permitted).

There are also several cases in which it was determined that a statutory requirement of notice was jurisdictional and that since it was not complied with, the sale was void, but it is not asserted that the proceeding was not in rem. See *Dorrance v. Raynsford*, 67 Conn. 1, 34 A. 706 (1895); *French v. Hoyt*, 6 N. H. 370 (1833); *Jenkins v. Young*, 35 Hun. (42 N. Y.) 569 (1885). And see VANFLEET, COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS (1892) § 406. But these cases would seem to prove little; though the orders with respect to the

decedent was not subject to the jurisdiction of the ecclesiastical court. If it was reached at all to satisfy the debts of the decedent, it was reached in equity. The theory of the proceeding was that, since title to the land passed to the heir or devisee at the instant of the decedent's death, chancery was proceeding against such person to appropriate his interest to the payment of the debt.³¹ It is still the rule in this country that title to land passes to the heir or devisee at the moment the decedent dies. In some jurisdictions a proceeding to sell land to pay debts is an independent proceeding by the personal representative against the other interested parties.³²

In *McPherson v. Cunliff*,³³ one of the earliest cases on the subject of the in rem character of probate proceedings, the Pennsylvania Supreme Court decided that the decree of the orphans' court could not be attacked collaterally in an action of ejectment by one claiming to derive title from one of the heirs who resided in Ireland and who evidently had no notice of the administration sale. While there were other circumstances which might have been relied on to reach this conclusion, the court based its decision squarely on the in rem character of the decree, when it said:³⁴

“ . . . It is a proceeding purely *in rem* against the estate of the intestate, and not *in personam*. So much is it a proceeding against his estate, that it overrules the lien of a judgment. The estate was condemned to a sale, and may well be compared to a condemnation of goods by a court of exchequer, whose condemnation is final, in an action brought to try the right of the goods.”

sale of land are in rem, a failure to comply with statutory requirements may render them void. See *Robertson v. Bradford*, 70 Ala. 385 (1881).

The two recent cases, hereafter discussed, to the effect that the proceeding for the sale of land is not strictly in rem but quasi in rem should also be noted.

³¹ LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) 144.

³² See, for example, Neb. Comp. Stat. (1929) §§ 30-1101 to 30-1125.

³³ 11 Serg. & R. (Pa.) 422 (1824).

³⁴ At page 430.

A few recent decisions contrary to the trend of modern authority should be noted. In Montana,³⁵ and subsequently in Idaho,³⁶ it has been determined that a proceeding to sell the real estate of a decedent is not strictly in rem but is quasi in rem. What these courts actually held was that the proceeding for sale was void as to heirs or devisees who were not served as provided by statute or who did not appear. The Idaho decision is to the effect that the sale was binding on heirs who appeared or were served. In both cases it appeared that the statute required personal service or service by publication of the order to show cause. In both cases it appeared that neither of these requirements was complied with. In a recent Oklahoma case³⁷ it was decided that minor heirs residing in the county who were not personally served were not bound by a proceeding to sell real estate. A statute required that notice be personally served on heirs residing within the county. While conceding that other probate proceedings are in rem, the court adhered to the view that this proceeding was in personam. It would be easier to state the effect of these decisions, if we could determine what would have been held if, in Montana or Idaho, the statutory requirement for publication of notice had been complied with, or if, in Oklahoma, all heirs within the county had been personally served. It would be perfectly possible to say that the decree would then have in rem operation and that it would bind all other persons in or out of the state whether they were personally served or not. It is not clear whether the Montana and Idaho courts, in describing the proceeding as quasi in rem, meant to use this term in the sense in which it is used in the *Restatement of Judgments*. But if they did, it would seem that such a doctrine would be most unsatisfactory as applied to sales of a decedent's

³⁵ *Lamont v. Vinger*, 61 Mont. 530, 202 P. 769 (1921). See also 2 BLACK, JUDGMENTS (2d ed. 1902) § 808, cited in this case, to same effect.

³⁶ *Kline v. Shoup*, 38 Idaho 202, 226 P. 729 (1923).

³⁷ *Seal v. Banes*, 168 Okla. 550, 35 P. (2d) 704 (1934).

lands. It would mean that the court sells only the interests of designated heirs or devisees, not the entire interest of the decedent. Since a final order of distribution in many states would not be made until after the order of sale, it is entirely possible that the proceeding to sell might purport to seize the real estate of *A*, but a later order of distribution would determine that *B* and not *A* was the heir. Perhaps, all the Montana and Idaho decisions mean is this: a substantial compliance with statutory requirements for notice as to the sale is necessary in order for the court to have jurisdiction as a proceeding in rem. Otherwise the proceeding is merely in personam, and binds only persons actually served or those who appear. Indeed, as to the Oklahoma decision, it can be said that it merely holds that notice to heirs residing in the county is a condition precedent to the court's jurisdiction and that a failure to comply with that requirement renders the decree totally void.

A few other decisions concern the character of various other orders and decrees in the administration of a decedent's estate. Nearly all of them are to the effect that the decree or order is in rem. This has been held with respect to the partition among distributees,³⁸ a decree determining that the estate is insolvent,³⁹ an order permitting the personal representative to mortgage assets of the estate,⁴⁰ an order setting aside a homestead,⁴¹ and an order determining that all claims not properly filed are forever barred.⁴² On the other hand, a decree as to an advancement⁴³ and an order making an allow-

³⁸ *Wyman v. Campbell*, 6 Porter (Ala.) 219 (1838).

³⁹ *Hine v. Hussey, Admr.*, 45 Ala. 496 (1871).

⁴⁰ *Walker Bank & Trust Co. v. Steely*, 54 Idaho 591, 34 P. (2d) 56 (1934).

⁴¹ *Bedwell v. Dean*, 222 Ala. 276, 132 So. 20 (1930); *Kearney v. Kearney*, 72 Cal. 591, 15 P. 769 (1887); *Roundtree v. Montague*, 30 Cal. App. 170, 157 P. 623 (1916).

⁴² *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1 (1907).

⁴³ *Cecil v. Cecil*, 19 Md. 72 (1862).

ance to an administrator for extraordinary services⁴⁴ were declared not to have in rem operation.

