

1953

In the Matter of the Estate of James John Latsis : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of JAMES
JOHN LATSIS (also sometimes known
as "LATSES"),
Deceased }

APPELLANTS' BRIEF

Appeal From The District Court Of The Third Judicial
District, In And For Salt Lake County, State of Utah

HONORABLE RAY VAN COTT, JR., *Judge*

WHITE, WRIGHT & ARNOVITZ
GUSTIN, RICHARDS & MATTSSON
JAMES W. BELESS, JR.

*Attorneys for Petitioners and
Appellants*

FILE

APR 28 1953

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

of the

STATE OF UTAH

In the Matter of the Estate of JAMES JOHN LATSIS (also sometimes known as "LATSES"), <i>Deceased</i>	}	Case No. 7954
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APPELLANTS' BRIEF

This appeal is taken from orders entered December 12, 1952, dismissing the petition of the heirs of James John Latsis, deceased, residing in Greece. That petition alleged improper acts of the administrators in making other than the proper intestate distribution without appropriate notice to those non-residents, and that the distributions made were contrary to the prior order of the probate court which provided for distribution upon agreement by the heirs in Greece, which agreement was never had or obtained. That petition further prayed that distribution should be ordered according to the laws of succession.

STATEMENT OF FACTS

Dimitrious John Latsis, also known as James John Latsis, died intestate at Salt Lake City, Utah on February 5, 1944 and left surviving him as his heirs Virginia Latsis, his widow, Vassilios John Latsis, sometimes known as William J. Latsis, brother, Nickolaoas Latsis, sometimes known as Nick J. Latsis, brother, John G. Latsis, sometimes known as Constantinos John Latsis, only son of Gust J. Latsis, deceased brother, and Peter J. Latsis, brother (Tr. 4, 158-159). At the time of the death of said decedent all of said heirs, with the exception of Virginia Latsis and Peter J. Latsis, resided at Asterion, Laconia, in the Province of Parmon, Sparta, in Greece (Tr. 184). The estate consisted of assets appraised by the Inheritance Tax appraisers at \$89,499.11, of which \$56,259.00 was real property (Tr. 76-82).

On March 14, 1944 Letters of Administration were issued to Utah Savings & Trust Company and Virginia Latsis (Tr. 8) and they qualified as such administrators and ever since have been and now are the duly qualified and acting administrators of said estate; on March 8, 1944 the Honorable A. H. Ellett, one of the judges of the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, upon his own motion, appointed N. J. Cotro-Manes, an attorney at law duly authorized to practice in the State of Utah, to act as attorney for the non-resident heirs of said estate (Tr. 240-241).

On December 12, 1944 the administrators of said

estate entered into a stipulation with Peter J. Latsis and N. J. Cotro-Manes representing the non-resident heirs, whereby it was stipulated and agreed that the said four heirs other than Virginia Latsis would receive as their full distributive portion of said estate the sum of \$10,000.00; that said stipulation further provided "That the said payment and settlement shall be binding and conclusive as to each of the said four heirs, particularly John Latsis, William J. Latsis, Nick J. Latsis and John G. Latsis, upon the acceptance of his portion of said fund and the execution of the necessary instruments to receipt therefor and to assign his said interest and release the said estate. That the said settlement shall become binding as to each of the said heirs accepting the same and executing such instruments." (Tr. 86-88). On February 27, 1945 the Honorable Ray Van Cott, Jr., one of the judges of the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, after a hearing, entered an order approving the stipulation for settlement with the heirs, which order provided, among other things, "It is further ORDERED that the said agreement and distribution shall become binding and conclusive as to each of the said four heirs upon the acceptance by him, or by his heirs at law, of said payments." (Tr. 95-97); that the only heir that accepted the payment provided by said stipulation was Peter J. Latsis, who accepted the sum of money and executed the release and assignment required (Tr. 123-124).

On August 22, 1945 the administrators of said estate

filed their petition for approval of their final account and for a decree of distribution, and in said petition the following allegations were made:

"5. In the course of probate, a petition was presented for and on behalf of the heirs of the said decedent other than Virginia Latsis, his wife. This petition set forth the desirability of making a settlement with, and distribution to, the other said heirs prior to the final distribution hereof. In said petition filed in the above proceeding on February 13, 1945, the said heirs set forth their reasons for desiring a settlement of all their claims and interest against the said estate for the sum of \$10,000.00 and for an earlier distribution to them based on the estimated value of their interest herein. This petition was consented to by Virginia Latsis and by your petitioners.

"On February 21, 1945, a hearing was had in which the attorney for said heirs other than Virginia Latsis, presented evidence in support of the said petition, whereupon the same was allowed, and on February 27, 1945, an order of this court was duly made and filed herein approving the said petition and fixing the attorney's fees of the attorney for the heirs and directing the administrators of this estate to pay and distribute to the said heirs and their attorney the said amount of \$10,000.00 in the manner set forth in said order. It was also ordered that the balance of the said estate be distributed to Virginia Latsis, the surviving wife of the said decedent.

"6. Pursuant to the above-mentioned order, the petitioners have paid and distributed \$4,750 of said \$10,000.00 as follows: To Peter J. Latsis,

in full settlement — \$2000.00; to John G. Latsis, Nick J. Latsis and William J. Latsis — \$500.00 each, through the American Express Company; and to N. J. Cotro-Manes, to apply on his attorney's fees as fixed by the Court — \$1250.00. That there remains to be paid on said settlement the sum of \$5,250.00 as follows: The amount of \$1500.00 each to the said three heirs, John G. Latsis, Nick J. Latsis and William J. Latsis, and a balance of \$750.00 to Attorney N. J. Cotro-Manes. That there is no cash in the hands of petitioners from the estate to complete the said distribution, or to pay the administrators fees, attorneys fees and the cost of closing the estate. That Virginia Latsis, the sole remaining distributee of the said estate has deposited with the Utah Savings & Trust Company the said sum of \$5,250.00 for distribution to said heirs and their attorney, and has agreed to deposit and provide the additional sums necessary to pay the remaining fees and costs herein. That she prefers to provide the necessary cash rather than have the petitioners sell any of the property of the estate." (Tr. 106-121).

