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ARE PROBATE COURTS IN MISSOURI UNDERGOING RETROGRESSION?

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Probate courts in Missouri have always occupied an inferior status in the total hierarchy of court organization.[1] They have been courts of record[2] and, as to matters or subject matter confided to them, they have enjoyed the same presumption as to the regularity and validity of their orders and decrees as have courts of general jurisdiction.[3] However, appeals from their orders have always been heard de novo in the circuit courts of general jurisdiction.[4] Also they have not always enjoyed the highest type of judge. Although some of the larger cities have been most fortunate in having outstanding lawyers as judges, it has been possible to have the probate courts manned by laymen without any legal training or judicial experience whatever.[5]

The new Missouri Probate Code adopted in 1955 tried to enhance the status of probate courts without elevating their place in court organization.[6] This latter would have taken an amendment of the Missouri Constitution. Nevertheless, those charged with the drafting of this new code and with persuading the legislature of its values were able to introduce two important changes which represent a forward step for probate courts.

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1. MO. CONST. art. V, § 12 (1820) provided that "inferior tribunals shall be established in each county, for the transaction" of probate matters. For a full discussion of the status of probate courts see SIMES & BASYE, *Organization of the Probate Court in America*, 42 MICH. L. REV. 965 and 43 MICH. L. REV. 113 (1944), in PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 385 (1946).

2. MO. CONST. art. V, § 17.

3. See Johnson v. Beazley, 65 Mo. 250, 256 (1877).

4. § 472.250, RSMo 1959.

5. § 1988, RSMo 1939. See also SIMES & BASYE, *supra* note 1, at 137-45, reprint at 466-77.

The latest revision of the Missouri Constitution in 1945 provided that "every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed. . . ." MO. CONST. art. V, § 25. Ideally, this was not the best solution to the problem, but it was recognized that it would eventually insure that all probate courts within the state would have capable lawyers in charge of them.

6. Chs. 472-75, RSMo 1959.

One, the new code followed the *Model Probate Code* and declared that "the administration of the estate of a decedent from the filing of the application for letters testamentary or of administration until the decree of final distribution and the discharge of the last administrator or executor is deemed one proceeding for purposes of jurisdiction. Such entire proceeding is a proceeding in rem. No notice is jurisdictional except as provided in section 473.033 unless the provision requiring the notice expressly provides that the notice is jurisdictional."[7]

Two, it increased the function and jurisdiction of probate courts by conferring upon them, in addition to those powers previously exercised, jurisdiction to construe wills as an incident to the administration of estates, to determine heirship, and to administer testamentary trusts.[8] All of these changes added considerably to the stature and responsibility of the probate courts over the property and estates of decedents, forecasting perhaps the time when all probate courts will be supervised by legally trained judges and will be either a part of courts of general jurisdiction or fully coordinate with them.

Under the former law the orders and decrees of probate courts were always subject to scrutiny to verify that every matter essential to authorize the probate court to act had been complied with. The result was to bring into question numerous orders of probate courts unless every element of jurisdiction was satisfied.[9] This in turn cast doubt upon titles when the slightest of irregularities appeared anywhere in proceedings leading up to sales of property belonging to the estate. Property owners suffered, the public image of probate courts suffered, and marketability of land titles was severely impaired.

It is a matter of common knowledge that most attacks upon probate orders and decrees are based upon shortcomings or informalities in the form or length of notice given as to the hearing upon which those orders and decrees are to be made. Because precise notice has been viewed so often as essential to due process, defects in the notice given have been

7. § 473.013, RSMo 1959.

8. § 472.020, RSMo 1959. It was also provided in section 472.030 that "the court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its orders, judgments and decrees in probate matters as the circuit court has in other matters . . . ."