No analysis has been found in the cases,—perhaps because no practical difficulties are presented,—of the character of a judgment or decree determining a contract claim against the estate. It is true, one decision⁴⁵ appears to be to the effect that a decree of the probate court adjudicating a claim is in rem, and in view of the general trend of judicial decision it is to be expected that courts might so conclude. But suppose, as often happens, the claimant, in accordance with the terms of a statute, sues the executor or administrator in his representative capacity in a contract action in the court of general jurisdiction. Is this contract action in rem as to other persons interested in the estate? Obviously, it has in personam operation in so far as it determines liability on the contract. That is to say, if *A* has a contract claim against the decedent and the court determines that the administrator is liable in his representative capacity, it does not decide anything about the right of *B*, another claimant on that contract. It may, however, decide as to all the distributees and others interested in the estate, that the amount found due should be taken from the estate to pay the claimant, provided the estate is solvent. Of course, no real problem is likely to arise, since the claimant and the personal representative both submit themselves personally to the jurisdiction of the court; and, if the other persons interested in the estate are bound, the personal representative may be said to represent them.⁴⁶

⁴⁴ *McMahon v. Ambach Co.*, 79 Ohio St. 103, 86 N. E. 512 (1908). It is believed that this was not a final order, and therefore, could be reconsidered in the accounting.

⁴⁵ *Ware v. Farmers' National Bank*, 37 N. M. 415, 24 P. (2d) 269 (1933).

⁴⁶ In general, as to the doctrine of representation, see RESTATEMENT, JUDGMENTS (1942) § 80, comments a and b. Of course, this doctrine is primarily applicable where the action is in personam or quasi in rem.

While most of the decisions are concerned with the question of *res judicata*, a few appear to derive other conclusions from the *in rem* character of probate proceedings. Thus it is held that, because the proceeding is *in rem*, a party who has appealed cannot dismiss the appeal;⁴⁷ that one not named as a party in the initial proceeding to probate a will can nevertheless intervene in the appeal because all persons having any interest are parties to an *in rem* proceeding;⁴⁸ and that an arbitration or compromise cannot be effectuated by particular parties, since there is no way of joining all persons in the stipulation for this purpose.⁴⁹

This survey of the decisions would seem to show that, for most purposes, the administration of the estate of a decedent consists of one or more proceedings *in rem*; that such proceedings are properly described in most jurisdictions as strictly *in rem* and not as quasi *in rem*; that unlike condemnation or admiralty proceedings which may consist in a single seizure and sale or other disposition of the *res*, the administration of a decedent's estate involves a considerable number of final orders, most of which concern the rights of the successors in interest of the decedent to his estate; and in so far as they do, they are *in rem*. There may, however, be orders which primarily concern the personal liability of particular persons, such as an order surcharging the executor or a judgment on a claim against the decedent; to the extent that they do not concern the *res*, they are not *in rem*.

⁴⁷ *Matter of Will of Storey*, 20 Ill. App. 183 (1886). See also *Hutson v. Sawyer*, 104 N. C. 1, 10 S. E. 85 (1889).

⁴⁸ *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902 (1913). See also *Sheeran v. Sheeran*, 96 Minn. 484, 105 N. W. 677 (1905). Compare *Griffin v. Milligan*, 177 Ala. 57, 58 So. 257 (1912).

⁴⁹ *Estate of Carpenter*, 127 Cal. 582, 60 P. 162 (1900); *In re Estate of Meredith*, 275 Mich. 278, 266 N. W. 351 (1936). Compare *Culpeper National Bank v. Morris*, 168 Va. 379, 191 S. E. 764 (1937).

II. WHAT NOTICE IS SUFFICIENT TO PREVENT
COLLATERAL ATTACK?

We are now ready to consider the question: what notice is necessary to prevent collateral attack on a probate decree? It is clear that, regardless of the kind of proceeding in rem, the requirements of notice are necessarily somewhat less exacting than for a proceeding in personam. Many of the earlier cases on probate proceedings state or imply that no notice whatever is necessary because they are proceedings in rem. It is true, there is a well recognized doctrine to the effect that, in order to acquire jurisdiction, a court must have some power, actual or constructive, over the person or the thing which is the subject matter of the controversy.⁵⁰ The rule is stated in the *Restatement of Judgments* as follows:⁵¹ "A judgment is void unless the State in which it is rendered has jurisdiction to subject to its control the parties or the property or status sought to be affected." It is, of course, recognized that this proposition does not mean that the thing is the defendant. Here, as in the proceeding in personam, the parties are in fact persons. But in the proceeding in rem, the parties consist in an indefinite number of persons. Indeed, a judgment in rem may be said to affect all, or nearly all, persons in the world. Thus, in the probate proceeding, in determining who are the successors in interest of the decedent with respect to his estate the decrees determine not only that certain persons have an interest but that all other persons in the world do not. Since a proceeding in rem determines the rights of persons quite as much as a proceeding in personam, it follows that a mere control over the thing may not be enough, and that the judgments rendered thereunder will not be valid unless interested

⁵⁰ See the opinions of Holmes, J., in *McDonald v. Mabee*, 243 U. S. 90, 37 S. Ct. 343 (1917) and *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812 (1900).

⁵¹ RESTATEMENT, JUDGMENTS (1942) § 5.

parties have had reasonable notice and an opportunity to be heard. Otherwise the procedure would not meet constitutional requirements of due process. "A judgment is void," says the *Restatement of Judgments*, "unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected."⁵² There is authority involving probate decrees to support this proposition.⁵³ But, as has been said, since all persons are bound by the decree, somewhat less notice is reasonable than in the case of proceedings in personam.

In determining what is reasonable notice in proceedings to administer a decedent's estate, however, it is believed that the courts have been and will continue to be profoundly affected by two things, namely: the peculiar function of administration proceedings and the recognized English historical procedures from which our procedures are derived. It must also be recognized that a state may impose by statute jurisdictional requirements of notice which go farther and are in addition to minimum requirements of due process.

Before considering these aspects of notice in probate proceedings, attention will first be directed to a principle which is particularly significant in its application to probate cases, namely that, if reasonable notice is given at the beginning of a proceeding, no further notice to interested parties is ordinarily required for any further steps in the same proceeding. The important question, then, is: Is the administration of a decedent's estate, from the filing of the petition for the appointment of the personal representative to the final order of distribution and the order discharging the personal representative, one judicial proceeding? This, of course, depends on the law of any particular state. But there is no doubt that in

⁵² *Id.* at § 6.

