

1953

In the Matter of the Estate of James John Latsis : Respondent Utah Savings & Trust Company's Brief

Utah Supreme Court

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IN THE
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.

} Case No. 7954

RESPONDENT UTAH SAVINGS & TRUST
COMPANY'S BRIEF

FILED MULLINER, PRINCE &
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Clerk, Supreme Court, Utah

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COMPANY'S BRIEF

Appellants *by petition* in this former probate proceeding, which was closed in 1945, are seeking to proceed separately against administrators who were then expressly discharged by decree of the Court, as if they were still acting, and then by such petition, to set aside

that same decree both as to the distribution of the estate then made therein and also as to the then express discharge of these two administrators.

STATEMENT

Here the effort of the appellant brief is to reverse the trial Court's order dismissing their said petition. The argument ignores the most fundamental grounds of support for this order, and also disregards certain statutes and facts upon which the order below was principally based.

The statement of facts is only slightly inaccurate in what is stated, but it conveys an incomplete understanding by misconstruing portions of the record taken out of context, and by omitting important portions thereof.

We can call attention to these matters by following appellants' points in the same numbered order, and then bringing in the relevant omitted and additional matters where these seem to apply.

We will, therefore, answer their five points in the order as argued by appellants. We will state our position very briefly under each number and then present our contentions under their point numbers in the same order. Under "Point 5" we will discuss the five grounds of our motion to dismiss, which was sustained by the trial Court. If any of these grounds were properly sustained, the order of dismissal of appellants' petition was, of course, proper. Appellants have attacked none of these,

except by indirect reference to the subject matter of two of them.

We deny that appellants would be entitled to a reversal even if they were correct in any, or in all, of their first four points, but shall nevertheless show wherein they are wrong on these.

AS TO POINTS

To indicate the conflicts between us here, we will very briefly state our position on each of appellants' five points, as follows:

1. Claims of appellants have been settled according to the stipulation, and on their own plan of carrying it out.

2. Decree of distribution was carried out, as it is therein recited, and before respondent was discharged.

3. Settlement did not fail but was carried out as agreed and directed to be done by appellants.

4. Appellants are not entitled, and could receive no benefit from a distribution according to their claim of succession, and, if they were, respondent can do nothing about it.

5. The order dismissing appellants' petition was legal and proper and each of the grounds of respondent's motion sustained by the Court were well taken.

POINT I

This point goes to the question as to whether the decree of distribution was in accordance with a prior

stipulated settlement of the appellants' claims. We disagree, as to whether it was, and, also, as to whether it needed to be.

At the beginning of appellants' discussion of this (p. 12) they question the authority of Mr. Cotro-Manes (who, for the sake of brevity, will be referred to hereinafter as Mr. "C-M") to make the settlement. It is stated (p. 13):

"There is serious doubt 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 * * * concerning the appointment of an attorney to represent them."

Since similar intimations occur throughout their brief, and since Mr. C-M's actions on behalf of appellants were the basis for the proceedings taken and orders entered by the Court as to appellants, we will attempt to clear this matter up at the outset.

His appointment to act for these heirs, who are now the appellants here, was pursuant to our State Statute, as follows:

75-14-25. Attorney for minors and nonresidents.
At or before the hearing of petitions * * * for letters testamentary or of administration, for * * * settlements, partitions and distributions of estates, * * * and all other proceedings where notice is required or prescribed, * * * the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings all persons interested who are minors and have no gen-

eral guardian in the county, or who are nonresidents of the state, and all those interested who, though they are neither such minors nor nonresidents, are unrepresented. The order must specify the names of the parties so far as known for whom the attorney is appointed, *and he is thereby authorized to represent such parties in all such proceedings and subsequent to this appointment.* The attorney may receive a fee, to be fixed by the court, for his services, which must be paid in the case of estates of decedents out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney,
* * *

There is nothing here, or anywhere else that we can find, requiring notice of his appointment. None is "required or prescribed." And the very purpose of the statute appears to refute any such contention.

It is plainly intended to give the Court "discretion" to take care of situations where "minors" without guardians and "non-residents of the state," could not be expected to readily receive notice or to consult or act for their protection, at least could not do so without intolerable or interminable delays.

And since it was common knowledge at the time that Greece was overrun by Communists and was itself in a state of Communist revolution and war, this was clearly a proper place for the Court to exercise this discretion.

If notice to and approval by the persons to be represented were a necessity, this statute would never have

been needed, and it can serve no useful purpose. By this statute he was thereafter authorized in "all * * * proceedings where notice is required or prescribed."

In any event the intent and meaning of this statute, 75-14-25, is clear as to Mr. C-M's authority here, and to the effect that:

(1) He was thereby, and by his appointment thereunder, "authorized to represent such parties in all *such* proceedings subsequent to this appointment," and all the proceedings involved were subsequent, and

(2) That "such parties" were the same as the appellants who are now here complaining, and the father and predecessor in interest of two minor appellants, and

(3) That the "such proceedings" to which he was expressly so appointed to represent them were the "*settlements, partitions and distributions of estate.*" And these are exactly the things he did represent them in. This statute, therefore, settles the question of his authority here. What he did, was then in legal effect, done by appellants themselves.

In *State v. Dist. Court*, 85 P. 1022, the Montana Supreme Court held that the appointment by the Probate Court, in this situation, of a guardian *ad litem* under statutes similar to ours, as to such guardians, was void since their probate statute, which appears to be in the exact language of our 75-14-25, covers and "is exclusive" as to the like appointment of legal representatives in probate proceedings, and points out that California and some other Courts have also so held.

Speaking of the purpose of this statute, one cited California Court said:

“Now, the attorney for minors in probate proceedings is to represent the minor, and so far as he is concerned, *to conduct and control* the proceedings.”

Since appellants have made no effort to support either their intimations as to lack of authority of Mr. C-M or the constitutionality of the statute or of his appointment thereunder, we do not feel called upon to further refute such intimations. However, in the following cases the Courts have made pertinent observations on the question of such constitutionality of appointment:

In Re Estate of Lux (Cal.) 66 P. 30;
Learch v. Pierce (Cal.), 29 P. 239;
In Re Estate of Roarke (Ariz.), 68 P. 527.

In each of the last two cases the Supreme Courts of these states say, as to the order of appointment: “The order may be made *ex parte* and no notice of the entry thereof is required.”

And further, this appointment in the exercise of discretion by Judge Ellett (R. 240) and the right of Mr. C-M thereunder to represent these heirs, was thereafter recognized by three other Judges of the lower Court; Judges Van Cott, Crockett and Bronson.

And this appointment and this settlement were not instigated or promoted (R. 243-253) by the administrators against whom appellants are complaining. The administrators’ attorney in fact made to the Court a sug-

gestion that such an appointment may not be necessary (R. 24) and he raised the only questions that were raised on the settlement and then indicated to the Court the possibility that these heirs might finally realize an amount of some \$1,100.00 more than appellants were then seeking to agree to and get (R. 249-250). It now appears that his estimate was perhaps not as good as that made by the appellants' representative.

And time then seemed important too, because Mr. C-M satisfied the Court that delivery of at least some of this money could be made immediately (R. 257) and that it was urgently needed by these foreign heirs, as well as by the local heir, who was also a party to this settlement.

The "settlements, partitions and distributions" now complained of were promoted (R. 249) and procured (R. 246-253) *by* and for the appellants themselves. This respondent, as administrator, had no interest whatsoever in this.

Meaning and Effect of Stipulation:

A better understanding of the portion of the stipulation and order in question here will be obtained if some background is considered.

Just before the Court appraisal had been filed May 13, 1944 (R. 38) fixing the gross value of the estate at \$76,209.16, Virginia Latsis, acting personally by her own attorney (R. 45), filed May 12, 1944 a petition (R. 42) claiming that an item of \$12,000.00 which got into the

bank account of the decedent, and \$5,990.23 (R. 43) of which had been invested by decedent in a lower State Street property, belonged to her and not to the estate. It recited that she had sold Davis County property derived from her mother's estate for this \$12,000.00. This claim was indisputable and was found by the trial Court to be true (R. 67), but Judge Crockett at that time apparently upon a "presumption of gift" theory decided against her (R. 67), and after findings and judgment, but before appeal could be taken, a stipulation was entered into between the litigants and was consented to by the administrators (R. 89) and granted by the Court, setting aside this decision. This litigation had been entirely between the heirs represented by Mr. C-M on one side, and the widow represented by her attorney, Mr. Alke E. Diamant, on the other. The administrators, as such, had no interest in it.