On October 9, 1945 the court entered its order approving the final account and made its decree of distribution and stated therein as part of its findings the following:

"4. The account of the petitioners as presented showed all receipts and all disbursements, vouchers having been presented herewith covering all disbursements, and it appeared that all such have been regularly made and properly authorized. It further appears from the records and files herein that under an order dated February 27, 1945 by Honorable Ray Van Cott, Jr., Judge

of the above-entitled Court, a settlement with all of the heirs of said deceased, other than Virginia Latsis, was made and approved, by which the said four heirs were to receive \$10,000.00 as their full share and in settlement of the claims of each and all of said heirs against this said estate. That in said proceeding it was ordered that Attorney N. J. Cotro-Manes, theretofore employed, and appointed by the Court, to represent said heirs, was to receive out of said sum of \$10,000.00 as his attorney's fees the sum of \$2000.00, a portion to be paid forthwith, and the balance upon the final distribution to the said heirs, he to render the additional services required in arranging and insuring the receipt by the said heirs of the amount which each is entitled to receive under said settlement. That such distribution was to be made to said heirs through the American Express Company or the Hellenic Bank Trust Company.

"5. That full settlement and payment has been made to Peter J. Latsis, residing in Utah, and his receipt, release and discharge filed herein. That \$1500 has been forwarded through the American Express Company, being \$500.00 each, to each of the said three remaining collateral heirs. That \$1250.00 has been paid to N. J. Cotro-Manes, as attorney for the said heirs. That there remains to be paid and disbursed the sum of \$5,250.00, as follows: \$1500.00, each, to John G. Latsis, Nick J. Latsis and William J. Latsis, and a balance of \$750.00 to Attorney N. J. Cotro-Manes when the prior distribution of said prior respective sums to each of said three heirs is completed.

"6. That there was, and is, insufficient cash in the hands of the administrators of said estate

to make such payments and such distributions and the expenses of closing the estate. That there has been filed herein a statement and an agreement on the part of Virginia Latsis, the surviving wife of the said deceased and the heir entitled to all the remaining estate, in which she has agreed to pay the necessary cash to take care of said charges and expenses and to deposit with Utah Savings & Trust Company the sum of \$5,250.00, to be transmitted as aforesaid. The said Utah Savings & Trust Company has received and has filed herein its acknowledgment of the receipt of \$5,250.00 to be transmitted to the said remaining heirs and paid to their attorney, in the manner heretofore ordered herein, and in the amounts aforesaid.

"It, also, appears that the administrators herein have rendered special services, and that the Utah Savings & Trust Company, as administrator, is entitled to an additional and extra allowance of \$750.00.

"Receipts showing the payment, as aforesaid, by Virginia Latsis of the attorneys fees, administrators fees and costs of closing the said estate have been filed herein, and the estate is now in condition to be closed, and the administrators discharged." (Tr. 126-128).

Then in the order of October 9, 1945 the court stated the following:

"The settlement, payments and distribution, and provision for distribution, made pursuant to the order herein of February 27, 1945, and as hereinabove set forth, is approved and allowed.

"It is further ordered that all of the remaining properties of the said estate, after the pay-

ments and distributions aforesaid, of every nature, real or personal, whether discovered or undiscovered, and all property interests of the decedent at the time of his death, or acquired by his estate, are hereby distributed to Virginia Latsis, the surviving wife of the said decedent." (Tr. 128).

No notice was posted or mailed of the hearing of the petition for approval of the stipulation, and upon which hearing the order of February 27, 1945 was entered. That order of February 27th specifically states "all the parties having joined in said petition and being represented, no notice was required or ordered on said petition." (Tr. 95).

The notice given in relation to the hearing of the petition on the final account and for distribution provided as follows:

"The petition of Utah Savings & Trust Co., et al. administrators of the estate of James John Latsis, etc. deceased, praying for the settlement of final account of said administrators and for the distribution of the residue of the estate, to the persons entitled, and discharge has been set for hearing on Wednesday, the 5th day of September, A. D. 1945, at ten o'clock A.M. at the County Court House, in the Court Room of said Court, in Salt Lake City, Salt Lake County, Utah." (Tr. 105).

In accordance with the proof of mailing, a copy of the above notice was forwarded to each of the heirs residing in Greece.

The settlement payments and distribution have never been made in accordance with the provisions of the order of February 27, 1945. In fact, the three payments of \$500.00 each which were to be forwarded to the heirs in Greece were returned by the American Express Company after deducting certain costs. The letter from the American Express Company, dated December 31, 1945 (Tr. 137), states:

“Our correspondents advise that they are unable to deliver the above remittances.

“We are, therefore, authorized to refund to you the sum of \$1,490.86 upon surrender of your receipt. Please call at our office at your convenience, and we will be pleased to make refund to you.” (Tr. 137).

Mr. Cotro-Manes alleges the same facts in his petition for the order authorizing the administrators to pay fees filed in the court on or about the 9th day of January, 1946, wherein he states:

“8. That your petitioner has been advised by the American Express Company that their correspondents at Athens, Greece, was not able to deliver the above remittances and therefore they have paid to the administrator as refund \$1,490.-86, \$9.14 having been expended for cables.” (Tr. 135).

On October 29, 1951 petitioners and appellants herein, being one heir and the representatives of two deceased heirs in Greece, filed a petition directing the court's at-

tention to improper acts of the administrators and for an order to show cause why the administrators should not be required to properly administer the estate (Tr. 158-172); on October 26, 1951 the court issued its order which, among other things, required the administrators to show cause why distribution should not be made in accordance with the order of February 27, 1945, or why the heirs should not receive their respective portions of the estate (Tr. 155-156). On August 1, 1952 Vassilios John Latsis, sometimes known as William John Latsis, one of the petitioners and appellants, filed a petition directing the court's attention to improper acts of the administrators and for an order to show cause why the administrators should not be required to properly administer the estate (Tr. 183-197). An order to show cause was issued on August 1, 1952 (Tr. 180-181), which was duly served on August 2, 1952. On November 20, 1951 the Utah Savings & Trust Company, one of the administrators, filed its motion to dismiss (Tr. 153-154), and on August 11, 1952 Virginia Latsis Zambukos, the co-administrator, filed a motion to dismiss (Tr. 198-199), both of said motions being identical and under part I thereof providing:

"TO DISMISS

1. Lack of jurisdiction over the subject matter.
2. Lack of jurisdiction over the person.
3. Insufficiency of process.
4. Failure to state a claim upon which relief can be granted.
5. Failure to join an indispensable party." (Tr. 198).