⁵³ *Goodrich v. Ferris*, 214 U. S. 71, 29 S. Ct. 580 (1909). As to proceedings in rem, in general, see *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410 (1900).

a number of states it is a single proceeding, and that, if the law of a given state makes it a single proceeding, jurisdiction may be acquired by notice at the beginning of that proceeding. In *Michigan Trust Company v. Ferry*,⁵⁴ a testator died domiciled in Michigan and defendant Ferry petitioned for appointment as executor in that state and was duly appointed. Subsequently he removed to Utah and became of unsound mind. After he became a resident of Utah, steps were taken in the Michigan probate court to remove him. He was accordingly removed and the Michigan Trust Company was appointed administrator. The Michigan probate court also decreed that the defendant Ferry was indebted to the estate for a sum of over a million dollars. Action was brought by the administrator in the federal court of Utah against the defendant personally to recover this indebtedness, and the decision was for the defendant. The Supreme Court of the United States reversed that decision. To the objection that full faith and credit should not be given to the Michigan decree by the Utah court because there was no personal service on the defendant in the Michigan proceeding in which the indebtedness was decreed, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

“Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign’s pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. . . . This is true not only of ordinary actions but of proceedings like the present. It is within the power of a State to make the whole administration

⁵⁴ 228 U. S. 346, 33 S. Ct. 550 (1912).

of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives by the order of the Probate Court.”⁵⁵

The principle that the entire administration is one proceeding has been clearly recognized by several other courts.⁵⁶ Thus, in *Culver v. Hardenbergh*,⁵⁷ a sale of land by the probate court in connection with an administration proceeding was attacked on the ground that the court was without jurisdiction. The facts on which this objection was based were that two persons having been appointed administrators and one of them having subsequently resigned, the court appointed another person to act in his stead. This latter appointment was admittedly irregular, and the question was whether a sale of land made by that person in his official capacity was void. The court held that it was not void and that irregularities in the appointment did not affect the jurisdiction of the court since that jurisdiction attached on the initiation of the proceeding. After a full analysis of the proposition,⁵⁸ the court concluded with these words:

⁵⁵ At page 353.

⁵⁶ *Wm. Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323 (1897); *Heck v. Heck*, 34 Ohio St. 369 (1878); *Barrette v. Whitney*, 36 Utah 574, 106 P. 522 (1909); *Everett v. Wing*, 103 Vt. 488, 156 A. 393 (1931).

⁵⁷ 37 Minn. 225, 33 N. W. 792 (1887).

⁵⁸ See pages 234-236 of the court's opinion, which is in part as follows:

“By the proceedings for the probate of a will and its probate, or, in case there be no will, for the appointment, and the appointment, of an administrator, being the first step towards the administration and settlement of the estate, the constitutional jurisdiction of the court attaches to the estate. The jurisdiction given by the constitution is entire ‘over the estates,’ and where it has once attached it must continue (unless legally terminated) until its purpose is accomplished; that is, until the estate is administered and settled. Unless the administration of an estate is an entire proceeding, so that the jurisdiction of the court to direct and control it, once attaching, continues until its close, then it is or may be split up into an almost infinite number of subjects of jurisdiction, and the probate court, whenever it is necessary for it to take any action, must acquire jurisdiction to do the particular thing required of it, as though it were an original, independent

“We hold, therefore, that when a probate court legally probates a will, or appoints a first administrator, it thereby acquires jurisdiction to direct and control the administration of the estate; and that such jurisdiction (unless previously legally terminated) continues over the administration, as one proceeding, until its close; and that all the court may do in the course and for the purpose of the administration, including the removal or discharge of administrators, and the appointment of new administrators, is sustained by the jurisdiction thus acquired.”

While the modern trend is to regard all steps in the administration of a decedent's estate as one proceeding, nevertheless, in some jurisdictions, certain steps are still regarded as separate. The steps required to sell land for the payment of debts originally constituted a separate proceeding. The land was not brought within the jurisdiction of the probate court, but the personal representative, by an independent suit against the heir or devisee, might secure an order for a sale of the land. Such a proceeding is still brought in some states in some court other than that in which probate of the will takes place.⁵⁹ Obviously that is an independent proceeding. Indeed, as we have seen, it may not even be strictly in rem. Even though statutes provide that sales of land to pay debts are in the probate court, the steps required to sell land may still be regarded as an independent proceeding.⁶⁰ This is likely to be true

proceeding. If the jurisdiction acquired by the proceedings for the probate of the will, or for the appointment of the first administrator, ceases with the probate or appointment, then the court cannot appoint commissioners or appraisers, nor extend the time for creditors to present claims, nor require an administrator to renew his bond, nor direct him to pay debts, or sell personal property, or take possession of real estate, or commence an action, or render his accounts, nor do any of the scores of things that may be necessary for a probate court to do in the course of directing the administration of an estate, without acquiring anew jurisdiction to do the particular thing.

“On the other hand, if the jurisdiction originally acquired continues beyond the probate or appointment, then there is no stopping place short of the close of the administration.”

⁵⁹ See note 32, *supra*.

⁶⁰ *Lamont v. Vinger*, 61 Mont. 530, 202 P. 769 (1921).

where the statutory requirement of notice for sales of land is jurisdictional.⁶¹ On the other hand, if, as is the case in several states, the probate court assumes general control of the real estate of the decedent throughout the administration,⁶² a reasonable conclusion is that the sale of land to pay debts is but a part of a single proceeding to administer the decedent's estate.

In some states the personal liability of an executor who is in default is not determined as a part of the probate proceeding, but in a separate action brought by distributees and creditors rather than by the administrator *de bonis non*.⁶³ The determination of heirship may be either an independent proceeding or a part of the administration proceeding, depending upon the local statute.⁶⁴

Since the courts regard all or most of the steps in administration as a single proceeding, the most significant step from the standpoint of the requirement of notice is the initial one. What notice is necessary for the hearing on the petition for probate of a will or for the grant of administration? In this connection, it should be observed that the usual circumstances suggest a minimum of notice as reasonable. In a large number of cases it is important to have some one take charge of the property of a decedent as soon as he dies. This is obviously true in the case of an estate consisting of a farm or of a business involving perishable goods, or in any case where protection is needed to prevent damage, theft or embezzlement. Moreover, in the vast majority of cases there is no contest among the parties interested in the estate, and the administration is accomplished merely to make sure that the estate is distributed

⁶¹ See note 30, *supra*.

⁶² See Simes and Basye, "The Organization of the Probate Court in America," 43 MICH. L. REV. 113 at 121-130 (1944).

⁶³ See note 27, *supra*.