The order on this stipulation follows after the signatures to the stipulation (R. 90). It reversed the previous decision as to the \$12,000.00 as between the litigating parties, but reserved the question as to how it should be considered by the State Tax Commission for tax purposes. The Judge also added, after his signature, the following statement which he initialed:

"Subject to approval by the probate division of this Court as to the compromise above referred to."

The "compromise above referred to" (R. 90) by the Judge is the stipulation of settlement now in controversy. This stipulation is dated (R. 86) Dec. 12, 1944,

but was not filed until Feb. 13, 1945 (R. 88), just two days before the reversing of the \$12,000.00 item, which was signed and filed Feb. 15 (R. 90). So these matters were handled together. The order approving this \$10,000.00 settlement agreement was then signed; it was filed Feb. 27, 1945 (R. 97), after a hearing.

The stipulation and the hearing thereon were directed principally to the establishment by the appellants, through their representative, that the settlement of Ten Thousand Dollars (\$10,000.00) was a fair settlement as between them and the widow of the decedent.

The appellants now place reliance (p. 13) upon a paragraph in the stipulation (R. 87) that the settlement "*shall* become binding and conclusive upon" the individual heirs executing certain receipts or documents mentioned, and accepting their portion of the settlement fund. They contend this meant it could never become binding except upon these being *first* obtained.

We are entirely unable to see how this statement at that time has any effect here now. Whether it is considered *as a legal conclusion*, or a correct recital of something they agreed would be the effect of such acts by the heirs, it did not limit the settlement in the first place, nor the further proceedings agreed to and taken. Certainly the parties making the settlement could, if they had wanted to, *change* their ideas as to how or when it should be closed.

It was correct to say that the settlement would have become binding if the heirs so executed the documents

and accepted the money. This would be true whether such statement had been inserted in this stipulation or not, or whether there had been any stipulation at all.

But, it doesn't follow that there was any agreement that the stipulation and settlement, as approved by the Court, would not be binding as an agreement until they personally so signed. There was no such statement, although it would have been easy to make such, if so intended. In fact, all the actions of all the parties to this stipulation, and of all the Judges who considered and acted upon this matter indicate an exactly contrary intention.

This agreement by all of the parties said (R. 86-7), "that it will be for the best interest of said estate, and particularly of the said four heirs, that a settlement be made *at this time.*"

If it had been the intention to have their approval before the settlement was made, there would have been no sense in the importance given to making the money available then, and there would have been no sense in proceeding to get the order approving the settlement at that time. Courts do not ordinarily approve and direct performance of agreements not yet fully agreed to by the parties, and which never may be.

It must be kept constantly in mind too that this "settlement," in so far as agreed to by Mr. C-M, was made by these appellants, just as if they had all been present and signed the agreement themselves. And so also were

all the acts thereafter taken by their representative pursuant thereto, their acts.

This stipulation also said (R. 87):

“It has been agreed that the said four heirs,” naming them, “will accept in full settlement of all of their claims, interest and demands, which they have, or might have had, as heirs at law of the said decedent, the sum of \$10,000.00 to be paid as hereinafter agreed and provided.

* * *

“That the Court, upon hearing hereon, shall determine and fix the attorney’s fees and charges of N. J. Cotro-Manes, as attorney representing the said four heirs by appointment of the above entitled Court, and shall direct the manner of disbursement of the said fund.”

So that the settlement was already agreed to, and the manner of disbursement, which is the thing appellants are talking about, was not settled, but was to be directed later, as it was.

The Order of Feb. 27, 1945:

Appellants (p. 13), after referring to this provision of the stipulation, say that the order “in like language” stated the same conditions. This is inaccurate. The order (R. 97) on this matter did not mention all the acts mentioned in the stipulation, but only one, it says simply this:

“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.”

So that all mention of signing of documents, including receipts and assignments as referred to by the stipulation, are not in this order, at all.

And here again, while it is a true statement of law to say that *accepting* the benefits of a settlement would bind the parties to it, again there is no order to the effect that the making of the settlement depended upon, or was to await, such personal receipt. A contrary intent clearly appears in the order itself.

This statement in the order, upon consideration, will be seen to have had one or two possible purposes. It could have meant that "acceptance" by their representative would have this effect. One of the four heirs was a minor who could properly accept only through his representative.

Otherwise, the purpose intended by this was to give some protection to the representative appointed by the Court for these foreign heirs. It was beginning to be common knowledge, as it definitely has since, that during the war organized efforts were commenced to acquire the interests, or the right to represent the interests, of foreign heirs residing in enemy nations or in nations in enemy hands, and who were deprived of, or delayed in getting, their inheritances. The receipt by these heirs as referred to in the order, or the signing of documents as referred to in the stipulation, might protect the representative of these heirs from thereafter claiming that their representative had made an unauthorized or an intentionally unfair settlement; or from denying receipt of the money.

This purpose is consistent also with the paragraph of the order quoted by appellants (p. 14) "that the said heirs *shall furnish* * * * receipts of said payments," and that "their attorney *shall procure*" such receipts.

Some more important provisions of this order on this matter are not referred to or quoted by appellants. The order says, "*all the parties having joined in said petition and being represented, no notice was required*" (R. 95), then refers to Mr. C-M as "representing the heirs other than Virginia Latsis." This is consistent with our position that these heirs were actually there in Court, at least legally.

Then, after reciting that the settlement is a fair one and in the best interests of these heirs, and after fixing the fees of their representative, and in *directing the distribution*, the Court says (R. 96):

"It further appears that in addition to the services already rendered by the said attorney to the said heirs, additional services will be required in *arranging and insuring* the receipt by the said heirs of the amount to which each is entitled under the said settlement, to-wit, the amount of \$2,000.00, after the deduction of said attorney's fees."

Then the Court makes an unconditional order of distribution of this to "each" of these heirs and it is then ordered (R. 96) that such payments to the three heirs, i.e., William and Nick, the brothers, and John, the nephew, naming them,

"may be made***through the Hellenic Bank Trust Company of New York City, or through

the American Express Company, *whichever source is selected by the above mentioned attorney for the heirs, and that the issuance and delivery of checks to such source SHALL RELIEVE THE ADMINISTRATORS HEREIN FROM FURTHER RESPONSIBILITY THEREFOR.*" (Emphasis ours.)

This was pursuant to the agreement (R. 87): "that the Court***shall *direct the manner of disbursement of the said fund.*"

Thus, the Court did not, as contended by appellants, require these administrators to make delivery to these heirs, or to procure any documents from them. This mention of "acceptance" in the order had no connection with the administrators. This matter was left up to their representative, and he was paid for doing it. We don't see how there can be any dispute about this. The final decree makes this conclusive.

The appellants then proceed to argue (p. 14) that the Court was without *jurisdiction* to modify this order of Feb. 27, 1945, by the final order of distribution and discharge of Oct. 9, 1945. The answer is, the Court did have jurisdiction to modify it, and also that the Court didn't modify this or any order.

We agree that the *Whitney* case cited (p. 16) held that probate proceedings, as here, are proceedings *in rem* and would not be void for want of notice. We have a statute also to that effect.

The argument that this case should be overruled and all the argument with relation to notice is beside

the point here. There is no allegation that the regular statutory notices were not given throughout. It is contended (p. 17) such final notice was insufficient because it didn't tell the heirs "of the contents of the petition" for distribution. If this were necessary every decree of distribution, we think, entered at least for the last 40 years in the District Court here is invalid. The notice sent to these heirs describes the petition as one (R. 105) asking for "the settlement of the final account of said administrators and for the distribution of the residue of the estate to the persons entitled and discharge." That is what it was. It has not been the practice to do more than this and it is not required.

Furthermore, this order and this decree plainly could not be affected by this claim by reason of statutes which we can better discuss later under Point 5, in discussing the grounds of our motion, and appellants were represented.

Appellants repeatedly say that the order of Feb. 27, 1945 "was conditional." They must mean that the delivery of the money to the heirs meant an actual delivery to and receipt by these personally, and that this was a condition precedent to the agreement taking effect. It must seem apparent from the record (R. 127 & 244) that this could never be done without an agreement first taking effect so as to get the money for delivery. And also, that a contrary interpretation was plainly given by all the parties who participated in procuring, in making, or in carrying out this order, or who had anything to do with it.

This was completed by the heirs acting through their representative duly and legally appointed. He also carried it out as ordered, as far as this was possible, prior to the time the appellants filed their petition here, and there is no indication that he will not complete the job. The money is on savings deposit (R. 121) subject to his order.

