

1952

# In the Matter of the Estate of James W. Linford : Petition for Rehearing

Utah Supreme Court

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Leon Fannesbeck; Attorney for Petitioners;

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# In the Supreme Court of the State of Utah

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In the Matter of the Estate  
of James W. Linford, Deceased.

Beatrice E. Linford Sorenson,  
Administratrix,  
Appellant,

vs

Jean H. Linford and Phoebe L.  
Bingham,

Respondents,

PETITION FOR  
REHEARING

No. 7648

**FILED**

JAN 21 1952

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Clerk, Supreme Court, Utah

Leon F. Fannesbeck

Attorney for Petitioners

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TO THE HONORABLE SUPREME COURT OF THE  
STATE OF UTAH

Extention of time for filing Petition for Rehearing  
having heretofore been granted, comes no respondents  
and petitioners herein and file their Petition for Rehear-  
ing, and state that the opinion as rendered by the Court  
is in error in the following particulars:

## POINTS OF ERROR

1. This Court erred in failing to recognize and pass  
upon respondents MOTION TO DISMISS APPEAL.

which challenged the jurisdiction of this court upon the points covered in the decision, and in proceeding with its opinion as though no such motion to dismiss had ever been made.

2. The Court erred in failing to note or recognize in its decision the fact that on April 24, 1950, the lower court made and entered its Findings of Fact, Conclusions of Law, Order and Judgment, directing the administratrix to make and file her final account of all moneys belonging to the estate, as the court therein found, to-wit: \$7855.50.

3. The opinion, as rendered, further erred in failing to note or recognize the fact that appellant not only failed to appeal from said Findings, Conclusions of Law and Judgment rendered April 24, 1950, but about June 1, 1950, as such administratrix, she made and filed her verified "Final Account and Petition for Settlement Thereof". in which she set forth that as such administratrix she has received and collected the sum of \$7855.50, as moneys belonging to the estate.

4. The opinion rendered is further in error, because it fails to recognize the undisputed fact that, about November 1, 1950, after filing her supplemental Account (covering the three years operation of the business), the administratrix filed her Petition For Distribution of Estate,—as provided by statute, and that the court entered its Decree of Distribution, December 22, 1950,

based on her Final Account, as settled by the court, and on her Petition for Distribution of Estate.

5. The opinion, is also in error, because it fails to recognize and abide by the limited scope of this appeal, as stated in the Notice of Appeal; but proceeds to decide a posed question: to-wit: whether, where the estate is found to exceed \$1500, the decree of summary distribution should be vacated and the whole estate subjected to probate? The opinion fails to note that no such question was presented in the appeal, nor argued or contended for by appellant.

6. The opinion is further in error because it will cause confusion and uncertainty to the lower court among the heirs and the parties hereto as to its meaning.

Leon Fannesbeck

Attorney for Respondents

I, Leon Fannesbeck, attorney for respondents and petitioners, hereby certify that in my opinion there is good reason to believe that the decision rendered by the court herein is erroneous in the particulars set forth in the foregoing petition and that said matter and decision should be re-examined.

Leon Fannesbeck

## ARGUMENT AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

For brevity, I shall refer to the points of claimed

error, as stated in the petition, by number.

Point 1. The Court failed to pass upon respondent's MOTION TO DISMISS APPEAL. I believe Your Honors will all agree that it has always been the custom and practice of this Court, whenever its jurisdiction to hear a case has been challenged by Motion to Dismiss, or otherwise, to first dispose of such jurisdictional question. This time our Motion To Dismiss Appeal was wholly overlooked or ignored. The opinion proceeds as though no such motion had been presented to the court.

Our Motion To Dismiss Appeal is based upon two grounds: *First*, appellant did not make the minor heir and distributee, James S. Linford, a party to this appeal and no notice of appeal was served on him. We cited 4 C.J.S. pg. 854 (pg. 11 of respondents' brief), to the effect that parties to the judgment or decree, whose interest will be directly affected, if the judgment or decree is sustained, reversed or modified, must be made parties.

In Gill vs Tracey, 13 P. 2nd 329, this Court held that appellant must confer jurisdiction on the supreme court; must serve notice of appeal on all parties to the action who may be adversely affected by either a modification or reversal of the judgment appealed from. As James S. Linford was a distributee in the decree of distribution from which this appeal is taken, which appel-

lant seeks to vacate or modify, we submit jurisdiction has not been conferred and this Court has no jurisdiction or authority to vacate, change, or modify the decree of distribution entered December 22, 1950, by which the court distributed to each of the three heirs the sum of \$1195.94, out of moneys which the administratrix reported in her Final Account as belonging to the estate.

Respondents further insist that the *Second* ground in support of their Motion to Dismiss Appeal, is not only well taken, but is conclusive—*the appeal was not taken in time*, concerning the points of which appellant complains and on which the opinion herein largely concerns itself. The findings and conclusions of which appellant complains, by which the court found and held that the \$6,000.00 (sale of business) and the other items, totaling in all \$7855.50, belonged to decedent's estate, were made and filed April 24, 1950. No appeal was taken from those early findings, hence they had long since become final, at the time the decree of distribution, herein appealed from, was signed, December 22, 1950.