⁶⁴ Mich. Stat. Ann. (1943) §§ 27.3178(145) to 27.3178(149) inclusive. The proceeding may be either a part of the administration or may be brought as an independent proceeding.

in an orderly fashion. What is done is essentially administrative, and the judicial decrees rendered are all of a routine character and uncontested. Courts have also sometimes pointed out⁶⁵ that the death of the decedent is itself a fact which is likely to come to the attention of all near relatives, so that most interested parties may know that an administration is likely to be initiated. Of course, numerous instances could be pointed out where this is not the case; and the fact that the decedent is dead does not necessarily suggest to an heir the county in which his estate is being administered.

A further element tending to reduce the requirement of notice is the English procedural model furnished by the ecclesiastical courts. Probate could be either in common or in solemn form.⁶⁶ If in common form, no notice whatever was given. But at any time within thirty years interested parties might come in and demand probate in solemn form. The issue was then tried anew on notice to interested parties. If no one demanded probate in solemn form, the decree admitting the will to probate in common form was regarded as effectual. In the case of intestate estates,⁶⁷ it is probable that at least the surviving spouse could secure a grant of letters without notice; but notice to next of kin was ordinarily given when one of them applied for a grant.

Without doubt, if a given procedure was traditionally followed by English courts and copied in this country, that is a strong argument that the same procedure in this country is

⁶⁵ *Knight v. Hollings*, 73 N. H. 495 at 500, 63 A. 38 (1906) ("ordinarily the heirs learn of the decease of the person very soon after it occurs"); *Crippen v. Dexter*, 79 Mass. 330 at 333-334 (1859) ("A man dying, having property, usually dies with the knowledge of his kindred; the death itself is a fact of some notoriety in his neighborhood, and through the circle of his associates; proceedings for the settlement of his estate of necessity soon follow, and may be easily known to those most interested, so that actual knowledge of the proceedings will generally be had.")

⁶⁶ ATKINSON, WILLS (1937) 428.

⁶⁷ CONSET, THE PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS (3d ed. 1708) 14; 4 BURN, ECCLESIASTICAL LAW (9th ed. 1842) 366-367.

due process.⁶⁸ In this instance, of course, it may be said that the English practice only applied to the administration of personalty and that proceedings in England with respect to the lands of the decedent had to be initiated with notice. That argument, however, has not been accepted by the American courts. And the decisions on the point are unanimously to the effect that a probate in common form without any notice whatever is due process.⁶⁹ Moreover, in the United States at the present time probate in common form without any notice

⁶⁸ See *Coler v. Corn Exchange Bank*, 250 N. Y. 136, 164 N. E. 882 (1928), aff'd 280 U. S. 218, 50 S. Ct. 94 (1929), which sustained a summary proceeding to seize property of a person who deserted his wife and children. The decision was based in part upon the fact that the procedure had its roots in the distant past. Cardozo, Ch. J., giving the opinion of the court, quoted with approval from *Jackman v. Rosenbaum Co.*, 260 U. S. 22 at 31, 43 S. Ct. 9 (1923) as follows:

"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."

⁶⁹ In *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504 (1903), the court, in a full discussion of this question, so decided. A part of the opinion is as follows:

"Stated in a word, the contention is that the State has no power to make conclusive, after any lapse of time, a judgment which has the effect to deprive one of his property without any notice to him and without giving him an opportunity at the time of or before the rendition of the judgment to say why such judgment should not have been rendered. We do not think this proposition is universally true. The principle at the foundation of the constitutional provisions just referred to was brought across the waters with the common law. Any rule or procedure which is in accord with the settled usage and practice of the common law affords due process, within the meaning of that phrase as used in the various constitutions of this country. . . . It seems, therefore, to be well settled that at common law there was a conclusive presumption, after the lapse of time, in favor of the validity of a will proved in common form of law, and that this presumption had the effect of placing the will upon the same footing as if it had originally been proved in solemn form or per testes. Any system of laws which recognizes this common-law principle and provides for a reasonable time can not be said not to afford due process of law." (pp. 443-444).

Other cases to the same effect are: *Dickey v. Vann*, 81 Ala. 425, 8 So. 195 (1886); *Knight v. Hollings*, 73 N. H. 495, 63 A. 38 (1906); *Pratt v. Hawley*, 297 Ill. 244, 130 N. E. 793 (1921); *Farrell v. O'Brien*, 199 U. S. 89 at 117, 118, 25 S. Ct. 727 (1905). See also *Crippen v. Dexter*, 79 Mass. 330 (1859) and *People ex rel. Frazer v. Wayne Circuit Judge*, 39 Mich. 198 (1878).

To the effect that a grant of administration on intestacy without previous notice is invalid, see *Alabama Great Southern Railroad Co. v. Hill*, 139 Ga. 224, 76 S. E. 1001 (1912).

whatsoever is a part of a procedure in a score of states;⁷⁰ and in about the same number of states, it is possible to have a grant of administration without notice.⁷¹

But if the administration of a decedent's estate may be initiated without any notice whatever, what becomes of the requirement of notice and a fair hearing? How can the proposition just stated be squared with the following exposition of that doctrine in the *Restatement of Judgments*:⁷² "A judgment purporting to affect the interests of persons in a thing is void, even though the State has power over the thing, and the court has jurisdiction over it, if no notification was given"? Obviously the *Restatement of Judgments* does not ignore the judicial authority just cited and the practice in a score of states. The explanation would seem to be this. Notice and a fair hearing are offered to interested parties when there is probate in common form, but they are offered after the probate in common form, not before. In the states which permit probate in common form it is usual to find a requirement of notice immediately after the personal representative is appointed. This may take the form either of a notice to creditors or a notice of the appointment. Moreover, in practically all those

⁷⁰ Ark. Dig. Stat. (1937) § 14544; Del. Rev. Code (1935) § 3799; Fla. Stat. Ann. (1941) § 732.23; Ga. Code Ann. (1936) § 113-601; Ky. Rev. Stat. (1942) § 394.220; Md. Code (1939) art. 93, § 360; Miss. Code (1942) §§ 502 to 504; N. H. Rev. Laws (1942) c. 349, § 2; N. J. Rev. Stat. (1937) § 3:2-21; N. C. Gen. Stat. (1943) § 31-32; Ore. Comp. Laws (1940) § 19-204; S. C. Code (1942) § 8932; Va. Code (1942) § 5259; Wash. Rev. Stat. (1932) § 1380; W. Va. Code (1943) § 4070. In Indiana, Missouri, Pennsylvania and Tennessee probate may be had without notice although there is no statute so providing. See I HENRY, PROBATE LAW AND PRACTICE OF INDIANA (1931) 760; State ex rel. Mitchell v. Gideon, 215 Mo. App. 46, 237 S. W. 220 (1921); 2 HUNTER, PENNSYLVANIA ORPHANS' COURT COMMONPLACE BOOK (1939) 1122.