We can see no application of the statute or the cases cited in the brief (p. 15-18) to this point of theirs, or to our motion to dismiss and the order of the Court appealed from. We will, however, notice some of these later.

POINT II

This numbered point by appellants (p. 26) is that the decree of Oct. 9, 1945 has not been carried out according to its terms. On this, the record shows that the decree of distribution has been fully carried out.

Actually this point of theirs is based on the assumption, (1) that Mr. C-M acted without authority in making the agreement of settlement; and (2) that it was never completed because the delivery of the money *by* the administrators and the receipt of it by these heirs was a condition precedent to the making or completing the contract; and now (3) that this condition precedent was "incorporated" (p. 19) into the final decree of Oct. 9, 1945.

We have considered the first two, and will now answer the third of these assumptions. This contention

not only rests upon the two incorrect assumptions discussed, but upon the far-fetched and erroneous assumption that any such condition precedent, if it had ever existed, was "incorporated by reference" into this final decree, or, especially, that there is such a condition in this decree.

Notice in their very first quotation therefrom (p. 19) that the Court said the "settlement" agreement *"was made and approved."* Not that an agreement was to be made if and when the heirs personally approved and accepted the money.

In arguing this point appellants can make no claim that the final decree mentioned any of the references to documents in the stipulation of settlement. They do contend it adopted the Feb. 27 order, but this doesn't have any statement that it shall or shall not become binding upon the heirs signing any documents. They claim that what they term "conditions" in the Feb. 27 order as to acceptance of the money were adopted and that this made the final decree conditional, and also charged the administrators with procuring personal acceptance of it by the heirs.

On this it is argued that the final decree, by adopting from the Feb. 27 order an inference which they claim was there, that this agreement could not become such until there was a personal acceptance of the payments by the heirs, then itself said that the agreement had not been completed and would not be completed until payments thereunder were personally accepted. Thus

it is argued that, (1) this final decree says and means that the contract has *not* been completed, and (2) that this final decree adopted this meaning and so held, and (3) that, therefore, the administrators violated the decree by not holding up all distribution as if no agreement had been attempted. All these are untenable.

If we have refuted the first, the others need not be considered. However, we deny that this language was ever intended to be or was adopted in any way or manner into this final decree, or that any such limitation or condition, as is contended for, was ever mentioned, or adopted. Every provision of it, as well as its entry at all at that time, refute this.

All that appellants say, by way of adoption by reference, is stated (p. 19) to the effect that this decree recited in substance that the files and records showed that by order dated Feb. 27, 1945 by Judge Van Cott, a settlement with these heirs was made and approved and then after stating the amount (R. 20) the decree mentioned the fees of Mr. C-M and referred to him as "appointed by the Court to represent said heirs, *** he to render the additional services required in *arranging* and *insuring* the receipt by said heirs of the amount which each is to receive under the settlement." And this settlement is referred to not as one to be made, but one which "was made and approved." These had to be mentioned to be provided for.

And then the other reference which is relied upon to support this theory of incorporation by reference (R. 20):

“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.”

Nothing is said “hereinabove” in this decree about any acceptance by these heirs, and nothing about *any condition precedent to the distribution made*. It was made, then. And if there had been a condition to the completion of this contract, there certainly was plenty of occasion and opportunity for the parties, or the Courts, to have said so.

Anyway what the February order itself said, in directing “the manner of disbursement,” as all the parties had agreed it should (R. 87) was (R. 96), as above quoted, that the administrators upon making the money available to the “sources” authorized to deliver it would be relieved of “further responsibility therefor.” And the final decree recited that funds for this had been made available, and then it *discharged* the administrators.

And when this final decree approved the “payments” and “provision for distribution made pursuant to the order herein of February 27,” it was, of course, referring to this specific direction as to payment and distribution and to its order making absolute distribution of \$2,000.00 to each of these heirs.

What the Court in this decree did say and do, is at total variance with appellants’ contention. It referred to the agreement “made and approved” as one whereby

said four heirs were to receive the \$10,000.00 "as their full share and in settlement of the claims of each and all of said heirs against this said estate," and then goes on to recite the payments theretofore made thereunder, including the \$500.00 each which had been forwarded, as arranged by their representative, through the express company.

It, in harmony with the prior order, recited (R. 127) he was to receive the balance of his fee "when the prior distribution to each of said three heirs is completed."

The decree also, after reciting that there was no cash in the estate to pay the balance of the money due on this distribution, recited that the widow had "deposited with the Utah Savings and Trust Company" the cash for these heirs and that this money for the heirs and their representative (R. 127) was "to be transmitted to the said remaining heirs and paid to their attorney, in the manner heretofore ordered herein."

And that, as quoted by appellants, their representative was "to render the additional services required in *arranging* and *insuring* the receipt by the heirs of the amount to which each is entitled to receive under said settlement." And also said, after reciting the use of the N. Y. Bank and the express company as in the prior order, that this representative was to be entitled to the balance of his fee when such manner of payment was completed. Thus, this Court, in referring to payments in the manner "heretofore ordered herein," referred to and covered all the provision of the order of Feb.

27, 1945 as to the manner of disbursement of these funds, but no conditions.

All this was consistent only with performance of a completed and approved agreement and it is useless to argue that either the Court or the parties intended to, or did adopt any interpretation contrary to this.

Furthermore, the Court, again acting consistently with the prior order that the making of funds available for such distribution "shall relieve the administrators herein from further responsibility therefor," said (R. 133):

"It is further ORDERED that the said Utah Savings and Trust Company and Virginia Latsis, be and they are hereby discharged."

This decree was signed and entered Oct. 9, 1945.

Coming to the cases cited (p. 20) under this point we have no doubt that a Court "may incorporate the provisions of the will" by "express terms" as was done in the *Horton* case there cited, and, of course, agree to the propriety of "resorting to a will to explain and interpret the decree" in respect to matters referred to in both.

We deny that there is any "rule of law" or any authority for the claim that a decree by simply referring to a former proceeding or document approves and adopts everything that happened or which occurs therein.

And, particularly, we deny that a decree can be assumed to have adopted a disputed construction of a

clause in a prior document when the whole decree and all that it does or says is inconsistent with such construction. We like some of the language of the *Ewer* case they cite (p. 23) that “a single phrase * * * apart from the context * * * indefinite in itself” should not upset the plain meaning of a whole decree. And here the disputed clause is not even in the decree being interpreted, but, of course, such a clause would have been if such disputed condition had been intended to apply to it.

Just as absurd, is the position taken by appellants (p. 23) that the decree of distribution which unconditionally (R. 128) said the balance of the properties “are hereby distributed” to the widow, was not intended to take effect until every one of these heirs had accepted his money.

POINT III

This point again assumes the complete correctness of their first two points, and then again proceeds on the assumption that there has been no settlement at all.

This emphasizes the inconsistency of quoting and relying upon a so-called “condition”, which, they say, was a part of the agreement their representative made, and at the same time arguing that no agreement at all was made.

It would seem that if the agreement of settlement was made and approved by the Court that all the relief appellants can have is the money which they may accept and give the receipts which the Court directed them to

give (R. 97). Because, as the appellants quote in their brief (p. 30), the "Court has inherent power to enforce its order."

Another thing thrown in to aid the confusion (p. 28) deals with the authority of Mr. C-M again. This half-way assumes his authority to represent the heirs who were such at the time of his appointment and of the distribution of the estate, but says that: "Nick J. Latsis died leaving as his two minor children, John Nikolaou Latsis and Panagiotou Latsis, * * *. Mr. Cotro-Manes was not appointed to represent these minors or the heirs or the estate of Nick J. Latsis and could thus in no way stipulate on behalf of these minors in regard any settlement agreement."

This not only entirely disregards the realities of the appointment when the father was alive, but of the settlement which Mr. C-M did agree to and of his entire representation of the people then interested in making this agreement, and his efforts thereafter, and in recognition thereof in making partial payment according to said settlement and the final order of the Court thereon, but it also ignores the order of the Court made to cover this exact situation (R. 97), as follows:

"It is further ORDERED that if either of the above-named heirs shall have or shall become deceased before such distribution, that the said Hellenic Bank Trust Company, or the American Express Company, may be authorized to make delivery and payment to the heirs at law by succession of any such named heir who shall have or shall become so deceased."

And also our statute 75-12-7, to the same effect.