In the findings made by the court December 22, 1950, when the decree of distribution was signed, the court, (in paragraph 3 of said findings), referred to and copied paragraphs 4, 5, 6, 7, and 8 of the earlier findings of April 24, 1950. Surely that could not have the effect of giving rebirth to the earlier findings, so

as to restore the right of appeal there from? If that was your decision, I believe Your Honors will all agree that the opinion should definitely so state and hold; so that trial courts and members of the Bar may know how dangerous it is, from the standpoint of reviving the right of appeal, to refer to or incorporate prior findings or judgments, the right to appeal from which has otherwise expired.

Furthermore, what is the Court going to say about the fact that on June 1st (or 5th), 1950, the administratrix filed her verified Final Account showing that she had collected \$7855.50 belonging to the estate? How can she complain of any findings, or any judgment, by the court on December 2, 1950, when six months prior thereto, she had filed her own verified final account, showing that all of said moneys, \$7855.50, belonged to the estate?

We therefore submit that the Motion to Dismiss Appeal must be granted, so far as any question is concerned as to what moneys belong to the estate and must be accounted for by the administratrix, and which she has now accounted for and has now been distributed by the court in its decree of distribution. The administratrix and her counsel did not see fit to appeal from the findings of fact, conclusions of law and judgment, made and entered April 24, 1950, (even though the court suggested that they might want to take an interlocutory

appeal under the new rules), but got a further extension of time in which to file her account, and then, about June 1, 1950, filed her final account as aforesaid.

*Points 2 and 3.* The opinion erres, because it fails to recognize or pay any attention to the fact that on April 24, 1950, the lower court made and entered its finding of fact, conclusions of law and judgment to the effect that the \$6000.00 and other items, totaling in all \$7855.50, belonged to the estate and directed the administratrix to account for the same.

Likewise the opinion is in error, for it wholly fails to note, observe, or recognize the fact that the administratrix did not appeal from the said findings, conclusions and judgment made and entered April 24, 1950, and that the right to appeal therefrom had long since expired, when the decree of distribution herein was signed, December 22, 1950.

The opinion fails to note and hold, as we submit it should have done, that the questions, as to what moneys and how much belonged to the estate and what belonged to her personally, are not properly before this Court, as no appeal was taken in time to raise said questions.

Likewise is the opinion erroneous, for it wholly ignores and fails to note or state the very important fact that about June 1, 1950, the administratrix filed her verified *Final Appoint with Petition for Settlement*

*thereof*, showing that as such administratrix she had received and collected \$7855.50 as moneys belonging to the estate. Her final account was properly filed under the provisions of Sec. 102-12-6.

*Point 4.* The opinion is likewise erroneous, because it overlooks, ignores and fails to state or note the fact that about November 1, 1950, (after filing her pencil supplemental account, of the three years operation of the business), the administratrix filed her *Petition for Distribution of Estate*, and that thereafter, in pursuance of her said *final accounts*, the settlement thereof, in pursuance of her said petition for distribution of estate, the lower court on December 22, 1950, entered its decree of distribution of said estate to the heirs—\$1195.94 to each of the three heirs.

What else could, or should the court have done? The trial court had held a regular hearing, heard much evidence, oral and documentary, as to what moneys and property belonged to the estate. This was done in pursuance to the direction of this Court, in the first appeal, 207 P. 2nd 1033. After hearing all of the evidence and the argument of respective counsel, the trial court made and entered its findings of fact, conclusions of law and judgment, holding that \$7855.50 of the moneys the administratrix had collected, belonged to the estate and should be accounted for by her. She did not appeal from such findings and order; but on or about

June 1, 1950, as such administratrix, she filed her Final Account with Petition for Settlement Thereof. Later the administratrix filed her Petition for Distribution of Estate. These were all statutory proceedings.

I respectfully submit that it is unfair for the opinion to omit all of the basic facts upon which the decree of distribution is based, and then proceed to correct the trial court in its holdings as to what moneys belonged to the estate, when those questions are not properly before the court, as no timely appeal was taken on the lower court's findings and judgment on said matters.

*Point 5.* The opinion here poses a new question,—whether, when the estate exceeds \$1500, the summary decree of distribution should be vacated and the whole state subjected to probate? We submit that is a moot question so far as this estate is concerned, for the court found in paragraph 1 of its conclusions of law, of Dec. 22, 1950, that there was on hand available for distribution \$5381.75, based on the final account which the administratrix had filed, as above noted; she had also filed her Petition for Distribution of said money. So what other question was presented except to distribute that money? I submit none.

I further submit that with that much money on hand, the question posed it wholly immaterial, for if there were distributed \$1500 to the widow, that amount would have to be subtracted from the \$1793.94 distributed

to her in the decree of distribution entered by the court. (Query whether she would be entitled the \$1500 as summary distribution, as she had the decedent place his home in joint tenancy, so when he died, she became the full owner. It would probably be valued at least \$4500.00).

*Point 6.* Many questions of uncertainty arises from said opinion.

(1) Does the opinion set aside and vacate the decree of distribution entered by the court below? It doesn't say so. How can there be "further proceedings" in the lower court, when this Court did not set aside the decree of distribution which has been entered? This case has been closed, so far as the lower court is concerned. The estate has all been distributed.

(2) Is there any duty, authority, or obligation upon the trial court to set aside and vacate its own decree of distribution, when the same was not so ordered by the Supreme Court?

(3) Was the decree of distribution intended to be set aside so far as the minor is concerned? The opinion says the minor is not affected by this opinion.

(4) Was it intended that the decree stand as to the minor, but not so far as Jean and Phoebe are concerned.

I respectfully submit that a reconsideration must be granted.

Leon Fonnesbeck

Attorney for Petitioners