On November 25, 1952, after the motions to dismiss had been argued, an order granting the motions to dismiss each of said petitions was entered (Tr. 203-204), and thereafter on December 12, 1952 the court again entered an order dismissing each of said petitions (Tr. 205-208), that later order providing in part:

“This dismissal is upon the grounds of Sub-division I, the ‘Motion to Dismiss’ of Utah Savings and Trust Company, and it is not necessary, therefore, to consider the Sub-division II, its ‘Motion to Strike’, nor Subdivision III designated as ‘Requirement of Authority’, and these two subdivisions have not been passed upon or decided.

“This order, effective this date, takes the place of the Order of Dismissal herein dated November 25, 1952, and which latter order has been and is hereby vacated and set aside.” (Tr. 206).

A similar provision is contained in the order dismissing the petition in relation to Virginia Latsis Zambukos.

STATEMENT OF POINTS

POINT 1.

CLAIMS OF PETITIONERS HAVE NOT BEEN SETTLED IN ACCORDANCE WITH THE PETITION AND STIPULATION OF SETTLEMENT AND ORDER OF FEBRUARY 27, 1945.

POINT 2.

DECREE OF DISTRIBUTION HAS NOT BEEN CARRIED OUT IN ACCORDANCE WITH ITS TERMS.

POINT 3.

STIPULATION OF SETTLEMENT HAVING FAILED, THE ESTATE SHOULD BE DISTRIBUTED IN ACCORDANCE WITH THE LAWS OF SUCCESSION.

POINT 4.

PETITIONERS ARE ENTITLED TO HAVE DISTRIBUTION MADE TO THEM OF THEIR DISTRIBUTIVE SHARES OF THE ASSETS OF SAID ESTATE IN ACCORDANCE WITH THE LAWS OF SUCCESSION.

POINT 5.

THE COURT ERRED IN ENTERING ITS ORDERS OF DECEMBER 12, 1952, DISMISSING THE PETITIONS DATED OCTOBER 26, 1951 AND AUGUST 1, 1952, RESPECTIVELY.

ARGUMENT

POINT 1.

CLAIMS OF PETITIONERS HAVE NOT BEEN SETTLED IN ACCORDANCE WITH THE PETITION AND STIPULATION OF SETTLEMENT AND ORDER OF FEBRUARY 27, 1945.

For the purpose of discussing the question of whether the petitioners have been paid in accordance with the stipulation entered into by N. J. Cotro-Manes on their behalf, we will assume that Mr. Cotro-Manes had the authority to enter into such a stipulation and bind the heirs and that the court had jurisdiction and authority to make its order of February 27, 1945. We make this statement for the reason that there is serious

question in our minds as to whether Mr. Cotro-Manes, in the first place, could enter into such a stipulation where no notice was given to the heirs in question of the hearing concerning the appointment of an attorney to represent them, and where there is no showing that after his appointment by the court he was ever in communication with the parties or advised them of the nature of the stipulation he was going to enter into, and where, in the record, it further appears that no notice of the hearing of the petition to approve the stipulation was either posted or mailed or otherwise given to the heirs in Greece.

But assuming, as above indicated, that the stipulation is binding and the order valid, it is apparent from the record that the terms and conditions of the stipulation and order have never been fulfilled. The stipulation and petition provides:

“That the said payment and settlement shall become binding and conclusive as to each of the said four heirs, Peter J. Latsis, William J. Latsis, Nick J. Latsis and John G. Latsis, upon the acceptance of his portion of said fund and the execution of the necessary instruments to receipt therefor and to assign his said interest and release the said estate. That the said settlement shall become binding as to each of said heirs accepting the same and executing such instruments.” (Tr. 87).

The order, in like language, states:

“It is further ORDERED that the said agreement and distribution shall become binding and

conclusive as to each of the said four heirs upon the acceptance by him, or by his heirs at law, of said payments.

“It is further ORDERED that the said heirs shall furnish, or that their attorney shall procure from the said recipients of said payments, a proper receipt therefor and an assignment and relinquishment of all interest in this said estate, and a release of the administrators herein, which receipt and relinquishment shall be delivered to the administrators.

“It is further ORDERED that upon the disbursement as herein provided to the said four heirs hereinabove named, the balance of the said estate of the said deceased, after the payment of all taxes, debts and other obligations, shall belong to and shall be distributed to Virginia Latsis.” (Tr. 97).

There can be, and we believe there is, no dispute as to the fact that three of said heirs, namely: William J. Latsis, Nick J. Latsis and John G. Latsis, have never received any sum of money whatsoever from the administrators of said estate, nor have they ever signed any receipts or releases as provided by the petition and stipulation and the order. In fact, the record clearly indicates that some of the money, if not all, is being held by the Utah Savings & Trust Company to date.

The question then arises whether a subsequent order of the court, and namely, the order and decree settling the final account and ordering distribution, dated October 9, 1945, has modified the stipulation and the order

of February 27, 1945. Appellants contend that it has not been modified and that, under the proceedings had, the court had no jurisdiction to modify said order. It is true that the order of October 9, 1945 states "The settlement, payments and distribution, and provisions for distribution, made pursuant to the order herein of February 27, 1945, and as hereinabove set forth, is approved and allowed." (Tr. 128). However, under the order of February 27, 1945 there was no provision made for the payment of this money to the Utah Savings & Trust Company, and that order could not be modified by a subsequent order unless proper notice of the hearing for modification was given.

Bancroft's Probate Practice, Second Edition, Volume 1, Section 82, Page 191 :

"A finding in a probate decree that due and legal notice has been given is conclusive that the court obtained jurisdiction of the proceeding, but not that it extended to matters beyond those disclosed by the notice forming part of the record."