⁷¹ N. H. Rev. Laws (1942) c. 349, § 2. In three states notice is optional with the court: Ark. Dig. Stat. (1937) § 8; Mo. Rev. Stat. Ann. (1942) § 8; Ore. Comp. Laws (1940) § 19-211. In 13 states the statute is silent as to notice; in these states notice is apparently not required. These states are Alabama, Colorado, Delaware, Indiana, Iowa, Mississippi, New Mexico, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia, Wyoming.

⁷² RESTATEMENT, JUDGMENTS (1942) § 32, comment f.

states, an interested party, without being substantially prejudiced, has a reasonable time in which to have another hearing on the same issue after due notice. Thus, in substance, the practical result is not very different from that in the states where statutes provide that notice must precede a hearing on a petition for probate or grant of administration. For in those states it is commonly provided that a special administrator may be appointed summarily and without notice to take charge of the estate pending the hearing on the application for probate or administration. In states where proceedings may be initiated without notice, it would seem that interested parties are not seriously prejudiced. The personal representative can still be removed for cause, and a will can still be probated.

In jurisdictions where statutes provide for some sort of notice to initiate the administration, it is clear that publication is sufficient and that personal service on interested parties is not required.⁷³ While most of the cases so holding involve interested parties out of the jurisdiction, it would seem that publication would be sufficient even for parties within the state, if the legislature so provided.⁷⁴ Of course, if the legis-

⁷³ *Estate of Davis*, 136 Cal. 590, 69 P. 412 (1902); *Farmers' & Merchants' Nat. Bank v. Superior Court* (Cal. App. 1944) 148 P. (2d) 445, aff'd on rehearing, 150 P. (2d) 241; *Loring v. Steinman*, 1 Metc. (42 Mass.) 204 (1840) (decree of final distribution); *In re Estate of Eklund*, 174 Minn. 28, 218 N. W. 235 (1928) (decree of final distribution); *Starkey v. Kingsley*, 69 N. H. 293, 39 A. 1017 (1897) (decree of final distribution); *Matter of Horton*, 217 N. Y. 363, 111 N. E. 1066 (1916); *Roseman v. Fidelity & Deposit Co.*, 154 Misc. 320, 277 N. Y. S. 471 (1935); *Everett v. Wing*, 103 Vt. 488, 156 A. 393 (1931) (cert. den. 284 U. S. 690); *Krohn v. Hirsch*, 81 Wash. 222, 142 P. 647 (1914) (decree of final distribution); *Broderick's Will*, 21 Wall. (88 U. S.) 503 (1874); *Goodrich v. Ferris*, 214 U. S. 71, 29 S. Ct. 580 (1909) (decree of final distribution); *Christianson v. King County*, 239 U. S. 356, 36 S. Ct. 114 (1915) (decree of final distribution).

⁷⁴ *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708 (1840) (sale of land); *Hall's Heirs v. Hall*, 47 Ala. 290 (1872); *Sheldon v. Newton*, 3 Ohio St. 494 (1854) (sale of land); *Farley v. Davis*, 10 Wash. (2d) 62, 116 P. (2d) 263 (1941) (decree of final distribution); *Dower v. Seeds*, 28 W. Va. 113 at 134 (1886) (will contest).

lature imposes additional requirements of notice which are jurisdictional, then obviously they also must be complied with.

This leads us to the question: may the legislature impose requirements of notice as to a later step in the administration proceeding and make these requirements jurisdictional? Statutes not infrequently require some sort of notice at three points: at or immediately following the initiation of the administration proceeding; at the time creditors are required to file their claims; and at the closing of the estate when the final account is settled. If there are sales of real estate, notice of them is frequently required. In a few instances some of the notices subsequent to the initiation of the proceeding have been held to be jurisdictional.⁷⁵ But does that mean that there is more than one proceeding, or does it merely mean that a particular part of the proceeding will be invalid if no notice is given? It is possible that the latter may be the proper conclusion.

One more question should be briefly considered. Must there be an actual or constructive seizure of the res in order to give the court jurisdiction? It is true, following the type form of proceeding in rem which the courts seem so often to have in mind,—such as the admiralty proceeding or the proceeding to confiscate property,—the seizure of the res might in some instances be an appropriate method of giving notice to interested parties. But that is not the only way, nor is it, in some instances, the proper way, to give notice.⁷⁶ It is believed that, as to proceedings in rem in general, notice by

⁷⁵ In re Killian, 172 N. Y. 547, 65 N. E. 561, 63 L. R. A. 95 (1902) (settlement of accounts); Schneider v. McFarland, 2 Comstock (N. Y.) 459 (1849) (sale of land); Carter v. Frahm, 31 S. D. 379, 141 N. W. 370 (1913) (decree of distribution); Ruth v. Oberbrunner, 40 Wis. 238 (1876) (decree of distribution).

⁷⁶ See Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108 (1894); Goodrich v. Ferris, 214 U. S. 71, 29 S. Ct. 580 (1909); Tyler v. Judges of the Court of Registration, 175 Mass. 71 at 77, 78, 55 N. E. 812 (1900). But see WAPLES, PROCEEDINGS IN REM (1882), where the opposite view is stressed.

publication without seizure of the res can be a sufficient notice.⁷⁷ The jurisdictional requirement is not that the thing be seized but that it be within the state.⁷⁸ Certainly if a probate court did not acquire jurisdiction until the personal representative on behalf of the court took charge of the estate, numerous difficulties would be experienced, among which is the obvious one that the court must have jurisdiction to make the grant of letters testamentary or of administration before the personal representative takes charge of the estate.

III. WHAT PERSONS AND THINGS ARE BOUND BY A VALID PROBATE DECREE?

If it be determined that a probate decree is valid, the next inquiry is: What persons and what things are bound by it? Obviously, the principal purpose of the whole administration proceeding is to determine who are the successors in interest to the estate of the decedent and to preserve that estate until this is determined. Thus, unlike an eminent domain proceeding or a statutory proceeding to register title to land, the probate proceeding does not determine as to all the world who has title to the land and other things in which the decedent has an interest. It does not decide, as between the decedent and persons claiming adversely to him, who was the owner. But it does determine, as to all the world, who are the successors to whatever interests the decedent may have had.⁷⁹

⁷⁷ *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410 (1900); *Calhoun National Bank v. Bentley*, 189 Ga. 355, 6 S. E. (2d) 288 (1940); and cases cited in note 76, supra.