Under this point the brief, in a totally irrelevant and perhaps inadvertent assertion, reveals the reason for the attack on this final decree, as well as what is really aimed at; it says:

“The real properties of the estate have greatly appreciated in value since 1944 * * *.”

And then pursuing this under Point IV, which we will later notice, they argue that the administrators must give them part of the real property.

Appellants \$10,000.00 Settlement was Fair

We cannot resist answering briefly the effort here to influence the Court by the claim of appellants' brief (p. 27) that these heirs were shorted by the settlement their representative made for them.

It is said that their calculations show that each of the four heirs share should have been \$4,916.20 instead of the “stipulated * * * \$2,000.00.” The stipulation settlement was actually \$10,000.00 for the four, or \$2,500.00 each.

The gross amount of the estate figure taken is that shown in the inheritance tax appraisal of \$79,829.11 (R. 99). These figures were set up April 12, 1945, some time after the settlement. The Court at that time had on file only the appraisal by its appraisers (R. 38) in the gross amount of \$76,209.16. Both of these totals contain the \$12,000.00 which had been in litigation and as to which the trial Court, as above pointed out, ex-

pressly found that this amount in decedent's bank account came by inheritance to the widow, from her mother and although it was first ordered to belong to the estate on a technicality, that order was reversed as to the estate. Appellants have taken no recognition of this item in making their claim here and while their representation to this Court is by no means as bad as that presented to the trial Court (R. 169) in their petition, which the trial Court dismissed, it is still not fair, nor correct.

The deductions of the widow's one-third ($\frac{1}{3}$) and of the expenses of probate stated in the brief are correct but it appears in the record and has been called to the attention of appellants' representatives here that there are other items of expense. The item of \$1,636.45, which is not included in their deductions, was for State Inheritance Tax (R. 98).

It does not take in other items of expense, a principal one of which is the Federal Inheritance Tax payment which we have been unable to immediately locate in the record, but which was considered and not disputed in the trial Court as \$2,221.04. Since this estate was settled long before the marital deduction now allowed on federal estate taxes, it is apparent to the Court that it would be at least in that amount. These two items alone total \$3,857.49.

To the appraised value they add the total "rent collections," of \$9,771.32, without making any allowance for expenses at all. The record shows that all that was

collected was paid out, but does not show the total that was used from these collections for repairs, operations or expenses. Mr. C-M did ascertain and represent to the Court that the farms had operated "at a loss" (R. 249)

And these heirs' representative claimed nothing by reason of possible operation income (R. 253) because no one knew how that was going to come out.

We point out also as another single item to be considered and which was to be considered, and which was considered on the settlement, the \$12,000.00 (R. 80) included in the inventory as the value of Black Rock Beach Co. stock. While an outlawed mortgage of \$9,670.00 (R. 81) was deducted in arriving at the above gross appraisal of \$79,829.11. This \$12,000.00 stock item was not deducted. This corporation did not own the Black Rock real estate which is "Black Rock" and inventoried separately (R. 78-79). This corporation was an operating company.

On the hearing Mr. C-M, who showed that he had made thorough investigation of the assets and the possibility of expenses and losses, discussed the real estate (R. 245) and showed that the bulk of this was a one-half interest in an old business property, which was somewhat in jeopardy. He pointed out (R. 244) that if any of the real estate could be sold it could not then be sold for cash and that by this settlement these appellants were guaranteed \$10,000.00 regardless of any losses or fluctuations or expenses. It will be recalled that the

widow accepted these risks, and assumed all expenses and costs.

He also told the Court and it was true (R. 245) that this Black Rock Beach Co. stock was 99% owned by the estate; that it had operated at a "considerable loss" the previous year; and that additional cash would have to be raised by assessment and put up if it continued to operate at all. It would seem that when representations as to actual values were made here appellants would have told exactly the extent of what that stock loss has been. But, outside of all of this, let's now take the figures that we have and take the full gross as set up by plaintiffs:

Gross Estate	\$79,829.11
Add full rent collection — without any deductions.....	9,771.32
TOTAL	\$89,600.43
Deduct the widow's \$12,000.00, not belonging to the estate	12,000.00
	\$77,600.43
Deduct widow's portion of real estate, as agreed to by plaintiffs, not inherited	18,753.00
	\$58,847.43
Deduct expenses of administration, as agreed.....	12,350.24
	\$46,497.19
Deduct widow's first portion, by succession.....	25,000.00
	\$21,497.19
Deduct State Inheritance Taxes and Federal Inheri- tance Taxes, not included in expenses.....	3,857.49
	\$17,639.70

Of which these four heirs would be entitled to $\frac{1}{2}$ or \$8,819.85. So that if we stop at this point, and we cannot see how the above items can be disputed, the settlement of \$10,000.00 agreed upon is almost \$1,200.00 more than the value left. If we were to deduct even one-half of the \$12,000.00 appraised value given to the Black Rock Company's stock it would leave only \$5,800.00 on the highest valuation claimed for all four of these heirs. And if rents collected were used for operating expenses or losses nothing is left.

The remaining matter to be noticed under this point (p. 28) is the incorrect statement that if Mr. C-M represented these heirs at all "such representation and the stipulation * * * were effective only until notice could be given to all of the heirs in Greece and until those heirs had opportunity to affirm the stipulation." But, as stated, all statutory notices were given and Mr. C-M, pursuant to the agency given him by the Statute 75-14-25, participated in all these "settlements, partitions and distributions," and represented these heirs just as the statute authorized. He, in fact, promoted and brought about the very things now complained about. Notice to the heirs didn't affect his authority.

The further statement in this connection (p. 28) that the "minor heirs" or the "estate" of Nick Latsis, who was himself alive when this settlement and final distribution were made, could, after his death, disaffirm it all because of lack of notice to them is too absurd to discuss.

The two cases cited at this point (p. 28-29) have simply no relation at all to the preceding statements made, neither in the parts quoted, nor in any other part, so far as we can see.

The *Smith* case decided the point that a settlement made for a minor, but not by any legal representative of his, still had to be repudiated in a reasonable time after he came of age.

The quotation under the citation of the *Lupton* case is a part of the Note in A.L.R. cited at 979 on this case. Of course, we don't have matters of confidential relationship, or of fraud or unconscionable practice, and the *Lupton* case holds that if we did the agreement would still not be void. A mere reading of the portion of the note preceding that quoted will show the absolute inapplicability of anything in that case.

Then referring to the law, the brief (p. 29) states that Utah Law "did appear" to be clear that the administrator cannot be discharged until the estate has been fully administered. We simply assert that an administrator is discharged and his powers and duties end, when the District Court discharges him and distributes the estate from his control. If the Court errs in such distribution and discharge that, of course, is another matter, but the decree stands until it is appealed or attacked, and reversed. And the Utah cases cited do not support their statement, or conflict with the statement just made by us.

In Re Barker's Guardianship quotes a concurring statement by Justice Wolfe, but does not state the

ground of the decision. There the defendant guardian had been collecting disability payments for his ward in excess of \$400.00 and had paid only \$50.00 to the ward. Upon a doctor's certificate of restored competency to the ward, the guardian applied for and obtained an order of discharge. An affidavit was filed, and an order to show cause entered and then the case was tried. This Court says:

“as though a suit had been brought.”

It then cites another Utah case and says that that case held that where “issues were properly drawn by appropriate pleadings, although it was not error to proceed to dispose of the contested question,” it should be done according to the procedure of the Civil Code. Thus, in this case the trial proceeded without the question of procedure being raised.

The second distinguishing feature pointed out by this Court is the application of *102-13-45* R.S.U. 1933 (now *75-13-45*) which is quoted and which provides that

“upon complaint by any * * * ward * * * against *anyone*, suspected of having * * * embezzled or conveyed away any of the money, * * * belonging to the ward * * * may cite such suspected person to appear before it * * * and proceed with him on such charge” etc.

This makes it clear that this case never said or decided that an administrator here could not be discharged even if he still had possession of property of the estate, and since the record shows that this administrator had no such possession because of the distribution by the Court prior to its discharge, and there is no claim that it now

has such possession, that case has no bearing. Judge Wolfe's comment quoted, simply adds that the Court may enforce its order independently of this statute. There is no order of the Probate Court as to this administrator which is attempted to be here enforced.