The notice posted and published covering the hearing of the petition for settlement of the final account and for distribution contained no statement therein that the order of February 27, 1945, or the stipulation covered thereby, was to be modified, altered or changed in any particular. The notice given was that "The petition of Utah Savings & Trust Co., et al. administrators of the estate of James John Latsis, etc. deceased, praying for the settlement of final account of said administrators

and for the distribution of the residue of the estate, to the persons entitled, & discharge has been set for hearing * * *." (Tr. 105). If the heirs in Greece had received knowledge of the terms of the stipulation and the order of February 27, 1945, they knew they had not accepted the same and, by the notice above given, they had no knowledge that it was to be altered and changed and that they were going to be required to accept the settlement regardless of their desires, and they would merely be advised that they would receive the portion of the estate that they would be entitled to regardless of any claimed settlement. For the order of October 9, 1945 to have been binding, notice must have been given; otherwise, it is invalid as to those portions that were not set forth in the notice.

In *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522, in a decision written by Justice Frick and concurred in by Justice McCarty, the Utah court held that inasmuch as probate proceedings are matters in rem no decree of distribution should be void for want of notice where the administrator was appointed by a court of competent jurisdiction on statutory notice. To this opinion, Chief Justice Straup vigorously dissented, pointing out the need for proper notice throughout the probate proceedings to protect the rights of the heirs, and in his dissenting opinion Chief Justice Straup pointed out the conflict in rationale of the majority opinion in protecting real estate titles from subsequent attacks based on defects in the probate procedure as opposed to the rights

of heirs to notice of proceedings during probate which would affect the rights and title of the heirs.

Barrette v. Whitney has not been followed by any other jurisdiction and appears to be contrary to the great weight of authority, which is uniformly to the effect that proper notice upon distribution is jurisdictional. *Bancroft's Probate Practice*, Second Edition, Volume 4, Section 1135, Page 418; *21 Am. Jur.* 650; *37 L.R.A. (N.S.)* 368. The courts that have considered the matter of necessity of notice on the decree of distribution have, with the exception of the Utah court, uniformly held that the decree, in the absence of proper notice, is made without jurisdiction and, therefore, may be collaterally attacked. *Hoppin v. Lang*, 241 Pac. 636 (Mont.); *Harrison v. Cannon*, 203 Pac. 2d 978 (Mont.); *State v. Allen*, 294 Pac. 681 (Wyo.); *Gassin v. McJunkin*, 48 Pac. 2d 320 (Okl.); *In re Estate of Parsell*, 213 Pac. 40, 25 A.L.R. 1561 (Cal.); *Carter v. Frahm*, 141 N.W. 370 (S. D.); *In re Hoscheid's Estate*, 139 Pac. 61 (Wash.).

Section 75-12-6, *Utah Code Annotated 1953*, specifically provides that the petition for final distribution shall contain the names and addresses of the heirs, devisees or other persons entitled to participate in distribution and that upon the clerk's fixing the date of hearing notice shall be given. We believe that to give this provision for notice on the petition for final distribution any meaning, such notice must be mandatory and it must be such notice as will give the heirs a fair understanding of the contents of the petition, the distribution prayed

for, whether it be partial or final, and of other relief sought.

In *Child v. District Court of Second Judicial District*, 80 Utah 243, 14 Pac. 2d 1110, our court considered the question as to whether heirship may be determined before final distribution, and in considering the rights of heirs to notice of such a determination the court stated:

“It may be observed in passing that the complaint nowhere alleges that no action is pending or to be taken in the administration of the estate which may adversely affect the heir’s interest. But, considered from this angle, it becomes immediately apparent that the heir may be denied from the beginning substantial rights. His right to notice of all proceedings is important; sales of property, mortgages, and family allowance, all affect his rights, and if he is in fact an heir, he should be afforded an opportunity to be heard in respect thereto.”

The court further stated:

“If the district court has jurisdiction to probate the estate, it should and must have the right to fully protect the interests of all the heirs.”

We respectfully submit that this court should reconsider its holding in *Barrette v. Whitney* and should now give meaning to the sections of our probate code requiring notice, and that the requirement of notice should be mandatory and jurisdictional. Our contention is that to assure due process notice of distribution should be

given to all of the heirs, and further that this notice should have been of the type of distribution actually prayed for, that is, a distribution in accordance with the stipulation, which distribution would have materially altered the share which the heirs could expect on an intestate distribution and which latter they would naturally expect from a notice of a full and final distribution. Any notice disclosing any less information would make the probate proceedings the instrument for perpetrating, by a series of in and of themselves legal acts, a final vicious wrong in depriving the heirs in Greece of their rightful inheritances.

POINT 2.

DECREE OF DISTRIBUTION HAS NOT BEEN CARRIED OUT IN ACCORDANCE WITH ITS TERMS.

We contend that the order of October 9, 1945 has not been complied with, and that it cannot be complied with because of the fact that the order, in its directions, incorporates the prior order of February 27, 1945, which prior order is conditional and the conditions therein set forth have never been accomplished. The order of February 27, 1945 is incorporated into the order of October 9, 1945 by the following language of the second order:

“It further appears from the records and files herein that an order dated February 27, 1945, by the Honorable Ray Van Cott, Jr., Judge of the above entitled court, and settlement with all of the heirs of the said deceased, other than Virginia Latsis, was made and approved by which

the said four heirs were to receive \$10,000.00 as their full share and in settlement of the claims of each and all of the said heirs against this said estate. That in said proceeding it was ordered that Attorney N. J. Cotro Manes theretofore employed, and appointed by the Court, to represent said heirs, was to receive out of said sum of \$10,000.00 as his attorney's fees the sum of \$2000.00, a portion to be paid forthwith and the balance upon the final distribution to the said heirs, he to render the additional services required in arranging and insuring the receipt by the said heirs of the amount which each is entitled to receive under said settlement." (Tr. 126-127).

The incorporation by reference of the first order into the final order of October 9, 1945 appears even more clearly from the following portion of the final order:

"The settlement, payments and distribution and provision for distribution made pursuant to the order herein of February 27, 1945, and as hereinabove set forth, is approved and allowed." (Tr. 128).