9. Morrow v. Weed, 4 Iowa 77, 124 (1856) contains the best discussion of this phenomenon. For other cases holding probate sales invalid see Young v. Downey, 145 Mo. 250, 46 S.W. 1086 (1898) (failure to give notice for sufficient period of time); Norton v. Reed, 253 Mo. 236, 161 S.W. 842 (1913) (same). See also Starke v. Cole, 373 S.W.2d 473, 478 (K.C. Mo. App. 1963), quoting from Clyce v. Anderson, 49 Mo. 37 (1871).

responsible for numerous decisions invalidating those orders. The defects have been described in such cases as being "jurisdictional." The change in the new Missouri Probate Code was intended to obviate this very result in the case of numerous interim orders made in probate proceedings. This was accomplished by the inclusion of the statute quoted above making all notices of proposed hearings nonjurisdictional except the first notice at the commencement of the proceeding.

Now a recent decision of the Springfield Court of Appeals has refused to construe this statute according to its terms when applied to a defective notice of a petition for the sale of land. In effect the decision would relegate probate courts in Missouri to the same inferior position which they occupied prior to 1956 and leave titles which are dependent upon their orders of sale to be suspect as before.

In *Clapper v. Chandler*[10] the administrator of a decedent's estate filed a petition in the probate court for an order to sell 280 acres of land belonging to the estate in order to pay the claims of creditors. On the following day the court issued an order setting the hearing on the petition for July 15, 1963, directed that notice of the hearing be given to all "heirs and devisees who are interested persons," both by publication and by ordinary mail, and ordered that proof by publication be filed in court on or before the date of the hearing. A Missouri statute[11] provides that when service by publication is ordered, the hearing shall be held not less than 30 nor more than 42 days after the date of the first publication. For some unexplained reason the first publication of the notice was not made until June 21. Nevertheless the hearing was held on the date scheduled for it, although this was only 24 days after the first publication. It also appeared that no notice was ever given to any of the heirs by mail as had been directed. One of the decedent's sisters, who was also an heir, together with her husband, appeared in court and undertook to purchase the property for $6,000, in accordance with an order authorizing a sale to them. Thereafter, because the purchasers were unable to raise the money to complete the purchase, the court modified its original order of sale and ordered a sale to a third party for $7,200. Upon payment of the full purchase price the administrator executed a deed to the third party. This order of sale and the administrator's deed dependent thereon were then assailed by the original purchaser—the heir who had been unable to raise the money to consummate the sale to her. Both the probate court and the circuit court on appeal upheld the validity of the sale and of the order of the probate court authorizing it. Upon appeal by

10. 406 S.W.2d 114 (Spr. Mo. App. 1966).

the heir the Springfield Court of Appeals held the order absolutely void, notwithstanding the participation and acquiescence of the appellant in the sale proceedings. It based its ruling on the single fact that the original order of sale was void for lack of notice to the heirs.

If this decision represents a final appraisal and construction of the Missouri Probate Code as to the effect of orders of sale of a probate court, no one should put much faith in them. Hereafter a purchaser of land at a probate sale and all subsequent purchasers from him must examine carefully the notice of hearing and every step in the probate proceedings leading up to that sale. If there is any irregularity in them, the order of sale will be questionable, and titles based upon them will perpetuate any defects which they may contain.

It is true that probate courts in many states have been inferior tribunals which have had to prove their jurisdiction at every stage. It was partly because of this unfortunate subordination that probate jurisdiction in many states was bestowed on courts of general jurisdiction or on courts fully coordinate with them so as to eliminate trials de novo and the requirement of proof of jurisdiction at every step.[12] In its adoption of its new probate code in 1955 Missouri did not change the status of its probate courts in its judicial hierarchy, but other changes in that code should have precluded the decision in the *Clapper* case.

Thus section 473.013 stated a fundamental proposition as to the nature of a probate proceeding, declaring it to be one proceeding for the purpose of jurisdiction, which it truly called "a proceeding in rem," and then expressly providing that "no notice is jurisdictional except the notice by publication provided in section 473.033" for initiating administration on an estate. Similar provisions have been embodied in the probate codes of several states which have made complete revisions of their probate laws within the past two decades.[13] Such a statement and characterization of an administration proceeding is to call attention to the fact that it actually consists of a whole series of separate steps, each of which is but a part of the whole, but that only the notice at its initiation is jurisdictional.[14] Notices at other stages may be specified and