The other Utah case cited for this so-called same rule (p. 30) is the *Brooks' Estate* case. We have no argument with the quotation. But here the Court specifically found that all of the real properties of the estate had been distributed by it and all other properties turned over by the administrators in accordance with the orders of the Court (R. 128). The *Brooks' Estate* case never discusses the point that the Court "cannot discharge" an administrator until he has finished administration, as contended by appellants. But, in that case, and exactly contrary to said contention, the Court cited the administrator to show cause why his appointment should not be revoked for certain defaults. He thereupon resigned and this case is entirely devoted to the matter of requiring him to *turn over* to his successor administrator monies of the estate in his possession. As stated by this Court (30 P.2 at 1068) the question was did "the Court below * * * require appellant to deliver to the new appointed administrator more property * * * than came into his possession as administrator."

The remaining statements under this point are repetitions which have already been answered.

POINT IV

Under this point appellants argue (R. 32) that they are entitled to have delivered to them their proportionate share of the real property estate as if no order of distribution had been made.

They gave this Court no clue as to what this administrator could possibly do to accomplish this some eight years after it has had any control of the property and after its distribution to private ownership.

What they here appear to contend, that seems new or different, is that the Court, except by getting conveyances of the "real property" from each heir, could not, and, therefore, did not make any distribution, and did not close the estate.

The statement quoted (p. 32) from the *Chamberlain* case that "any property" of a decedent vests immediately in his heirs, "*subject to administration* and the payment of debts" may, in some sense and for the purposes of that case, be correct. But, that any particular property may never reach them because of its being "subject to administration," is abundantly clear.

The only thing that this *Chamberlain* case held on this was that the plaintiff heirs of a decedent had sufficient interest to entitle them to contest a deed executed by such decedent, on ground of non-delivery thereof. So this statement was not necessary, and doesn't aid appellant. And, by 75-11-3, heirs are expressly given this authority in quiet title actions back as far as 1898 when this provision was first enacted.

Then they cite (p. 32) Sec. 75-12-15, and this simply says that "partition or distribution" of the real estate may be made as in this chapter provided to persons to whom it has been "conveyed" by heirs, and that such shall be "assigned" to those entitled. They then argue from this that shares of the estate, as referred to, can't be divested except by a conveyance, and, of course, this statute doesn't say that at all.

Statutes illustrating the error of the broad claim of the definite investment of title in the heirs, and that such cannot be divested except by their conveyance, are quite numerous. For example:

75-8-1 authorizes the Court to entirely exhaust the estate as to all heirs except the spouse, by "family allowances" to her; and 75-8-1 authorizes the same by "summary distribution."

Then, 75-9-21 and other sections provide for such "divesting" by sales to pay funeral expenses or debts, old or new, and sales of real estate for these and other purposes, or *even for distribution of the proceeds* from real estate or other property, are authorized by 75-10-1 and succeeding sections.

And, property in name of decedent may be afterwards conveyed by or under the direction of the Probate Court to any person entitled to have such property under 75-11-26 and 27, though legal title was vested in the decedent.

The exclusive right of possession by 75-11-13, which is ordinarily a right attaching to title, is not in the heirs,

but it is in the administrators until final distributon and turning over; and under 75-12-9 nothing at all may vest in an heir where the decedent has made advancements to him prior to death.

Before discussing the application of some more directly pertinent sections on this, we call attention to what appellants are claiming they are entitled to here, and to the impossibility of giving it to them. This claim that the share of each heir immediately vests, and that each heir is entitled to have it remain vested so far as it depends upon any statute or the *Chamberlain* or other cases referred to, applies alike to real property and personal property, so far as we can see. How is it that their claimed interest becomes real instead of personal property. We merely point this out, although it may have no particular importance. But what is it that appellants expect to get by continuing this probate, if it were opened up?

The total inventory which they have referred to in presenting their claim as to valut of the properties of the estate (R. 100) is \$80,000.00 in round numbers. We are not agreed as to what portion of all the estate would have gone to these collateral heirs according to these values, but we believe that we have demonstrated above that it would not exceed \$10,000.00. This is $\frac{1}{8}$ of the gross value, to the four of them, and each $\frac{1}{4}$ of $\frac{1}{8}$ is $\frac{1}{32}$ and one $\frac{1}{64}$ in each of Nick J.'s two minor children.

Looking at the matter from the standpoint of proportionate value, since each of these *four*, on this valu-

ation, would be entitled to about \$2,000.00 out of the \$80,000.00 of property, each of these would have a 1/40th interest and each of Nick J's children a 1/80th one. And by their contention, this interest is in each and every piece of property, and it is beyond the power of the Court to get it out of any piece of property except by conveyance.

With this in mind, we invite the Court to look at the list of these properties (R. 77-81) and try to figure out how the Court could give one of these heirs any benefit at all from a 1/32nd or a 1/80th in any of the Butlerville properties in the mouth of Big Cottonwood Canyon or in the so-called Black Rock near the shore of Great Salt Lake, or in any other or all of these listed properties. The Court would have to do something about exactly as was arranged here in order to give these foreign heirs any possible benefit from this estate whatsoever.

We point out also here, and before proceeding to the statutes which authorize this, to additional complications which cannot be ignored. The character of the real estate belonging to this estate, and some of the complications with relation to it, and particularly the impossibility in 1944 of selling any part of it outright for cash, was gone into at some length by Mr. C-M in presenting the appellants' proposal of compromise and settlement to the Court (R. 245-249). He said that none of the real estate could be sold outright for cash, but if sold could only be sold on a cash down-payment and future installment payment plan.

Thus, nobody can tell how much of this real estate it would have been necessary to sell under 75-10-1 to get cash to distribute to the collateral heirs, whether their proportion to be distributed, absent the settlement, would have been more or less than \$10,000.00.

So, as represented to the Court, and particularly to try and help these heirs when money would have been of the greatest benefit to them, their representative worked out an arrangement by which the widow provided the cash, and the bank acknowledged the deposit thereof to the credit of their representative and for their use and benefit. Now of the money available and so provided, \$2,000.00 was paid to the decedent's brother here and Mr. C-M has apparently received his full \$2,000.00. It is interesting, in this connection, to note that he, after the deposit, served notices as to this on the Utah Savings and Trust Company (R. 148), as a bank, and no longer dealt with it as an administrator.

Also, as the decree pointed out, \$1,500.00 additional had been withdrawn by him and forwarded through the "sources," as directed by the Court, to these heirs in Greece before the estate was closed. True, this came back and was re-deposited in the saving account held in the bank for these people. But, assuming that this Court could and it did attempt to give these interests in the real estate to one or more of these heirs, what becomes of this money and who is entitled to it? And, also, what about the money paid out?

The suggestion of the appellants' brief is that the brother here who took his \$2,000.00 doesn't get in on

any assumed "increased value" in real estate, which they are striving for; nor will any other of these collateral heirs who has or does become bound to the settlement; and so, if there is one who doesn't sign up the Court has to look after his VESTED interest in all of these properties.

We confidently assert that the law and our statutes do not require any such insane handling of such small fractional interests and that no Court controlling an estate, or any competent representative engaged in administering it, would willingly consent to any such handling of such matter.

We call attention now to the following statutes dealing with such situations:

"75-12-12. Partition by referees. — Whenever it is impracticable or inconvenient for the court to make a complete partition among all the parties in the first instance, or on petition of any interested person, the court, having first ascertained and determined the shares or interests of the persons entitled, may appoint one or more dis-interested persons to act as referees for the purpose of making the partition.

"75-12-16. When partition impracticable — When the real estate cannot be divided without prejudice or *inconvenience* to the owners, the court may assign the whole to one or more of the parties entitled to share therein who will accept it. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the

minority of such party, to the satisfaction of his guardian and the court having jurisdiction of the guardianship matter; and the true value of the estate must be ascertained and reported by the referees. * * *

"75-12-17. Partition—Set off to party—Payment.—When any tract of land or tenement is of greater value than any one person's share in the same estate to be divided, and it cannot be divided without injury to the same, it may be set off by the referees appointed to make partition to any of the parties who will accept it."

The foregoing statutes call for and permit use by the Court of referees to be appointed to aid in fixing values of interests as partitioned to heirs, but we do not have that problem or that necessity because, as we have pointed out, the parties here all fully agreed on the partition matters, and the Court, after full inquiry (R. 252), accepted this agreement, and distribution. This was all done in matters of "settlements, partitions and distribution of estates" to which the Court, by 75-14-25, had appointed the representative of these very appellants, with authority so to agree. It would have been idle and useless to then appoint a referee. And by accepting the values agreed to by the appointed representative, the Court was enabled to give these foreign heirs some consolidated value and benefit from their inheritance, which they could use.