Horton v. Winbigler, 165 Pac. 423 (Cal.), involved a situation of an incorporation into a final decree of distribution of a prior agreement between the son and the grandmother of the decedent, whereby the grandmother was to "take under the will one half of the moneys of the estate to use and enjoy during her life." The California court held that since the agreement was referred to in the decree of distribution it became a part of the decree, and the following language was used:

"In making a decree of distribution a court

may incorporate the provisions of the will therein or a contract or agreement entered into between the heirs and which is called to the attention of the court with a view of having it incorporated in the decree; and the court may, by express terms or by apt reference thereto, incorporate said will or contract in the decree so as to constitute it a portion of its distributive terms. This is what was done in the decree of distribution under consideration. The court incorporated the will and the contract between plaintiff and Mrs. Brown as to the respective interests which each should take on distribution, and pursuant thereto made distribution accordingly. When a necessity arose thereafter to construe said decree, the court was not limited to a consideration of the particular provision of it, as claimed by appellant, but it was the duty of the court to look to the will and the contract which were made a part of the decree, together with the other terms, in order to ascertain just what the terms of the distribution were, because the distribution as declared by the court was in accordance with the provisions of the will and the agreement of the heirs. This declaration and reference to the will and agreement made them a part of the decree as effectually as though set forth in it. The court was not, as appellant asserts, allowing the admission of the will and contract as matters extraneous to the terms of the decree for the purpose of modifying or changing the decree of distribution. The court was admitting these instruments, which were in effect part of the decree of distribution because referred to therein and declared to be the basis of the decree itself, not to modify it or change it in any particular, but for the purpose of construing it in its entirety and determining just what was meant

by all its distributive provisions. The right of the court to incorporate provisions of a will or agreement by express reference in a decree of distribution and thereafter in an action involving a consideration of the decree to resort to said will and agreement as part of the decree in construing its terms, as was done in this case, is well settled in this state. *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; *McCloud v. Hewlett*, 135 Cal. 361, 67 Pac. 333."

The Utah case of *In re Efferson's Estate*, 70 Utah 258, 259 Pac. 919, adopts the same rule that a will may be incorporated into and become a part of the decree and that the will may be resorted to for the purpose of interpreting the decree.

"The propriety of resorting to the will to explain and interpret the decree in the respects mentioned cannot be doubted and when the will is considered in connection with the decree there is no uncertainty."

While the case of *In re Ewer's Will*, 170 Cal. 660, 171 Pac. 683, adopts the same rule as the Efferson case just cited, we refer to the language in that case because it is particularly appropriate to this case. In the instant case a single phrase of the order states absolutely that distribution of the residue is to be made to Virginia Latsis. If that single portion of the order alone were to be considered, then there is no doubt that the distribution of the residue is to be made to Virginia Latsis, but when that portion of the order is considered together with the

context of the entire order, which has incorporated in it a separate order, then the real meaning of the order is obtained, and that real meaning is that distribution of the residue is not to be made unless the releases are obtained from the heirs and unless the heirs conveyed their interests to the other heir, Virginia Latsis. The following is quoted from *In re Ewer's Will*, supra:

“While a single phrase of the decree, apart from the context, though indefinite in itself, could possibly be considered as a distribution of the fund absolutely to Eliza B. Ewer, yet the decree as a whole shows that the intention of the court making it was to give the fund over to the trustee to hold and dispose of it upon the trust stated in the will, and in accordance therewith. It should, therefore, be given that effect.”

The order of distribution thus incorporates within itself the order of February 27, 1945. That order in turn incorporates within itself the petition and stipulation filed February 13, 1945. We reach this latter conclusion because the order of February 27, 1945 contains a reference to the petition and stipulation. The reference is clear and concise and is in this language:

“It is further ORDERED that the said agreement and distribution shall become binding and conclusive as to each of the said four heirs upon the acceptance by him, or by his heirs at law, of said payments.” (Tr. 97).

It is by this apt reference to the agreement and to the distribution that the petition and stipulation becomes

incorporated into and a part of the order of February 27, 1945.

There are at least two other references in the order of February 27, 1945 by which the petition and stipulation is incorporated into the order of February 27, 1945. Normally, it is unnecessary for an order to recite the facts upon which it is based because *Section 75-14-15, Utah Code Annotated 1953*, does not require that the facts be set out upon which the court has based its order, but in the instant case there is a recital in the order which reads as follows:

“The Court finds the facts as recited in the petition to be correct, * * *.” (Tr. 95).

In order to determine what those facts are, it is necessary to refer to the petition and stipulation and, therefore, this reference is sufficient to cause the petition and stipulation to be incorporated into and become a part of the order of February 27, 1945. The petition and stipulation can be used to explain and to interpret the order of February 27, 1945. In our view it is not necessary to resort to the petition and stipulation in order to learn the full meaning of the order of February 27, 1945. The order itself is specific and clear.

The net result is that the order of distribution has incorporated within it both the order of February 27, 1945 and the petition and stipulation filed February 13, 1945. The direction to the administrators with reference to distribution is contained in the order of distribution,

a part of which are both the order of February 27, 1945 and the petition and stipulation of February 13, 1945. Reading these documents together and giving effect to their meaning, the direction to the administrators is that distribution shall be made of all of the property (other than the \$10,000.00) to Virginia Latsis, only if the settlement "shall become binding and conclusive as to each of the said four heirs * * *". Similarly, the order of February 27, 1945, becoming as it does a part of the final order of distribution, decrees: "That upon the disbursement as herein provided to the said four heirs hereinabove named, the balance of the said estate of the said deceased * * * shall belong to and be distributed to Virginia Latsis" (Tr. 97). "Disbursement as herein provided" meant when the disbursement would be accepted by each of the heirs there would also be required "the execution of the necessary instruments to receipt therefor and to assign his said interest and release the said estate" (Tr. 87). In other words, disbursement as provided in the order would not be complete until the heirs did four things:

- (1) Accepted the amount tendered
- (2) Executed the necessary instruments to receipt therefor
- (3) Assigned his said interest and conveyed his title
- (4) Released the said estate.

Since not one of these four things was done, it cannot be contended that there has been "disbursement as herein

provided to the said four heirs", and since that has not occurred, the balance of the said estate of the said deceased was not ordered to be distributed to Virginia Latsis since the distribution never became binding and since the order provided that "the balance of the said estate of the said deceased * * * shall belong to and be distributed to Virginia Latsis upon the disbursement as herein provided to the said four heirs" Virginia Latsis never became entitled to the balance of the said estate. This is further made clear by the terms of the order:

"It is further ordered that all of the remaining properties of the said estate, after the payments and distributions aforesaid, * * * are hereby distributed to Virginia Latsis, the surviving wife of the said decedent." (Tr. 128).

