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# Constitutional Law -- Due Process -- Notice by Publication in Settlement of Accounts of Statutory Common Trust Fund

more readily attained. The solution of the problem in the lower schools is and should be left to time[20] and legislative action.[21]

## CONSTITUTIONAL LAW — DUE PROCESS — NOTICE BY PUBLICATION IN SETTLEMENT OF ACCOUNTS OF STATUTORY COMMON TRUST FUND

Trustee of common trust fund filed a petition for judicial settlement of accounts as prescribed in a statute authorizing the establishment of the common trust fund.[1] When the first investment in the fund was made, the trustee notified each beneficiary by mail. The notice given in this petition was by publication as set out in the statute.[2] The beneficiaries so served were not all within the jurisdiction of the court. *Held*, that under the Fourteenth Amendment, the statutory notice does not afford due process of law to those beneficiaries whose place of residence is known, but is sufficient to those beneficiaries whose whereabouts could not reasonably be ascertained. *Mullane v. Central Hanover Bank & Trust Co.*, 70 Sup. Ct. 652 (1950).

In the determination of what constitutes due process of law with respect to adequacy of notice under the Fourteenth Amendment, a distinction is usually drawn between actions in rem and in personam.[3] A proceeding in personam is against the person based on jurisdiction of the person,[4] while a proceeding in rem, against property, involves jurisdiction over the res to be adjudicated by the court.[5] Actions in personam are further distinguished from those in rem since, in the latter, a valid judgment is obtained without personal service of process, while personal service is a condition precedent to a valid judgment in personam.[6] Proceedings quasi in rem, against a person in respect to property within the jurisdiction,[7] include those actions to adjudicate interests of persons designated and constructively served as unknown.[8]

The adequacy of service by publication depends on whether it is reasonably calculated, under the circumstances, to give the necessary parties an actual knowledge of the proceedings and an opportunity to be heard.[9] The

20. See 2 BEVERIDGE, LIFE OF JOHN MARSHALL, 21 (1919) (these "distinctions and prejudices exist to be subdued only by the grave.").
21. *See* Carr v. Corning, 182 F.2d 14, 16 (D.C. Cir. 1950).

1. N.Y. BANKING LAW § 100-c.
2. N.Y. BANKING LAW § 100-c (12).
3. Pennoyer v. Neff, 95 U.S. 714 (1877).
4. McCormick v. Blaine, 245 Ill. 461, 178 N.E. 195 (1931).
5. *See* Beck v. Otero Irr. Dist., (D. Colo.), 50 F.2d 951, 953 (1931).
6. White v. Glover, 138 App. Div. 797, 123 N.Y. Supp. 482 (1st Dep't 1910).
7. Hill v. Henry, 66 N.J. Eq. 150, 57 Atl. 554 (1904); Gassert v. Strong, 38 Mont. 18, 98 Pac. 497 (1908).
8. 3 FREEMAN, JUDGMENTS § 1522 (5th ed. 1925).
9. Milliken v. Meyer, 311 U.S. 457 (1940).

due process clause of the Fourteenth Amendment requires appropriate notice of the pending judicial action.[10] A judgment rendered by a court has no effect without valid service of process[11] which affords such notice.[12] In order to adjudicate matters wherein unknown persons are involved, statutes have been enacted authorizing constructive service by publication.[13] These statutes contemplate an honest and well directed effort to ascertain the names and addresses of such persons.[14] Confined to proceedings in rem and quasi in rem, these statutes have been upheld.[15] Acknowledging that such proceedings are unsatisfactory,[16] the courts, of necessity, employ them since a person cannot be bound by a judgment unless he has been afforded service in some manner.[17]

The beneficiary's right to an accounting follows the existence of a trust.[18] A proceeding of this nature, being against the person with respect to the res, has been in cases interpreting the statute here involved, characterized as quasi in rem.[19] This classification is justified by reliance on the analogous adjudication of the rights of persons outside of a court's jurisdiction with respect to property within the jurisdiction in suits to quiet title,[20] to foreclose mortgages,[21] personal property tax confirmation proceedings,[22] and garnishment proceedings.[23] However, in the instant case, the distinctions between actions in personam and in rem have been dispensed with by the Court's assertion that the adequacy of constructive service is independent of such classification. The Court stresses, not the power of a state to control trusts established under its law, but the obligation of a state to give beneficiaries of such trusts appropriate opportunity to contest adjudication of their personal rights. Notwithstanding the type or historical classification of a proceeding, a statute prescribing constructive service on a person who can with proper diligence be served personally, can never conform with requirements of due process of law.[24]

