RULES AS TO NOTICE OR ASSENT AND THE GIVING OF BONDS IN THE MORE COMMON PROBATE PROCEEDING IN MASSACHUSETTS

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GUY NEWHALL

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RULES

AS TO NOTICE OR ASSENT AND THE GIVING OF BONDS

IN THE MORE COMMON
PROBATE PROCEEDINGS
IN MASSACHUSETTS

By
GUY NEWHALL, A.B., L.L.B.
(Author of "Settlement of Estates in Massachusetts")

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INTRODUCTION

The generous reception given to my book on the Settlement of Estates and to the several pamphlets which preceded it convinces me that the members of the bar generally appreciate any effort to explain our complicated system of probate law. This has encouraged me to attempt what is perhaps the most difficult problem in the whole field of probate practice, namely, to reduce to a clear and simple statement the requirements as to notice and assent in probate proceedings. *Who must be notified or whose assent must be obtained in order to put through a particular matter in the probate court?* This is the question which confronts a probate practitioner in connection with almost every petition which he files. In a large proportion of cases he must seek special information from the judge or register personally.

The task has been a very difficult one, owing to the variation in the requirements and practice in the different counties. Accordingly, I have tried to make my statements elastic, and to indicate the varying degrees of notice which may be required. Persons using the pamphlet, however, should keep in mind that owing to the large discretionary powers vested in each probate judge, requirements are certain to vary, not only in different counties, but with different judges in the same county, and if the court insists on a particular notice being given, the petitioner has no choice but to comply.

What I have said should not be interpreted as hostile criticism of either our probate system or the courts which administer it, for both of which I have the most profound admiration. Certain differences of practice in the different counties are inevitable. Courts whose business comes from the large cities are apt to be stricter in their requirements than those dealing with smaller communities, where people are better known to one another and to the court. At the same time, there is a great opportunity for a "getting together" in the direction of more uniformity, and it is my

hope that the setting forth of the differences in this pamphlet may result in an improvement in that direction.

I have not attempted to include all forms of probate petitions, but only those more frequently brought. I wish to acknowledge the great assistance which I have received from the judges and registers in the different counties, and hope that this pamphlet will be of assistance to the bar. I earnestly invite correspondence from any persons who have suggestions or criticisms leading to its improvement or the correction of errors.

GUY NEWHALL

Lynn, Massachusetts
March, 1918.

GENERAL RULES

(1) **Requirements as to Notice very Uncertain.** — It is difficult to lay down definite rules as to notice in probate proceedings. Very rarely does the statute prescribe any particular notice, most of the requirements being fixed by the probate forms, which, when they have been duly approved by the Supreme Judicial Court, have the force of law (R. L. 162, § 29; Baker *v.* Blood, 128 Mass. 543.) Even within these limits much is discretionary with the court, and, as I have previously stated, the practice varies very much in the different counties, and in some cases with the different judges in the same county,

In preparing this pamphlet the author has freely consulted the different probate judges and registers, particularly in the larger counties, and very gladly acknowledges his indebtedness to them for their assistance. It is believed that in the main the requirements herein set forth will be found to follow substantially the practice in most of the counties.

(2) **Assent to Take the Place of Notice.** — In any matter where notice is required, except to creditors, it may be dispensed with if *all* parties entitled thereto assent in writing to the proceedings, or waive notice in writing, or appear voluntarily. Likewise, if some of the parties assent, waive notice, or appear, notice may be dispensed with as to them. (See R. L. 162, § 45).

(3) **Assent or Waiver Must be of Competent Parties.** — There is a very important distinction to be observed between notice on the one hand, and assent, waiver or voluntary appearance on the other. Wherever notice is required, this requirement is satisfied by service in the manner indicated by the citation, whether the parties upon whom notice is to be served are residents or non-residents, minors or adults, competent or incompetent. If they are minors or mentally incompetent, the court may appoint a guardian ad litem or next friend to represent their interests. But where notice is to be dispensed with by assent, waiver or voluntary appearance, this must be by *competent* parties, so that if

any of the persons interested are minors, or have been adjudged insane, or committed to an institution for the insane, their assent, waiver or voluntary appearance must be by their legal guardians. If there is any doubt about the competency of a party, it is wiser to serve a citation upon him and have a guardian *ad litem* or next friend appointed to represent him.

(4) **No Substitute for Written Assent.** — Wherever by statute, rule or practice assent in writing is specifically required, nothing else will take the place of it.

(5) **Kinds of Notice.** — Notices (or citations as they are called in probate practice) are of two kinds; (a) personal service, and (b) publication.

(a) *Personal Service* means actual personal service upon the party, usually fourteen days (in a few cases, seven days) before the return day of the citation, and may be made anywhere, within or without the Commonwealth, regardless of the age or legal capacity of the person served. The requirement of personal service is not satisfied by leaving at the last and usual place of abode; it means actual personal notice. (See Parker *v.* Abbott, 130 Mass. 25) The court may, in its discretion, direct the service to be made by registered mail. (St. 1915, c. 24).

(b) *Publication* means publication in a newspaper for three successive weeks, and usually (but not always) the court requires in addition mailing or delivering a copy of the published notice to all persons interested seven or fourteen days before the return day of the citation. Where the citation reads "publication" and does not require mailing, it means that the only notice required is by publication, without mailing copies. In Suffolk and some of the other counties "mailing" is practically always required on a citation by "publication," and it is submitted that this a just requirement and should be made uniform.

Where there is any possibility of the existence of unknown heirs or unknown parties interested, it is always better to give notice by publication.