The proposed distribution to the four heirs never was made; the distribution never became binding and, therefore, the administrators should not have distributed the real properties and residue to Virginia Latsis.

POINT 3.

STIPULATION OF SETTLEMENT HAVING FAILED,
THE ESTATE SHOULD BE DISTRIBUTED IN ACCORD-
ANCE WITH THE LAWS OF SUCCESSION.

It is our contention that inasmuch as the conditions imposed on the order of February 27, 1945 were never completed, and as that order was subsequently incorporated in the order of October 9, 1945, that subsequent order was in fact a nullity as far as any distribution was

concerned and until a distribution in accordance with the laws of succession is made this estate is still open and the fiduciaries continue to be responsible until a complete and final distribution is made.

The intestate distribution to which the petitioners were entitled would by our calculations amount to \$4,916.20 each, in comparison to the cash sum stipulated to be distributed to each heir in Greece, namely, \$2,000.00 after attorney's fees (Tr. 96). By the Inheritance Tax Inventory and Appraisement (Tr. 99) the total property was appraised at \$79,829.11. Rents of \$9,771.32 were collected during probate and until June 26, 1945 (Tr. 116). This total in the hands of the administrators, less the widow's dower interest of \$18,753.00 and debts and expenses of administration of \$12,350.24 (Tr. 99-101), leaves \$58,497.19. Of this amount the widow is by statute entitled to \$25,000.00 and one-half of the remainder, leaving \$16,748.60 for distribution among the brothers of decedent and their representatives. Peter J. Latsis accepted \$2,000.00 by his stipulation, leaving \$14,748.60 for a three-way division of \$4,916.20 for each of the brothers in Greece. This computation is based on values as of the date of death of decedent. The real properties of the estate have greatly appreciated in value since 1944, and any computation of dollar value on intestate distribution should be made as of the time for distribution and should include therein rents and profits collected and accrued to that time.

Mr. Cotro-Manes was appointed by the court to rep-

resent certain named heirs, including Nick J. Latsis, a brother of the decedent (Tr. 241). Before the provisions of the stipulation were carried out as to Nick J. Latsis, as one of the heirs, said Nick J. Latsis died, leaving as his heirs two minor children, John Nikolaou Latsis and Panagiotou (Panayiotis) Nikolaou Latsis, who are now and have been at all times material herein residents of Greece (Tr. 213). Mr. Cotro-Manes was not appointed to represent these minors or the heirs or estate of Nick J. Latsis and he could thus in no way stipulate on behalf of these minors in regard any settlement agreement. If, by any means, Mr. Cotro-Manes can be said to have represented the estate of Nick J. Latsis or John G. Latsis, who was the minor child of Gust J. Latsis (Tr. 241), any such representation and the stipulation entered into by Mr. Cotro-Manes were effective only until notice could be given to all of the heirs in Greece and until those heirs had an opportunity to affirm the stipulation, or until the minor heir, John G. Latsis, and the estate of Nick J. Latsis could disaffirm the stipulation. The disaffirmance of those parties was made in the form of their petition to the probate court in this matter, which petition was made as soon as actual notice of the acts of the administrators was received by the heirs in Greece.

Smith v. Williams, 139 S.E. 625, 54 A.L.R. 964 (S.C.), involved a situation where a property settlement was made on behalf of three minor heirs. The court there stated that family settlements are favorites of the law, but that "in an agreement of this character, infancy

makes it voidable, not void. If disaffirmance is intended, then the acts of disaffirmance must be made within a reasonable time after the disability of infancy ceases."

In *Lupton v. Bangs*, 242 Pac. 830, 54 A.L.R. 979 (Ore.), in a suit to enforce a family settlement, the court held:

"While equity is anxious to encourage and enforce family settlements in order to preserve the peace and harmony of families, the parties are required to deal with the utmost good faith towards each other, and equity will readily seize upon any fraud or unconscionable practice to induce the settlement, to set it aside, in application of the well-established rule that, where there is a confidential relation between relatives in respect to an inheritance or distributive shares of an estate, equity will readily relieve a party who has yielded to the coercive influence of another."

Utah law would appear to be clear that the administrator cannot be discharged until the estate has been fully administered and a complete and final distribution made to the heirs. In *In re Barker's Guardianship*, 103 Utah 109, 133 Pac. 2d 784, an order was entered that the guardian "is discharged as guardian herein and his bondsmen are hereby discharged and exonerated." The court subsequently entertained a petition for an order to show cause filed by the ward, an incompetent. In the concurring opinion Judge Wolfe, then Chief Justice, stated:

"I concur on the ground that the Probate

Court has inherent power to enforce its order to pay money owing to its ward; that any discharge is conditional on the guardian so doing. The order to show cause was in pursuance of this inherent power."

The same rule has been set forth by our court in *In re Brooks' Estate*, 83 Utah 506, 30 Pac. 2d 1065, wherein the court stated:

"The ultimate end to be accomplished by a probate proceeding is to vest possession, or both title and possession, of the property of the estate in those entitled thereto. The duties of an administrator are not completed until the property of the estate has been delivered to the persons to whom the probate court directs that it shall be delivered whether it be a claim allowed against the estate or a decree of distribution. The administrator has not performed the trust imposed upon him by law until and unless he pays the claim or delivers the property to the distributee. R. S. Utah 1933, 102-9-25, 102-11-20, 102-11-21, 102-12-19. The duties of an administrator are not fully performed until he has not only accounted for, but also distributed, as ordered by the court, all of the assets of the estate which has come into his possession as administrator. *Ehrngren v. Gronlund*, 19 Utah 411, 57 P. 268."