11. § 473.493, RSMo 1959.
12. SIMES & BASYE, *supra* note 1, at 996-1008, reprint at 423-37.
13. ARK. STAT. ANN. § 62-2101 (Supp. 1963); IND. ANN. STAT. § 7-102 (Burns Replacement 1953); IOWA CODE ANN. § 633.330 (1964); TEX. PROB. CODE § 2 (1956).
14. This statute and idea was taken from MODEL PROBATE CODE § 62 (Simes 1946). It is expounded in detail and in depth in SIMES, *The Administration of a Decedent's Estate as a Proceeding in Rem,* 43 MICH. L. REV. 675 (1945), in PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 489 (1946).

actually made, but a failure to give them, or a failure to give them in the manner or for the period of time required, will not impair their effectiveness. This provision is most significant in recognizing that failures and errors do occur in giving notices at various stages of an administration proceeding, but it emphasizes that such irregularities are not to impair the more important policy of protecting subsequent orders and decrees of probate courts at all costs.

Probate court judgments and decrees have been struck down in Missouri many times in the past for the most insignificant errors and irregularities. It is true that the rights of individuals in privity with the probate proceedings may have been adversely affected, although all too often the impairment of rights has been more imaginary than real. But more people are involved than the heirs and beneficiaries under a will—namely, the purchasers of property at probate sales. Their very interest and willingness to bid at such sales make them an important element in upholding the sale at which they submit bids. If they are allowed to pay their money but are told in advance that they cannot rely upon the validity of the sale, they will most certainly be discouraged from bidding at all. We will only render more difficult the accomplishment of one of the primary purposes of administration, the raising of money in order to pay debts of the estate.

The sale of real estate in the case under discussion was but one part in the administration proceeding as a whole. It was one of the interim steps in the proceeding designed to raise money in order to pay the claims of creditors. The court's jurisdiction over the estate had already attached upon filing the application for letters of administration. It was true that the notice of the hearing for the order of sale was not given for the period prescribed by the statute and was not mailed to the heirs at all. Admittedly this was an irregularity which might have caused the probate court to continue the date of the hearing, to direct that notices be mailed as it had ordered, or even to vacate or modify its order of sale. But it did none of these things. It proceeded to order the sale and to approve a sale to one of the heirs who had offered to purchase the property. Why then should its order not be upheld in the greater interest of recognizing the validity of its judgment and upholding titles dependent thereon?

Possibly an heir adversely affected by lack of notice might interpose a direct objection and obtain such extension as would make the period accord with the statute. But the only heir who complained here was the very heir who had appeared and offered to purchase the property ini-

tially and then defaulted in consummating that purchase, with the result that the court ordered a resale to a purchaser who offered twenty percent more for the property. It was urged that this heir was barred by estoppel or waiver of any rights she may have had to question the order of the court, but the court contented itself by saying that the order was void. Upon the basis of her own argument, the sale to the complaining heir would also have been void had the original sale to her been completed.

Assuming for the purpose of argument that the proceeding was one in personam and not in rem, it may be asked why the court did not acquire jurisdiction over the heir. She had appeared at the sale and made a bid which was accepted by the court. If personal notice to her was essential, why did not her appearance at the sale constitute a waiver of service? Section 472.130 expressly provides for waiver of service and ends by providing that "any person who submits to the jurisdiction of the court in any hearing waives notice thereof." It would be hard to find a clearer case of waiver and submission, but the court took no notice of this statute.

In reaching its conclusion the court admitted that a probate proceeding was one single proceeding in rem, but declared that its "jurisdiction is based on its power over the res (the decedent's property) rather than its jurisdiction over the person. . . ."[15] It then asserted that such a power could not be exercised unless the res was subjected to its jurisdiction and that "possession or control of the property itself is regarded as essential to the exercise of jurisdiction in rem."[16] It then said that "the res consisted of the property of the decedent grasped through the personal representative as an officer of the court," but added that "if the title and right to possession of the decedent's realty did not vest in the personal representative by virtue of the grant of letters, then the probate court acquired no in rem jurisdiction as to the real property."[17] The lack of possession of the real property by the personal representative, reasoned the court, deprived the probate court of its in rem jurisdiction over it, so that it could order its sale only by giving notice exactly as specified by the statute and thereby acquire jurisdiction in personam over the *owners* of the real property as would be necessary in an ordinary civil action.