⁷⁸ 2 PAGE, WILLS (3d ed. 1941) 38.

⁷⁹ That a proceeding *in rem* can deal only with particular interests has been recognized. See *Day v. Micou*, 18 Wall. (85 U. S.) 156 at 162 (1873). In that case the court said:

"A condemnation in a proceeding *in rem* does not necessarily exclude all claim to other interests than those which were seized. . . . Decrees of courts of probate or orphans' courts directing sales for the payment of a decedent's debts or for distribution are proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage, *quasi* proceedings *in rem*, at least. But in none of these cases is anything more sold than the estate of the decedent, or of the

What is the *res* with respect to which all persons are bound? It would appear to be the assets of the decedent within the state. That the estate is the subject matter of the proceeding is the usual view expressed by the courts.⁸⁰ A few, however, have said that, with respect to the decree admitting the will to probate, the will is the *res*.⁸¹ It has also been suggested that the *res* may be regarded as the status of testacy or intestacy.⁸² Several serious difficulties would be encountered as to either of these two views. If the will or the status of testacy or intestacy is the *res*, then, a determination of the

debtor or the mortgagor in the thing sold. The interests of others are not cut off or affected."

See *Kamerer v. Kamerer*, 281 Ill. 587, 117 N. E. 1027 (1917) indicating that probate decrees do not determine title as between the decedent and third parties.

⁸⁰ *Wyman v. Campbell*, 6 Porter (Ala.) 219 (1838); *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708 (1840); *Perkins' Exrs. v. Winter's Admsr.*, 7 Ala. 855 (1845); *Lyons v. Hamner*, 84 Ala. 197, 4 So. 26 (1887); *Wm. Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323 (1897); *In re Estate of Togneri*, 296 Ill. App. 33, 15 N. E. (2d) 908 (1938); *Loring v. Steinman*, 1 Metc. (42 Mass.) 204 (1840); *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99 (1895); *Fridley v. Farmers' & Mechanics' Bank*, 136 Minn. 333, 162 N. W. 454 (1917); *McPherson v. Cunliff*, 11 Serg. & R. (Pa.) 422 (1824); *Barrette v. Whitney*, 36 Utah 574, 106 P. 522 (1909). In *State ex rel. Gott v. Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927) the following statement appears at p. 1089: "Looking at the administration as an entirety, the *res* is the property of the deceased grasped through the personal representative as a court officer; but in the preliminary proceeding for his appointment, the *res* is the status of the officer." And in *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238 (1875) the court says, at p. 243: "Shall Mrs. Tisdale receive letters of administration, was the *res*?"

⁸¹ *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337 (1910); *State ex rel. Mitchell v. Gideon*, 215 Mo. App. 46, 237 S. W. 220 (1921); *Woodruff v. Taylor*, 20 Vt. 65 (1847). See, also, *Crippen v. Dexter*, 79 Mass. 330 (1859).

⁸² See *Hopkins*, "The Extraterritorial Effect of Probate Decrees," 53 YALE L. J. 221 at 226, 227 (1944). In the footnote on page 227, this writer says:

"The notion that jurisdiction in *rem* attaches to the status of testacy or intestacy finds a ready analogy in divorce cases where it is usual to speak of the marital status as the *res*. It seems to the writer unnecessary and confusing to extend the conception of jurisdiction in *rem* usually applied to physical property so as to include a relationship or status. The explanation for this unfortunate terminology would seem to be the historical distinction in our law between jurisdiction in *personam* and in *rem*, and the desire to sustain a claim to jurisdiction in these cases without the necessity of personal service of process. It would have been more realistic simply to say that the appropriate court has jurisdiction to determine the status without the necessity of personal service."

validity of the will in the state of domicile would be controlling as to land of the decedent in another state; and under constitutional provisions as to full faith and credit, the state where the land is situated would be compelled to recognize the decree admitting the will to probate. It is, of course, elementary that the reverse is the law.⁸³ Moreover, to regard a determination of the validity of a will as a judgment with respect to a status is completely to disregard the notion of status as it is used in connection with problems of the effect of foreign judgments.⁸⁴ If the determination of the validity of a will can be a matter of status, why not the determination of the validity of a deed, or even of a contract? And, incidentally, if the validity of a contract is a matter of status, what becomes of Sir Henry Maine's famous observation about civilization progressing from status to contract?⁸⁵ Indeed it is believed that the notion that the res is the will or that the res is a status has been advanced in the hope that it would make for a single administration of an estate, even though the decedent left assets in two or more states. That this is a laudable objective can not be denied, but the writer believes that it should be accomplished by legislation or, if necessary, by constitutional amendment, and that nothing will be gained by confusing the law of *res judicata* in this way.

While, as has been said, this paper does not purport to deal with the broad question of the effect of a foreign probate decree, the views of the Supreme Court of the United States on that problem furnish a guide for the determination of the question under consideration here. Nowhere has the theory of our highest tribunal been more clearly indicated than in

⁸³ GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 436, 453.

⁸⁴ RESTATEMENT, *CONFLICTS* (1934) § 119: "In the Restatement of this subject, a 'status' means a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned."

⁸⁵ MAINE, *ANCIENT LAW* (10th ed. by Pollock 1930) 182.

the case of *Riley v. New York Trust Company*.⁸⁶ That case involved a bill for interpleader brought in Delaware by the Coca-Cola Corporation to determine the ownership of some of its stock, it being agreed that Delaware was the situs of the stock. The stock was the property of the estate of a Mrs. Hungerford. The Georgia court, in a probate proceeding to which the heirs and devisees were parties, had found that the decedent died testate domiciled in Georgia. Thereafter, administration proceedings were instituted in New York and an administrator was appointed. The New York administrator and certain New York creditors were not parties to the Georgia proceeding. The Delaware court found that the decedent was domiciled in New York and awarded the stock to the New York administrator. On certiorari to the Supreme Court of the United States, the judgment was affirmed. Mr. Justice Reed, speaking for the court, concluded that, while the Georgia decree operated in rem as to property in Georgia, it did not bind the New York administrator as to property outside the state of Georgia. He said:

“ . . . So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem*; so far as it affects personality beyond the state, it is *in personam* and can bind only parties thereto or their privies. . . . Phrased somewhat differently, if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process.”⁸⁷

In the light of that decision, the following conclusions may be suggested. Strictly speaking a probate proceeding, being in rem, has validity as such only with respect to the estate of

⁸⁶ 315 U. S. 343, 62 S. Ct. 608 (1942). Earlier cases suggesting this doctrine are *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1 (1907); *Thormann v. Frame*, 176 U. S. 350, 20 S. Ct. 446 (1900); *Overby v. Gordon*, 117 U. S. 214, 20 S. Ct. 603 (1900); *Baker v. Baker, Eccles Co.*, 242 U. S. 394, 37 S. Ct. 152 (1917).