In the instant case the order of February 27, 1945 approved a stipulation for a settlement which was to become binding "upon the acceptance of his portion of said fund and the execution of the necessary instruments to receipt therefor and to assign his said interest and

release the said estate. That the said settlement shall become binding as to each of said heirs accepting the same and executing such instruments." (Tr. 87). It is implicit in this order that if the moneys proposed to be paid by the settlement are not accepted and if the instruments, namely, the assignment by the heirs of their distributive share of the estate to the widow, are not received, that there then must be a distribution to those heirs of their interest in the estate as fixed by law. *Section 74-4-5, Utah Code Annotated 1953*. The District Court has not changed that order but further incorporated it in the order of October 9, 1945. We contend that the District Court has continued to have the inherent power to determine why this order was not carried out and to complete the probate of this estate. There has been no distribution effected when the two orders of the District Court are examined together and until a distribution is made the District Court should retain jurisdiction over the property of the estate and no discharge of the administrators could be made. Any such discharge is conditional upon the estate having been fully administered, including a distribution to the parties entitled, with the proper showing of receipt of such distribution by them. *Section 75-12-19, Utah Code Annotated 1953*.

POINT 4.

PETITIONERS ARE ENTITLED TO HAVE DISTRIBUTION MADE TO THEM OF THEIR DISTRIBUTIVE SHARES OF THE ASSETS OF SAID ESTATE IN ACCORDANCE WITH THE LAWS OF SUCCESSION.

The law in Utah is clearly settled that title to real property vests in the heirs at the instant of death of the decedent, subject to probate. In *Chamberlain v. Larsen*, 83 Utah 420, 29 Pac. 2d 355, the court clearly set forth the following rule:

“Upon the death of the decedent, the title to any property of which she died possessed, immediately passed to and vested in her heirs, subject to administration and the payment of debts. The purpose of an adjudication of heirship is not to vest title, but to adjudicate where the title of the decedent has already vested. Regardless of whether there had been an adjudication of heirship, the rights of heirs can be asserted or defended in any proper manner.”

The provisions of our probate code clearly contemplate that title vested in the heirs and that the administrator is entitled to take possession of the real property only for the purpose of completion of the probate, which includes payment of the debts of the decedent, collection of the rents and profits from the real property during the interim of the probate and ultimately determining the rights of the heirs and their respective shares in the real property.

Section 75-12-15, Utah Code Annotated 1953, provides as follows:

“Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees or devisees may have *conveyed* their shares to other persons,

and such shares must be assigned to the persons holding the same in the same manner as they otherwise would have been to such heirs, legatees or devisees." (*Italics ours*).

Our statute clearly contemplates a conveyance by an instrument ordinarily used for the transfer of title to real property. In the case of *In re Miles' Estate*, 63 Utah 164, 223 Pac. 337, the sole heir of the estate executed an assignment, absolute in form, to a bank and thereupon petitioned the court to distribute directly to the bank. A creditor of the estate objected to the proposed distribution upon the grounds that the assignments referred to in the petition were not conveyances in fact but were made merely to secure the payment of a note. The Utah Supreme Court held that the transfer was not a conveyance as contemplated by our statute, using the following language:

"We conclude that the court properly decided that the assignment, though absolute in form, but in fact intended as a mortgage, was not a conveyance as contemplated by the statute entitling the assignee or mortgagee to have the estate distributed to him."

A clear statement of the rule that distribution of real property shall be made only to the heirs, or to a grantee holding a duly executed conveyance from the heirs executed in the manner required for the conveyance of real property, is set forth by the California Supreme Court in *In re Meyer's Estate*, 238 Pac. 2d 597 (Cal.):

“The rule is different as to a succession by descent. The estate vests in the heir *eo instante* upon the death of the ancestor; and no act of his is required to perfect title. The estate is cast on the heir by operation of law without regard to his wishes or election. No assent or acceptance is necessary. He cannot, by an act, cause the estate to remain in the ancestor, for the latter is incapable of holding it after his death. He cannot, by any renunciation or disclaimer, prevent the passage of title to himself. Nor can he, by a renunciation or disclaimer, transfer the estate to any other person as the heir of the ancestor, for the object of a renunciation or disclaimer is not to transfer, but to prevent a transfer. He can only make a transfer by some instrument adapted to the transfer of the property.”

Mr. Cotro-Manes was appointed by the probate court to represent the non-resident heirs and he was specifically directed to attempt to make contact with those heirs and to properly bring them before the court (Tr. 127). Mr. Cotro-Manes was not authorized to execute on behalf of the non-resident heirs quitclaim deeds or any other instrument which would properly convey the interest of those heirs in the real property of the estate. The stipulation entered into by Mr. Cotro-Manes, and approved by the probate court, contemplated the execution by the heirs of the necessary instruments to properly transfer and release their interest in the estate. Such an instrument of necessity must have been a conveyance of their interest in the real property. Such instruments were not and have never been executed by the heirs.

One of the heirs represented by Mr. Cotro-Manes was John G. Latsis, sometimes known as Constantinos John Latsis, a minor, and he was recognized as such at the time of Mr. Cotro-Manes' appointment (Tr. 241). It was a clear impossibility for this minor by himself, or through the mere representation of Mr. Cotro-Manes as his attorney, to quitclaim any interest as an heir in the real property of the estate. The necessity for the appointment of a general guardian for this minor was patent and the appointment of such a guardian was one of the steps toward distribution under the stipulation which was absolutely necessary to the passing of title and to the carrying out of the very provisions of the stipulation itself.

We submit that the District Court erred in entering its order of October 9, 1945 in not requiring as a prerequisite thereto a showing of the receipt of proper instruments to pass title as contemplated in the stipulation and in the order of February 27, 1945. We further submit that the instant probate is unfinished and uncompleted and that the District Court properly should have entertained the petition of the non-resident heirs for proper administration of the estate.

Our probate code requires as the final act of the administrator, prior to actual distribution, a determination of heirship. *Section 75-12-7, Utah Code Annotated 1953*, requires that after the filing of a petition for final distribution "the court must proceed to distribute the residue of the estate in the hands of the executor or

administrator among the persons who by law are entitled thereto." *Section 75-12-8* then provides that "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, * * *." The order of October 9, 1945 did not set forth the proportions or parts to which each heir was entitled. Nowhere in the instant probate proceedings was there any determination as to exactly what share of the estate each heir, including Virginia Latsis, the widow, was entitled to receive. As this determination of heirship was an essential condition precedent to the closing of the estate and final distribution, the failure to make such a determination of heirship has left this probate unfinished and uncompleted. None of the heirs in Greece have transferred their interests in the real property of the estate and title thereto has remained vested in them in some undetermined proportions.