The advantageous use of proper distinction between actions in rem and actions in personam for many facets of the law is not disparaged by

10. State v. Standard Oil Co., 2 N.J. Super. 442, 64 A.2d 386 (1949).
11. Wise v. Herzog, 114 F.2d 486 (D.C. Cir. 1940).
12. Grannis v. Ordean, 234 U.S. 385 (1914).
13. McClymond v. Noble, 84 Minn. 329, 87 N.W. 838 (1901).
14. Robbins v. Slavin, 292 Ill. App. 479, 11 N.E.2d 651 (1937).
15. See Note, L.R.A. 1918F, 609, 613 (1918).
16. *Ibid.*
17. Jones v. Fuller, 280 Ky. 671, 134 S.W.2d 240 (1939).
18. RESTATEMENT, TRUSTS § 172 (1935).
19. *See In re* Security Trust Co. of Rochester, 189 Misc. 748, 70 N.Y.S.2d 260, 273 (Surr. Ct. 1947), *rev'd on other grounds*, 275 App. Div. 1020, 92 N.Y.S. 2d 308 (4th Dep't 1949); *In re* Central Hanover Bank & Trust Co., 274 App. Div. 772, 80 N.Y.S.2d 127, 128 (1st Dep't 1948) (dissenting opinion).
20. Jacob v. Roberts, 223 U.S. 261 (1912); McDaniel v. McElvey, 91 Fla. 770, 108 So. 820 (1926); Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. 614 (1904); *In re* Bergman's Survivorship, 60 Wyo. 355, 151 P.2d 360 (1944).
21. Bradwell v. Collins, 44 Minn. 97, 46 N.W. 315 (1890).
22. Barnett v. Cook County, 373 Ill. 516, 26 N.E. 862 (1940).
23. Encyclopaedia Brittanica v. Shannon, 133 F.2d 397 (D.C. Cir. 1943).
24. Hunstock v. Estate Development Co., 22 Cal.2d 205, 126 P.2d 932 (1942).

the Court in its analysis of the instant case. They are rightly circumvented, however, by the Court's holding that the adequacy of constructive service rests solely on its reasonable probability of giving actual notice. The trustee, in the instant case, knew the whereabouts of the known beneficiaries. They were given notice by mail when the trust was established. The inconvenience, incidental to mailing notice, should not relieve the trustee of his obligation to give notice where reasonable. Expediency in the administration of complex trusts is desirable, but the safeguard of our constitutional guaranty of due process of law should not be disregarded to achieve this end.

## CONSTITUTIONAL LAW—LABOR-MANAGEMENT RELATIONS ACT—NON-COMMUNIST AFFIDAVIT REQUIRED OF UNION OFFICERS

Noncompliance by the unions with the requirements of § 9(h) of the Labor Management Relations Act of 1947[1] raised the issue of constitutionality of the provision. The section establishes, as a condition precedent to the use of the facilities of the National Labor Relations Board, the filing of an oath by each official of the labor union that he is not a member of, or affiliated with, the Communist party and that he does not believe in the overthrow of the government by force or support any organization that so believes or teaches. Failure of union officers to supply such affidavits in one case resulted in dismissal of an action by the union to enjoin an election in which its name did not appear on the ballot.[2] Refusal to comply with the requirement in another situation prevented enforcement of a Board order requiring the company involved to bargain on pension matters.[3] The two cases were considered simultaneously by the Court. *Held*, that § 9(h) of the Labor Management Relations Act does not unreasonably abridge individual freedoms and thus is compatible with the Federal Constitution. *American Communications Ass'n v. Douds*, 70 Sup. Ct. 674, *rehearing denied*, 70 Sup. Ct. 1017 (1950).

The Act was designed to remove obstructions to the free flow of commerce.[4] The power of Congress to protect interstate commerce has been established.[5] However, the method chosen by the enactment of § 9(h) to prevent dangerous political strikes necessarily met with objection from those who found their liberties somewhat lessened thereby. The labor group was encouraged to chose officers who would sign the affidavits or it might not

1. 49 Stat. 449 (1935), 29 U.S.C. § 151 (1946), as amended 61 Stat. 146 (1947), 29 U.S.C. § 159(h) (Supp. 1949) (Taft-Hartley Act).
2. Wholesale and Warehouse Workers Union Local No. 65 v. Douds, 79 F. Supp. 563 (S.D. N.Y. 1948).
3. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948).
4. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
5. *Ibid.*