This reasoning assumes, first, that the heirs become the owners of the property upon the death of the decedent and, second, that it may only be taken away from them by giving them notice as would accord

15. Clapper v. Chandler, *supra* note 10, at 118.
16. *Id.* at 119.
17. *Ibid.*

with due process, the due process in such a case being that specified in the probate code itself. The heirs, of course, do not become absolute owners of the decedent's property upon his death. At most they become potential owners of it. A decedent's real property is now subject everywhere to sale for satisfaction of creditors' claims. If the heirs are given possession of it, it can only be a temporary possession for it may be necessary to sell it in order to pay the claims of cerditors. This need cannot always be determined at the commencement of an administration proceeding, so any possession taken by or granted to the heirs is necessarily always tentative.

Historically, the heirs or devisees did take possession of real property immediately upon the death of its owner. This was because title also passed to them at death free from the claims of creditors, unless the testator charged the real estate with the payment of his debts.[18] By modern legislation both real and personal property have become available for the payment of debts.[19] If it is necessary to sell land for this purpose, some few states require an independent proceeding in a court of general jurisdiction with service of process upon the heirs or devisees.[20] At the present time, however, most states authorize sales of land by the probate court as a part of their general jurisdiction over the administration of estates.[21] In many states, where probate judges have had no legal training, this has resulted in errors and irregularities in proceedings of this kind which in turn have permeated the ultimate orders of sales. This accounts in large part for the lack of confidence often reposed in probate proceedings and in titles dependent upon them.

Some, but not all, of these infirmities have disappeared with time. They do not exist in states where probate jurisdiction has been conferred upon courts of general jurisdiction or their equivalent. Elsewhere they have been alleviated by legislation such as is contained in section 473.013 of the Missouri Probate Code, designed to make all notices except that given at the commencement of the proceeding nonjurisdictional in character. Notwithstanding the obvious purpose of this statute the court in the *Clapper* case declared that notice given exactly as prescribed by the probate court was a prerequisite and jurisdictional to the power of the court to act.

It will be noted that section 473.013 says that "the administration

18. ATKINSON, WILLS 563 (2d ed. 1953).
19. *Ibid.*
20. SIMES & BASYE, *Organization of the Probate Court in America*, 43 MICH. L. REV. 113, 121 (1944), in PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 455 (1946).
21. *Ibid.*

of the estate of a decedent . . . is deemed one proceeding for purposes of jurisdiction." It was not suggested that the real property was not a part of the estate. Even though the heirs may be given possession of it immediately upon the decedent's death, it still remains in his estate until it is definitely ascertained that it will not be needed to satisfy the decedent's debts; or if it appears that it is not so needed, the heirs' title will not be clear until a decree of final distribution is made determining the identity of the heirs and distributing the real property to them.

The court finally concluded that the probate court acquires no more jurisdiction initially over an interstate's realty under the new code than it did under the old statutes. It correctly observed that the Missouri Probate Code permits the personal representative to take possession of the decedent's real property only upon a specific order of the probate court, whereas the *Model Probate Code* makes it the duty of the personal representative to take possession of it.[22] It does not follow, however, that this difference deprives the probate court of jurisdiction over the real property so as to preclude any resort to it at all. It is the very existence of debts which makes resort to the probate court necessary in order to sell the real estate. And in such a case the court is still dealing with the decedent's estate, even though the heirs may have temporary possession of it. If it is not needed to pay debts, at the conclusion of the administration proceeding the probate court is required to determine and to designate the persons entitled to distribution of the estate, including the real property. The statute provides that "every tract of real property so distributed shall be specifically described therein."[23] If the court's construction of the statute is correct, then decrees of final distribution of real property are also suspect in case there is any defect in the notice upon which the decrees of final distribution are predicated. This would indeed be a tragedy in its impairment of marketability of titles in Missouri. People have come to rely on decrees of final distribution in determining ownership of land in Missouri derived from a decedent. Similarly, they should be able to rely upon an order of sale of real property, notwithstanding possible errors or irregularities in it.