POINT 5.

THE COURT ERRED IN ENTERING ITS ORDERS OF DECEMBER 12, 1952, DISMISSING THE PETITIONS DATED OCTOBER 26, 1951 AND AUGUST 1, 1952, RESPECTIVELY.

On December 12, 1952 the District Court, by two separate orders, dismissed the two petitions of the non-resident heirs, both of which petitions directed the court's attention to the improper acts of Utah Savings & Trust Company and Virginia Latsis Zambukos, the co-administrators, and further prayed that the co-administrators should be required to properly administer the estate. One of the orders of December 12, 1952 was

dismissing the petitions as to the trust company and the other order dismissed the petitions as to Virginia Latsis Zambukos. The motions of the co-administrators to dismiss the petitions were identical and the grounds thereof upon which the court based its orders of dismissal were generally a claim of lack of jurisdiction over the subject matter and failure of the petitioners to state a claim upon which relief can be granted.

In re Linford's Estate, 116 Utah 21, 207 Pac. 2d 1033, involved a factual situation closely analogous to that of the instant case. In the *Linford* case a decree of distribution was entered in December 1942. In April 1948 two heirs of the estate petitioned for an order to show cause why the decree of distribution should not be vacated and why the administratrix should not be compelled to file a true inventory and make a proper distribution. In granting such order, our court in the *Linford* case approved the procedure taken by the heirs in attacking the decree of distribution. The court stated:

"This is not an action against the administratrix, but rather a petition directing the court's attention to certain alleged fraudulent and improper acts on the part of the administratrix, and requesting that the court require her to properly administer the estate."

The court referred to *In re Raleigh's Estate*, 48 Utah 128, 158 Pac. 705, where *Section 75-11-37, Utah Code Annotated 1953*, providing for conclusiveness of settlement of the final account was construed. As to the con-

struction of that statute in the *Raleigh* case, our court stated:

“* * * we construed the above quoted statute to mean that the settlement of an account, whether it be a final or an intermediary account, is conclusive as to all items included therein, *provided that the statutory requirement of notice has been complied with*, and no heir or party is laboring under any legal disability, unless the settlement is set aside in a proceeding in equity for fraud or mistake prosecuted as are proceedings to set aside other judgments. This case holds that the statute does not preclude the court from charging the personal representative with items of property which he has not included in his final account.” (Italics ours).

We contend that no final distribution was ever made in the instant case, nor could any final distribution be made upon the conditions imposed by the prior order of the probate court, which prior order was incorporated in the order of October 9, 1945, and we submit that the procedure approved by our court in the *Linford* case should equally apply and that the co-administrators in the instant case should now be compelled to fully administer this estate.

The notice that was given on the final order of October 9, 1945 would indicate to any parties receiving it that a full and normal intestate distribution was contemplated. We believe that to give our statutes providing for notice on distribution any meaning, if a modified distribution or any distribution less than the normal

intestate distribution is contemplated, that the notice must so inform all interested parties and that failure to give such notice is a jurisdictional defect. We have previously quoted the Utah case of *Barrette v. Whitney*, supra, which stands alone and is contrary to the general rule. The widely accepted general rule contrary to *Barrette v. Whitney* has been set forth in a majority of states allowing collateral attack where there is a want of jurisdiction because of improper notice on a decree of distribution. *Teynor v. Heible*, 133 Pac. 1 (Wash.); *Baker v. Riordan*, 4 Pac. 232 (Cal.); 21 *Am. Jur.* 655, Section 490. See also cases cited on page 17, supra.

Irrespective of any consideration of the matter of notice or want of notice, and aside from any application of *Barrette v. Whitney* or the discredit which that decision has received from the courts of the sister states, the startling fact remains that title to the real property vested in the heirs at the date of death. Only an instrument of conveyance could divest those heirs and transfer title to Virginia Latsis. No such instrument was ever executed, and title has remained in the heirs. We grant that by an appropriate action in the nature of a suit for specific performance, or other proper proceedings where the facts and jurisdiction warrant it, the court could order a conveyance or make a judgment of conveyance. No such action was brought, and irrespective of the procedural gymnastics of the administrators the title today is vested in the heirs subject to the cloud of the orders of distribution.

One of the grounds for dismissal was the claimed failure of the petitioners to join an indispensable party, presumably a grantee of the widow, to whom conveyance has been made of estate properties. The relief sought by the petitioners is an action directed against the two co-administrators for completion of the probate and for a distribution according to the laws of succession. The relief available to the petitioners can be had only from the administrators of the estate.

CONCLUSION

The entire contention of the non-resident heirs of James John Latsis is that the District Court erred in dismissing the petitions of those heirs for completion of probate proceedings and in thereby denying jurisdiction over the estate and the acts of the co-administrators.

The acts of those fiduciaries in an attempted distribution were void. The order directing such distribution incorporated a prior order which imposed a condition precedent to its operation and effectiveness. That condition was the acceptance of the stipulation in property settlement, the receipt of moneys payable thereunder and the execution and receipt of proper instruments in transfer of the interests of the non-resident heirs. Those instruments must of necessity have included conveyances of the interests in real property of the estate.

None of the court-imposed prerequisites to the validity of the modified distribution were fulfilled. To assure

the non-resident heirs of due process, they must have had notice of any distribution other than that assured them by the laws of succession. Such notice they did not receive, and such notice was not given.

To ignore the fact that the heirs in Greece received no knowledge or notice of the death of decedent or of any of the probate proceedings until 1950 (Tr. 184), and to allow a disinheritance of those heirs by the arbitrary and wilful acts of the co-administrators of this estate, is unconscionable.

In the interests of justice to those heirs in Greece who, by their distance and remoteness from the scene of these proceedings, must rely on our courts for the preservation of their rights, it is prayed that the orders of the District Court dismissing the petitions of the non-resident heirs for completion of the probate proceedings be reversed and that this matter be remanded to the District Court for vacating of the order of October 9, 1945 and for further administration of this estate, including an order for final distribution in accordance with the laws of succession.

Respectfully submitted,

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