⁸⁷ At pages 353 and 354.

the decedent within the jurisdiction. But as to persons who were personally served or who appeared, its decrees may operate in personam, at least by way of collateral estoppel.⁸⁸ Of course, the foreign jurisdiction may, if it wishes, by statute or judicial decision determine that the devolution of title to the estate of the decedent in the foreign state is to follow the devolution of title to the estate of the decedent in the state of domicile.⁸⁹ But if property in the foreign state is bound, it is bound by the laws of the foreign state and not by the doctrine of *res judicata*.

Two situations occasionally arise which should be discussed with reference to the application of these propositions. Suppose the decedent has personal estate both in state *A*, the state of his domicile, and in state *B*. There are administration proceedings in both states and at the conclusion of the proceeding in state *B* personal property is transmitted by the ancillary administrator to the administrator in the state of domicile. Or suppose that there is no property of the decedent in the state of domicile, but the will is probated there and an

⁸⁸ See the discussion of this matter, *infra*. There is also authority tending to support the view that, if the domiciliary probate decree purports to dispose of personalty in the foreign state, persons who appear or are personally served are bound as to that property. In other words the decree operates directly in personam. See *Loewenthal v. Mandell*, 125 Fla. 685, 170 So. 169 (1936).

⁸⁹ While it is conceded that there are cases inconsistent with this view, it is believed that the appointment of a personal representative in state *A* does not *per se* give him title to property of the decedent in state *B*. See *GOODRICH, CONFLICT OF LAWS* (2d ed., 1938) § 182. It is true state *B* may have a statute or rule of law to the effect that the appointment of the personal representative in state *A*, which gives him title to personalty in state *A*, also gives him title to personalty in state *B*. And such a statute or rule would be valid except in so far as it might conflict with requirements as to due process. But the title of the personal representative is derived from the law of state *B*, and not from the judicial power of the court of state *A*. Of course, state *A* may, and probably does, authorize the personal representative to bring into state *A* any property of the decedent in state *B*; and in so far as unadministered property is brought within state *A*, the decrees of its probate court can operate in rem as to persons claiming interests in it. But, if the courts of state *B* had, in a probate proceeding, determined the devolution of the property while it was still in that state, the probate court of state *A* could not disregard that, even though the property was later brought into state *A*.

executor is appointed. Subsequently the executor brings unadministered personal property of the decedent from some other state into the state of domicile. In each case, do decrees of the probate court of the state of domicile operate in rem as to property brought within the state after the decree is rendered? It is believed that they can do so. Our question is essentially one of due process. As to the case where there were no assets in the state of domicile (which would seem to be the more difficult) interested parties would be just as likely to find out about the probate proceeding if the decedent were domiciled in the state as in a case where he had assets but not a domicile in the state. Indeed, in trying to find out where probate proceedings might be instituted, interested parties would normally investigate the state of domicile whether the decedent left estate there or not. Thus, it would appear that the res is not only the estate of the decedent in the state of probate at the time of the decedent's death, but may also include property subsequently brought into that state.⁹⁰

In considering the operation of probate decrees up to this point we have assumed that the only limitations to their operation within the state are limitations as to jurisdiction and due process. It must be pointed out, however, that there are two other limitations. First, the decree itself may, by its terms, limit its operation to particular property or exclude its operation as to particular persons. In jurisdictions where the decree of distribution does not deal with real estate, the res, in so far as that decree is concerned, is personal estate within the state. But in those same states the decree admitting the will to probate is binding as to real as well as personal property. Thus the res with respect to that decree would be the real and personal property of the decedent within the state. Moreover, if assets of the decedent are not discovered at the time of the decree of distribution and are not covered by its

⁹⁰ See note 89, *supra*.

terms, then the decree would not operate as to them, even though they are within the state.

Second, certain persons may be excluded from the operation of a probate decree by reason of local statutes. It is not uncommon to find a statutory provision to the effect that heirs or devisees shall receive personal notice or notice by registered mail.⁹¹ Three possible consequences may arise from a failure

⁹¹ Kan. Gen. Stat. (Supp. 1943) § 59-2209: “. . . The petitioner shall mail or cause to be mailed a copy of the notice to each heir, devisee, and legatee or guardian and ward, as the case may be, other than the petitioner, whose name and address are known to him.”

It is not uncommon to provide for the conclusive effect of probate decrees. Cal. Code Civ. Proc. (Deering, 1941) § 1908: “The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, . . . the judgment or order is conclusive upon the title to the thing, the will or administration. . . .” Fla. Stat. Ann. (1941) § 732.26: “. . . The probate of a will in Florida unless revoked or revised upon appeal shall be conclusive in any collateral suit or controversy relating to the property, real or personal, thereby devised or bequeathed, of the due execution of the will by a competent testator of his own free will and that such will, at the date of the testator's death, was unrevoked.” Wash. Rev. Stat. (1932) § 1385: “. . . If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding and final as to all the world. . . .”

On the other hand, a statute may be found which, if taken literally, might indicate that decrees have only in personam effect. N. Y. Surr. Ct. Act, § 41, reads as follows: “The surrogate's court, in any action or proceeding before it, shall have jurisdiction of the following:

“1. The petitioner.

“2. Parties who have been duly cited, including all those described as being persons belonging to a class, or connected with the decedent, or as interested in the property or matter in question, whether designated by their full and correct names or not.

“3. Persons of full age who have not been judicially declared to be incompetent to manage their affairs, and public officers, commissions or bodies.

“a. Who shall, either before or after the filing of the petition, waive the issue or service, or both, of the citation by an instrument in writing signed, acknowledged or proved and duly certified.

“b. Who, whether named in the petition or citation or not, shall appear personally in court and file written signed notice of appearance acknowledged, or proved, and duly certified.

“c. Who, whether named in the petition or citation or not, shall appear by attorney whose authority in writing to appear, so signed, acknowledged or proved, and duly certified, shall be filed.