Section 473.013 says that "no notice is jurisdictional" except the original one. No exception is made as to proceedings for the sale of real estate, and no exception is made as to decrees of final distribution of real estate. It would appear that the court is reading something into the leg-

22. § 473.263, RSMo 1959. MODEL PROBATE CODE § 124 (Simes 1946).
23. §473.617, RSMo 1959.

islation that is not there and has reached a result which can have far-reaching, harmful effects upon the faith reposed in probate decrees and titles dependent upon them.

The court relies upon section 32 of the *Restatement of Judgments* as authority for its position that possession or control by the personal representative is essential to the exercise of jurisdiction in rem. This may be true in some forms of in rem proceedings, but it is not universal and does not apply to probate proceedings. Rather it is the presence of property within the state which makes it amenable to jurisdiction of the probate court, grasped by the appointment of the personal representative and not by his actual possession of the property.[24]

The discussion of possession and control of the real property by the personal representative as being essential to jurisdiction over the res is questionable since the new code nowhere requires that the personal representative be given possession of property before proceeding to sell it. The real question is whether the proceeding for the sale of land is a separate proceeding or only a part of the entire administration proceeding conceived as a unit, as stated in section 473.017. That it is not a separate proceeding is implicit, if not explicit, in section 472.020 which provides that "the probate court has jurisdiction over *all* matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians of minors and persons of unsound mind, settling the accounts of executors, administrators and guardians, *and the sale or leasing of lands by executors, administrators and guardians* . . . and of such other probate business as may be prescribed by law." (Emphasis added.)

The legislature recognized that proceedings for the sale of land would contain defects and proceeded to prescribe the legal effects of such irregularities as may occur. Section 473.480 provided that "no proceedings for sale, mortgage, lease, exchange or conveyance by an executor or administrator of property belonging to the estate shall be subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the same had jurisdiction of the estate." There is no language in this statute which required that the personal representative must have possession of the real property or that such possession is essential to the court's entertainment of the petition to sell it.

Undoubtedly the court was influenced by the historical immunity of land for the payment of a decedent's debts. This immunity resulted in

24. SIMES, *supra* note 14, at 696, reprint at 515-16.

title being cast upon the heirs immediately upon death. Since this is no longer true in any state, a truer evaluation would be that the heirs or devisees become entitled to it if and when it is determined that it is not needed for the payment of debts. It should follow that any granting of possession to them is temporary and tentative and not that the probate court is deprived of jurisdiction to sell the property as an incident of its probate jurisdiction over all property of the estate.

It should not be concluded from this discussion that the heirs and devisees are not entitled to notice. The statute prescribes the notice which should be given to them, but the statute says that notice is not jurisdictional. If it is not given in the exact manner or for the full period of time directed, the probate court has the power to refuse to make an order of sale or to vacate or modify it after it has been made. Such a power was not exercised in the present case by the probate court, by the circuit court upon appeal, or by the court of appeals. Instead, the latter held that the order of sale was completely void for lack of jurisdiction by the court over the real property because the administrator did not have possession of it.

If faith and credit cannot be placed in the solemn orders and decrees of probate courts which have acquired jurisdiction over an estate by the granting of letters to the personal representative, the impact will be disastrous upon those who must rely upon these orders in purchasing real property at sales where their bids are invited for the benefit of those in privity with the estate. The principal case is an unfortunate construction of a major and important piece of legislation which was passed by the Missouri legislature in order to simplify probate proceedings and enhance the respect for the decrees of Missouri probate courts[25] until such time as they may be merged with or made coordinate with courts of general jurisdiction.

25. Two excellent appraisals of the history and development of probate courts in Missouri and of the changes effected by the 1955 probate code have been written. They are Limbaugh, *The Sources and Development of Probate Law,* 1956 WASH. U.L.Q. 419; and Welch, Oliver & Summers, *Constitutionality of the Broadened Powers of the Probate Courts under the New Code,* 23 MO. L. REV. 113 (1958).