And, we ask the Court to particularly note that under none of these statutes is it required that any heir make any conveyance of anything. So that all of them

refute appellants' contention on this.

They empower the Court to avoid an "impracticable or inconvenient" partition under 75-12-12, or "prejudice or inconvenience" to owners in distribution under 75-12-16, and to give lands having a greater value than one heir's interest therein to another heir in making distribution under 75-12-17; and, also, to give the full recognition to the statutory authority of the representatives of minor and foreign heirs in all "*settlements, partitions and distributions*" under 75-14-25.

Thus, if it may be assumed title would pass subject to administration, still it is plain that title to any particular property may be completely divested *in administration*, as it was here.

The authorities cited by appellants in support of this point again do not have any bearing although they serve to indicate that counsel have tried to find something to support them.

In re Mile's Estate, 223 P. 337., cited by them (p. 33) has absolutely nothing to do with any question with which we are here concerned. It does hold that a purported conveyance of an interest in estate properties is not a conveyance, if it was not intended as such, but only intended to be given as security. This, of course, is sound law and it makes no difference whether the thing purported to be conveyed is property of an estate or any other property.

In re Meyer's Estate, 238 P.2d 597, which the appellants assert (p. 33) held that "distribution of real

property shall be made only to the heirs," doesn't seem to discuss real property at all, and says nothing about administrators or Courts being required to distribute only to the heirs. In that case, two foreign heirs of a foreign decedent in the enemy country of Germany attempted to get rid of their interest in the estate in order to avoid its seizure by the Attorney General, as custodian of alien property, in this country during the war. They sent waivers of their interest in the estate properties here to two heirs residing in this country. These tried to assert that that waiver divested the alien German non-resident heirs and invested those who were here with the others interest. They also contended that the interest of the foreign heirs had never vested so as to become subject to seizure because they had not accepted or claimed it.

So that the Court can now see what the language quoted from Page 605 of 238 P.(2) had application to.

There is a statement however (P. 605) which would take this case out of even the appellants' claim as to what the rule in California is as to agreements with other heirs, as here. The opinion says:

"While the Courts of this state have determined that an heir may sell, assign, hypothecate or * * * *may contract with other heirs with reference thereto* * * * the question of whether an heir succeeding by descent may renounce or disclaim his inheritance has not been determined in this state."

This, at least, recognizes that heirs may there contract with other heirs as was done here.

The statement (p. 36) that the final decree here did not determine heirship is just plainly erroneous. It sets forth the names, relationship and residence of every heir just as they are now claimed by appellants here to have been, at page 106, and then in the following pages states exactly what portions and what properties are to be received by each.

POINT V

Under this point appellants finally, make some reference to the order dismissing their petition from which they have appealed here, and thus they get a little nearer to the issues involved on this appeal.

However, they still ignore entirely all but two of the five points of the motion to dismiss which their brief quotes (p. 10) and refer only indirectly to the two points not ignored. This motion (R. 153) is one to dismiss for these reasons:

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.

These grounds are under our civil procedure and come under *Civil Rule 12 (b)*.

There is nothing new discussed under this point 5 by appellants, but the claim of lack of the Court's juris-

diction to enter the final decree of distribution and discharge of the administrators, is here more particularly emphasized.

This emphasis on jurisdiction, is an effort to have this Court believe that the *Linford* case, which they cite (p. 37), is in point here. In so doing they ignore a number of distinguishing matters and particularly the statement of this Court in the first paragraph of the opinion there (207 P.2 at 1033) that:

“The administratrix was not then and has not yet been discharged.”

This discussion also ignores statutes affecting their contention, which is based upon lack of notice and particularly 75-14-25, that the representative of these appellants thereunder appointed, represents them in the very matters here involved, “and all other proceedings where notice is required or prescribed.”

Since this is the first opportunity that we have had to support the grounds of our motion, our position will be clearer if we briefly discuss these grounds in their order as above stated, and make reference to appellant’s contention there.

1. *Lack of Jurisdiction Over the Subject Matter*

The order appealed from dismissed a “petition directing the Court’s attention” (R. 158) to alleged acts and proceedings in the probate file. This respondent was brought in only by service of an order to show cause

(R. 157) served more than six years after it had been expressly discharged.

There were five matters of relief mentioned in the order to show cause (R. 155) but not one of these is claimed or discussed here, because appellants apparently realize that no relief could be granted on any of these.

But the appellants argue throughout and in the end of the brief (p. 41) seek from this respondent "further administration of the estate, including an order for final distribution in accordance with the laws of succession." They also describe their petition (p. 41) as one for completion of the probate proceedings. This background and their demand that respondent do something here are important.

It is important, also to keep in mind that the charge that the administrators distributed the estate, or attempted to, and that they should distribute the estate in some different manner, is entirely erroneous. This decree distributed the estate, and all of the statutes relating to distribution refer to it as a function of the Court, and 75-12-8 provides that after the proportions or parts are so distributed the heirs may recover possession from the administrator or any person having possession; and Sec. 75-12-4 refers to the Court directing the administrator to deliver possession. These and other statutes clearly indicate that the Court distributes and exercises the power of distribution but that the administrator has the right of possession and the duty to deliver such, upon distribution.

The \$10,000.00 agreed to, was expressly distributed to the four heirs, and delivery charged to their agent, Mr. C-M, by the Court order of Feb. 27, 1945 (R. 96).

In the final order provision was first made for taking care of this distribution completely (R. 126-127) and then the order, as to the property now claimed, said:

“It is further ordered that all of the remaining properties of the said estate, * * * *are hereby distributed* to Virginia Latsis, the surviving wife of the said decedent.”

Now if, when this order to show cause was served upon this respondent, it had attempted to do what appellants are asking the Court to require it to do, i.e., proceed with the administration, what could it have done? If it filed another petition for distribution and got an order from the Court distributing some possible interest in the property here it would be totally ineffective for that purpose without divesting the parties in possession and having, at least, an apparent title. Even assuming that the order of distribution was void, and that this administrator could be reinstated, he could make any of the former properties of the estate available to these heirs only by proceedings against such persons holding it. It is obvious then that if he so attempted that he would have no interest sufficient to sustain an action to quiet title, and particularly, to acquire some small fractional interest therein, as to which it is claimed, this decree might be voidable or void.

In 75-12-8, which says the Court in the decree must name the heirs and the parts to which they are entitled,

says they may “sue for and recover” these from the administrator or any person having the *same in possession*.

They appear to concede that probate proceedings are *in rem*, but the crux of their contention (p. 37) is that the Court couldn’t get jurisdiction for this distribution by the ordinary notice because the distribution was not normal and that any “modified distribution” requires a notice which fully recites the contents of the petition.

Apparently this, if so, would apply to any distribution on any kind of partition arrangements as contemplated by any of the statutes cited by us under Point IV.

75-1-7 is one of the first statutes that they run dead into, because this recites that the Court has jurisdiction on final distribution without any notice as to it at all. Because of this and other statutes defeating this claim, they attempt to escape by asking the Court to now overrule *Barrette v. Whitney*, 106 P. 522. There, in discussing this, in an action between two property owners, one of which had acquired some estate property, after a distribution without any notice, and had sold it to the other, this Court pointed out that in states whose statutes or decisions treat these proceedings as *in rem* the notice of the appointment of an administrator in the first place gave jurisdiction, and that such states, even without a statute like ours, have held that notice of distribution was not jurisdictional. The opinion (108 P. at 525) says:

“In other words, from what is there said it would seem that the notice which is given upon the filing of the petition for letters of administration is the jurisdictional notice, the giving of which, when given as required by the statute, brings not only the property, but the persons interested therein, within the jurisdiction of the Court.”

As seems to be agreed, this statute plainly says that this decree cannot be held void on account of “any want of notice.” And appellants appear to agree, as they must, that unless the decree is void it cannot be collaterally attacked, and even they treat their petition as such an attack.

We have no jurisdiction of the property which is “subject matter” of this litigation, and can get none by this proceeding.

Secondly, this statute, 75-1-7, says that “no objection” can even be taken on account of “want of notice, defect or irregularity,” except on direct application to the same Court made at any time *before distribution, or on appeal.*” So this bars them also.

They want this *Barrette* case reversed, and this would not help them unless the statute was also repealed. Both this statute and this case have stood since 1909 when it was decided, and no change of policy has been indicated either by the legislature or by this Court. And, appellants have cited no decision to the contrary.

They make statements here (p. 39) and on previous mention (p. 17) that this case has not been followed in

other jurisdictions and "appears to be contrary" to the weight of authority. They have cited no state which has refused to follow this statute, or even any other state having a similar statute.