“d. Who shall appear by attorney appointed pursuant to sections two hundred and thirty-five or two hundred forty-nine-x of the tax law. The notice of ap-

to comply with such a requirement: (1) the court may conclude that the requirement is not jurisdictional, and that a failure to comply with it is merely error and does not make the decree invalid as to anyone; (2) the court may determine that the decree is void as to heirs and devisees who were not served, but valid as to all other persons; or (3) the court may decide that the decree is totally void. Apparently each of these conclusions has been reached as to particular statutes.⁹² If the court concludes that the decree is void only as to the heirs or devisees within the jurisdiction who are not personally served, does that indicate that the decree is in personam or quasi in rem, since it does not bind all the world? Formalistic definitions of a proceeding in rem might lead one to that conclusion. But it is believed that there is no good reason why a decree binding on all the world except a few designated persons should not be regarded as a decree in rem.

So far we have considered the extent to which probate decrees are res judicata as to the very thing which they determine about the res. But judgments and decrees also are ordinarily effectual as a collateral estoppel in totally different causes of action with respect to questions of fact actually litigated and determined.⁹³ There is, however, an important

pearance shall be signed by such attorney and shall show the fact of his appointment as aforesaid.

"4. All parties to any action at law which pursuant to the provisions of the surrogate's court act or the civil practice act may be transferred to it."

Section 80 provides that "Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained. . . ." But see New York cases cited in note 10, supra, to the effect that decrees regarding the probate of wills operate in rem.

⁹²To the effect that the proceedings are not void for lack of notice: *Hall's Heirs v. Hall*, 47 Ala. 290 (1872) (probate of will); to the effect that they are void as to persons not served: *Kline v. Shoup*, 38 Idaho 202, 226 P. 729 (1923) (sale of land); to the effect that they are totally void: *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370 (1913) (grant of administration); *Voyles v. Hinds*, 186 Ind. 38, 114 N. E. 865 (1917) (contest of will).

⁹³As to this doctrine, when applied to proceedings in personam, see Scott, "Collateral Estoppel by Judgment," 56 HARV. L. REV. 1 (1942). For decisions involving the application of the collateral estoppel doctrine to probate decrees,

limitation on this doctrine when applied to a proceeding *in rem*. As stated in the *Restatement of Judgments*,⁹⁴ "A judgment in such a proceeding will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact."

Two Massachusetts cases illustrate the application of this doctrine of collateral estoppel. In *Brigham v. Fayerweather*⁹⁵ a legatee under a will sued in equity to have declared void a mortgage executed by the testator on the ground of insufficient mental capacity. The will was executed after the mortgage, and the defendant contended that the order admitting the will to probate should have been admitted in evidence to show the testator's sanity when he executed the mortgage. Finding there was no error, the Supreme Judicial Court said:

"We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes. . . .

"If the defendant as well as the plaintiff had been a party to the probate of the will, a different question would arise."⁹⁶

In *Sly v. Hunt*,⁹⁷ just such a situation arose. In an action on a contract for services rendered to a testator, the testator's

see *State ex rel. Gott v. Fidelity and Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927); *Munday v. Knox*, 323 Mo. 411, 18 S. W. (2d) 487 (1929). See also *Overby v. Gordon*, 177 U. S. 214 at 227, 20 S. Ct. 603 (1900).

⁹⁴ RESTATEMENT, JUDGMENTS (1942) § 73 (2). See also Comment c to that section.

⁹⁵ 140 Mass. 411, 5 N. E. 265 (1886).

⁹⁶ *Id.* at 413-415.

⁹⁷ 159 Mass. 151, 34 N. E. 187 (1893).

sanity was put in issue. Plaintiff and defendant both participated in the proceeding in which the will was admitted to probate. It was held, distinguishing *Brigham v. Fayerweather*, that the parties were estopped to assert that the testator was of unsound mind when he executed the will.

Without going into detail, it may be suggested that perhaps a consideration of the doctrines of collateral estoppel might throw some light on the question of the effect of a foreign probate decree. Suppose *A* dies testate domiciled in state *X*, leaving real and personal property in state *X* and real and personal property in state *Y*. Since the probate decrees in state *X* can only operate directly on the property in that state, they have force as judgments in rem only as to that property. To the extent that they purport to deal with property in state *Y*, the court is, strictly speaking, without jurisdiction. But the laws of state *Y* are to the effect that the law of state *X* is to be applied in determining the devolution of personal property in state *Y*. Moreover, any persons who are actually parties to the proceeding in state *X* are bound as to any facts determined in that proceeding. Among these are the facts determining that testator died domiciled in state *X*. Thus, the effect of the opinion in *Riley v. New York Trust Company*,⁹⁸ already discussed, is that, as between persons actually appearing or personally served in a probate proceeding in which domicile is determined, there is a collateral estoppel which operates even in another state. As to the real estate in state *Y*, however, the law of that state does not distribute it in accordance with the law of the domicile. Therefore, the finding of domicile is irrelevant as to the questions involved in the distribution of testator's real estate in state *Y*.

By way of summary, the following conclusions are suggested. The proceeding to administer the estate of a decedent is properly described as strictly in rem. Nevertheless, due to the peculiar function of administration, to the history of its

⁹⁸ 315 U. S. 343, 62 S. Ct. 608 (1942).

procedures, and to the fact that administration is ordinarily accomplished by a series of final decrees and not by a single decree, many aspects of this proceeding are unique and do not precisely fit into the type form of proceeding in rem such as the condemnation or the admiralty proceeding. This series of steps in the administration of a decedent's estate may be, and commonly is, for the purpose of determining the requirements of notice and a fair hearing, a single proceeding. While probate decrees are strictly in rem to the extent that they involve a determination of the persons who succeed to the property interests of the decedent within the state, some of them may have in personam operation. But as to those which are in rem, the res is the estate of the decedent within the state. This does not mean that the proceeding determines all the owners of the property in which the decedent had an interest. Rather it decides who are the successors to the decedent with respect to any interests in property which he may have had at the time of his death. While probate decrees in rem do not directly operate as to property without the state, they can affect it by the operation of the laws of the foreign state; and doctrines of collateral estoppel may operate to bind interested parties as to property in the foreign state. Finally, it is believed that the legal doctrines herein discussed amount to nothing more than a unique application of recognized principles of *res judicata*.

“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,” said Mr. Justice Bradley. “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.”⁹⁹

⁹⁹ Case of Broderick's Will, 21 Wall. (88 U. S.) 503 at 519 (1874).