They have cited in support of this, *21 Am. Jur. P.* 655, Sec. 490. This does not support their contention except where the "statute makes such notice a jurisdictional prerequisite," and a statement directly contrary to that they seek to support is made on the preceding page, 654. The statement of the law there is in exact accord with that of this Court in the *Barrette* case. Nowhere in the brief do they cite a case involving any statute at all similar to ours, or any discussion of the effect or validity of any such statute. We submit, therefore, that this statute alone justifies the order appealed from.

2. *Lack of Jurisdiction Over the Person*

Under this we will deal only with the jurisdiction of the respondent here; additional questions as to parties will be discussed under succeeding grounds. The appellants have ignored this ground of the motion entirely although it seems to us to be a proper ground of motion and a serious one.

Our statutes appear to recognize a clear distinction between the settlement of an account in probate and an order of distribution and discharge insofar as future proceedings are concerned. This Court has held that if the administrator has not been discharged an account, though approved by order of the Court, may under some

circumstances be opened up and revised or the administrator required to inventory additional properties. See 75-11-37 and cases cited. But where the estate has been finally settled and distributed and the administrator discharged by decree, no further proceedings can be taken in the estate by the administrator. The decree cannot be attacked collaterally, and the discharged administrator can act only upon reissuance of letters reauthorizing him to serve as administrator.

See 75-12-20.

Obviously an administrator who has been discharged could not petition and, therefore, could not act upon any petition filed in the closed estate without a reissue of letters.

It appears that Section 75-12-19, which precedes the section just mentioned, sheds some light upon this, and also, that this section required the Court to make the entry of discharge which it did make. Here the estate had been fully administered and the discharge order was preceded by an order which entirely distributed it. Also everything else had been done and the order recited the performance of everything else required and the statute says that then "the Court must make a judgment or decree discharging him from all liability to be incurred thereafter."

And the Court (R. 133) entered a specific order "that the said Utah Savings & Trust Company and Virginia Latsis be, and they are hereby, discharged."

It is impossible for us to see how this respondent has any right or power to proceed in any way with relation to any of the properties of the former estate, and it follows that the Court does not have jurisdiction of him as administrator so as to direct his performance or any of the duties belonging to that office.

In *Banks v. Employers*, 4 F.R.D. 179, on a similar motion, under the same Rule 12, the Federal District Court for Missouri ruled that an administrator after final settlement and discharge could not bring an action relating to any estate matters without being reappointed or appointed administrator *de bonis non*. The case attempted was dismissed on motion. The Court said:

“he can no longer act in his representative capacity.”

In *Fistel v. Beaver Trust Co.*, 94 F. Supp. 974, the Court, under this same rule, held that a person served in New York could not be held in his capacity as executor, where the estate was not in New York and he had not been appointed there.

In *Spanner v. Brandt*, D. C. N. Y. 1941, 1 F.R.D. 555, the Court held that if a defendant is to be sued as a representative so as to bind those for whom it may be claimed or alleged he is to act, it must be indicated that the defendant is being sued in “representative capacity” and not in his individual capacity. This bears also on the next ground discussed.

3. *Insufficiency of Process*

This ground goes to the procedure attempted here of filing a petition in a closed estate, to commence a

case against a former administrator therein, who has been expressly discharged.

Civil Rules 3 and 4, under “Commencement of Action” and “Process”, provide for a complaint which shall set forth the names of all the parties and the averment of claims, and for service of summons entitled similarly to the complaint, and that the Court “shall have jurisdiction from the time of filing of the complaint or the service of the summons.”

Thus, the parties are defined, the issues are defined and limited by this, and subsequent pleadings provided for and the subsequent rules as to intervening parties, or the bringing in of necessary parties can be applied, so that the whole matter involved can be settled.

We have noted the provisions of 75-14-23 that “mistakes in settlement” may be corrected “at any time before final settlement and discharge, and after that time by *an action in equity*.”

This Court has held that under this statute a decree of distribution may be set aside only in an action in equity. *In re Estate of Rice*, 111 U. 428, 182 P. 2d 111; *In re Raleigh's Estate*, 48 U. 128, 158 P. 705. This also is the general rule.

21 Am. Jur., 654, Sec. 488.

Civil Rule 60 (b) is the rule dealing with relief from a final judgment and it recites seven different grounds upon which a motion may be made for such relief, none of which is taken by the appellants here, and says, with

reference to fraud, whether "denominated intrinsic or extrinsic", the motion must be brought within "not *more than 3 months* after the judgment * * * was entered or taken." It then recites that pending such motion the "finality of a judgment" is not suspended. That, of course, would mean that this estate would still be distributed and closed and the administrators discharged, when appellants petition was filed. The rule then says:

"The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an *independent action*."

The reason for the rule now requiring procedure by "independent action" in equity is well illustrated by the confusion here brought about.

This respondent was cited on Nov. 1, 1951 (R. 157) simply by service of an order to show cause why it should not proceed with the probate proceedings closed more than six years before. Our motion to dismiss was filed (R. 155) Nov. 20, 1951. On their petition a copy of *lis pendens* was filed, Nov. 1, 1951 (R. 150), describing all the real property mentioned and distributed Oct. 9, 1945.

We were the only party and the only administrator then or in the year 1951 served at all. And, as the record shows, and as it already appears herein, we had no control over the properties previously distributed and now in private ownership, and there was nothing that we could do, if we had tried, to comply with the petition or order, whether we were ordered by the Court,

or attempted ourselves to comply. Any action to divest title to real estate or to quiet title against any claim, or any settlement of such, could not be had by us.

In fact, the record showed no authority in the petitioner, Attorney Arnovitz, to then represent the appellants. Of course, Mr. C-M still represented them, under the statutory amendment. The other former joint administrator had not been served, and nobody could be bound by the procedure taken against this respondent and, of course, any right of action against it must be determined as of the time this action was attempted, against it.

Nor could this respondent bring in either the representative of these appellants who had procured the settlement complained about, and whose authority and conduct are questioned by appellants' brief (p. 34) so as to fix responsibility for the agreement made by him, and for the decree consented to. And it could not bring in the owners or purported owners of the lands involved at all.

There was, on March 5, 1952, a withdrawal (R. 173) filed by Mr. C-M, and then by an order dated Aug. 1, 1952 (R. 176) the attorneys who had filed the petition back in 1951 were appointed as the attorneys for the appellants here. They were not the authorized attorneys before, because Mr. C-M was the attorney and they could not substitute themselves for him under the provisions of 78-51-34, at least until his withdrawal.

This withdrawal, however, did not and could not relieve him from the provisions of the order or the

decree requiring him to "arrange for and insure" the payment of the money on deposit to these heirs, for which services he had been paid. And, of course, there is no claim by him, or at all, that it did.

Now, as further wrong *process* and confusion, on Aug. 1, 1952 appellants filed another copy of their petition (R. 183), and another order to show cause was issued. So that, another case, if they could so start a case at all, was then started. So, from this, we had two separate former administrators, neither one of which could ever act alone, involved in separate actions, separate motions to dismiss and separate orders; and the first one against this respondent involves a somewhat different situation because of intervening things, and some different questions of authority of attorneys, as noted above. And, in neither action can the appellants obtain any relief, that we can conceive of.

The service of process attempted on this second order to show cause is noteworthy.

On this the Sheriff got into this confusion of proceeding against *departed administrators*, and served the summons upon the *departed decedent himself*. The return said (R. 182) that he had "served the same upon the within named defendant, John James Latsis, by showing the original and delivering to * * * said defendant personally * * * a true copy of said order." If appellants' contentions are correct, we don't see anything wrong about this. The decedent is just as logical a "defendant" in this as is either of these former administrators.

And now, after the orders of the Court here appealed from were entered below, and after the notice of appeal herein (R. 209) was served and filed, we have still another of the same kind of petitions (R. 212) by one Sigmund Helwing, as administrator of Nick J. Latsis and as guardian of his minor children, and another like order to show cause, issued (R. 228) January 26, 1953.

If such "cases" can be so brought in a closed probate proceeding, when do they stop? Is this not an admission on our motion, that necessary parties plaintiff were not before the Court, and also that any decree entered on the first petition and order to show cause would not bind **anybody**?

This presents still a different kind of case, because here is a further question of authority and representation, and as to getting title to the real properties aimed at, this case is started more than 7 years after the distribution, and, therefore, presents new defenses by parties who have been in possession.

Appellants attempt to escape this situation and the statutes and decisions *supra* by reliance upon, *In re Linford's Estate*, 207 P. 2d 1033, which they cite (p. 37) and quote briefly. There were three equal heirs, and the sister filed a petition, had herself appointed as administratrix, listed only part of the properties at reduced values, did not list the complaining brother as an heir at all, and thus, kept him from receiving any notice and thus kept him away from Court, which is extrinsic fraud, and obtained summary distribution to

herself of the whole estate. The Court, in the first paragraph of the opinion says:

“The administratrix was not then and has not yet been discharged.”

Then, (207 P. 2d 1035), in citing a Washington case in support of its decision, this Court said that the proceeding could be taken by petition though the administrator's final account had been settled by the Court, “the administrator, *not having been discharged*, should be required to administer the omitted property.” We have admitted, of course, and the rules that we have relied upon permit correction of the account before final settlement, but not even this can be done after discharge of the administrator. And no case has been cited that then authorizes the procedure attempted here.

Furthermore, in this *Linford* case there was no question of parties, everyone interested, either as administrators or heirs, were there represented and the properties involved were all in the hands of the administratrix who was an heir too, and under the Court's jurisdiction and control, and all matters could be given complete and final settlement.

It cannot be too often emphasized that this is not a case, where (1) probate proceedings were still pending when respondent was served; or (2) where all necessary parties were before the Court; or, (3) where the properties or the parties holding them are before or within the jurisdiction of the Court; or (4) where the parties had already joined issues and voluntarily liti-

gated a non-probate matter, like quieting title. (See *In re Martin Estate*, Utah 1946, 166 P.2d 197.)

Cases involving such situations, therefore, have no application here.

And, the Court also points out in the *Linford* cases that it had previously decided *In re Raleigh's Estate* that even the "account is conclusive as to all items included there, 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 * * * prosecuted as are proceedings to set aside other judgments."

Appellants quote (p. 38) this portion of the opinion from the *Raleigh* case as it was there quoted by this Court, and then try to escape by emphasizing that the quotation said "provided that the statutory requirement of notice has been complied with." They make no contention that anyone here was laboring under a legal disability and, of course, they were not. And they have not shown that any statutory requirement of notice was not complied with. The record shows in every instance where notice was required that it was given as the statute provided.

Furthermore, and this is very vital on this as we have attempted to point out, everything that appellants are complaining about and everything that they want by their complaint is encompassed in the words of 75-14-25 "settlements, partitions and distributions of estate * * * and all other proceedings where notice is required

to prescribed” and the statute expressly says that in all such things Mr. C-M was here “authorized to represent such parties.”

Thus, it is ridiculous to argue lack of notice of proceedings which this representative promoted and brought about and participated in.

In any event, this final judgment cannot now be attacked by the *PROCESS* here attempted.

4. *Failure to State a Claim Upon Which Relief Can Be Granted.*

This is a very important ground of our motion to dismiss, because if we are right as to any of appellants' five points discussed above, or as to any of the other four grounds of our motion, and we think we are correct as to each and all of these, then the Court was right in sustaining this fourth ground of our motion also, because the petition did not state a claim upon which *relief can be granted*. In addition to these, we desire to mention another matter showing such failure.

There is no extrinsic fraud alleged in the petition or here claimed. And since the Court clearly had jurisdiction of the estate and had entered its final decree this, no matter what the process or procedure attempted, could not be set aside except for extrinsic fraud.

In *Glover v. Glover* (1952), 242 P. 2d 298, this Court discussed this question quite thoroughly in an estate matter and so held. This case discusses the leading case of *U.S. v. Throckmorton* and holds the rule of that

case applicable to judgment in probate proceedings, as do other Courts. This Court also quotes and approves the definition of extrinsic fraud from the *A.L.R. Annotation Vol. 113, P. 1235*, as follows:

“‘Extrinsic fraud must consist of some act ulterior to the merits of the proceeding out of which the judgment arose, by which the party attacking the judgment was prevented from presenting his case or was induced not to present it. Such fraud consists of something done by the successful party, preventing the adverse party from presenting all of his case to the court, so that there was, in fact, no adversary trial or decision of the issue in that case.’”

Since this case refers to some prior Utah cases it is not necessary to cite further authority.

In *Hammell v. Britton*, 119 P.2d 333, a case cited by our Supreme Court on this question, the California Court emphasizes that as to extrinsic fraud the facts “must be pleaded with particularity and specificity.” It also has a good statement distinguishing extrinsic and intrinsic fraud. Here, of course, no fraud is pleaded. This failure to allege extrinsic fraud in the present case presents a solid barrier to appellants here and independently of everything else, justifies the order dismissing their petition.

Before leaving this point and to avoid any misunderstanding, we also point out that the Court may take judicial knowledge of what the record here shows.

All of the matters of notice, orders, decrees here involved are contained in the complete record which is

before the Court. We point this out because the petition here makes a number of statements which the record proves to be erroneous. For example; the statement therein (R. 163-64) that when the final decree was entered the administrator knew the money sent by appellants' representative to them in Greece had not been accepted. The record (R. 137) shows that this was not returned and re-deposited until sometime after. Likewise, the statement (R. 166) "that the \$1500.00 so sent was never out of possession" of the administrators. It was made entirely available to appellants' attorney and representative for delivery through the Express Company or New York bank, as directed by the Court, and respondent was relieved of further responsibility and discharged.

Also, the statement (R. 171) that the Court "has not entered a final order discharging the administrators of the estate," whereas there was an order expressly discharging them (R. 131). These are not all, but they are some samples.

It is true that the appellants' brief does not now assert or rely upon such statements in the petition. In fact, they scarcely refer in their brief here to their petition at all. The point we make, however, as to any and all statements in the petition, or in the brief, contrary to what the Court may take judicial notice of, are not admitted by our motion and can be given no effect here, but must be treated as mere nullities.

French v. Senate, (Cal.), 80 P. 1031, 69 L.R.A. 556, a leading case.

State v. Bates, 22 U. 65, 61 P. 902.

Utah Power & Lt. Co. v. Richmond Irr. Co., 80 U. 105, 13 P. 2d 320.

78-25-1 U.C.A. 1953.

20 *Am. Jur.*, P. 104.

State v. Rolio, 71 U. 91, 262 P. 987, where this

Court said:

“* * * and what is judicially known may not be controverted by pleadings, or made issuable by them.”

5. *Failure to Join an Indispensible Party.*

This ground has been covered in the discussion of the other grounds, above.

CONCLUSION

In conclusion, it can, we think, be safely asserted that appellants have not shown that any Court has heretofore been asked to, or ever has entertained such a petition filed in a former probate proceeding theretofore closed by a formal final decree, and seeking to gain title or quiet title to real estate likewise formally distributed six years prior thereto, and which petition is directed to a former administrator, likewise by such decree, theretofore discharged.

On the merits of their contention we believe it is established that the mere statement in the stipulation that certain documents if signed would bind the heirs

signing, was not intended to prevent the stipulated settlement from then taking effect; and, if it was at first so intended, this was changed by the acts and conduct of all the same parties who had signed this stipulation, and was not carried forward as a condition to the finality of the decree thereafter agreed to, entered, and accepted and acted upon by all.

That Mr. Cotro-Manes was fully qualified and authorized to represent and act for the minor and foreign heirs, and all the interests claimed by appellants, and in all the "settlements, partitions and distributions" agreed to and finally made. And, in fact, in doing all that is now complained of, and that respondent could not then or now control or limit the authority of appellants' representative. And that it cannot be made responsible therefor in this proceeding.

That not only is the process and the procedure attempted here erroneous, and futile, but that the things pretended to be sought by way of fractional interests in scattered properties would be of no value to appellants, and could not sensibly be permitted as a distribution.

Also, that any interest in the property of the estate that these heirs might have claimed was "subject to administration," and, so, was subject to be changed therein, by partition and distribution provisions of the statutes under the agreement between the heirs themselves as to their respective portions, and by the "settle-

ments, partitions and distributions” agreed to by the appellants, and ordered by the Court.

It seems, also, to have been fully demonstrated that this final decree, was just that, and that it can be set aside, if at all, only by proper process and in an *equity suit* with jurisdiction acquired over the subject matter and all necessary parties; and then only upon allegations and proof of extrinsic fraud.

We respectfully submit that respondent’s motion was well taken and properly sustained and that the order thereon dismissing appellants’ petition should be affirmed.

Respectfully submitted,

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