

1953

# In the Matter of the Estate of James John Latsis : Appellants' Reply Brief

Utah Supreme Court

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Case No. 7954

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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

*Deceased*

**FILED**  
AUG 23 1953

Clerk, Supreme Court, Utah

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**APPELLANTS' REPLY BRIEF**

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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

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Appellants*

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# IN THE SUPREME COURT of the STATE OF UTAH

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

*Deceased*

Case No.  
7954

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## APPELLANTS' REPLY BRIEF

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### STATEMENT

The respondents, Virginia Latsis Zambukos and Utah Savings & Trust Company, both contend in their briefs that the appointment of an attorney for absentee heirs and minors under *Section 75-14-25, Utah Code Annotated 1953*, vests such an attorney with full power not only to represent such heirs at all proceedings after his appointment, including confirmations of sales, settlements, partitions and distributions of estates, but gives him the right of compromise and adjustment. In fact, they claim that he is practically an attorney in fact. They seem to lay considerable stress upon the words "settlements" and "distributions."

## STATEMENT OF POINTS

## POINT 1.

MEANING OF THE WORD "SETTLEMENT".

## POINT 2.

LIMITATION OF AUTHORITY OF AN ATTORNEY  
APPOINTED UNDER SECTION 75-14-25, UTAH CODE  
ANNOTATED 1953.

## POINT 3.

DECREE OF DISTRIBUTION OF OCTOBER 9, 1945, IN  
ITS PRESENT FORM, IS VOID.

## ARGUMENT

## POINT 1.

MEANING OF THE WORD "SETTLEMENT".

The word "settlement" does not include a compromise. "Settlement", as used in this statute, means as follows:

*Joyner et ux. v. City of Seattle*, (Wash.) 258 Pac.  
479:

"Compromise is the purchase of peace (12 C.  
J. 315); and, as a corollary, settlement is the  
consummation thereof."

*Black's Law Dictionary*, Third Edition, at page 1613,  
defines the word "settlement" in connection with probate  
practice as follows:

“The settlement of an estate consists in its administration by the executor or administrator carried so far that all debts and legacies have been paid and the individual shares of distributees in the corpus of the estate, or the residuary portion, as the case may be, definitely ascertained and determined, and accounts filed and passed, so that nothing remains but to make final distribution. See *Calkins v. Smith*, 41 Mich. 409, 1 N. W. 1048; *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641; *Appeal of Mathews*, 72 Conn. 555, 45 A. 170; *Pearce v. Pearce*, 199 Ala. 491, 74 So. 952, 957.”

*Words and Phrases*, Permanent Edition, Volume 39, page 67, in discussing the word “settlement” in connection with an estate, sets forth as follows :

“Ordinarily, ‘settlement of an estate’ means payment of taxes and debts and distribution of estate among those entitled thereto. In *re Wraught’s Estate*, 32 A. 2d 8, 9, 347 Pa. 165. \* \* \*

The ‘settlement of an estate’ is the process by which letters testamentary or of administration are granted, assets collected, claims allowed, debts paid, real estate sold if necessary for the payment of debts, and the property distributed to those who are entitled to it by the laws of descent or by the will. In *re Bishop’s Estate*, 18 N. E. 2d 218, 219, 370 Ill. 173.”

## POINT 2.

LIMITATION OF AUTHORITY OF AN ATTORNEY  
APPOINTED UNDER SECTION 75-14-25, UTAH CODE  
ANNOTATED 1953.

It is contended by respondents that we do not question the constitutionality of the statute or the appointment of Mr. CotroManes thereunder. It is true that we do not question the constitutionality of the statute nor the authority of the court to appoint Mr. Cotro-Manes under the statute. However, we do question the extent of his authority and power under such an appointment.

Our statute was adopted in 1898 and known as Section 4050 of the Revised Statutes of Utah of 1898. It was taken from the *California Code of Civil Procedure*, Section 1718, which statute is as follows:

“Sec. 1718. At or before the hearing of petitions and contests for the probate of wills, for letters testamentary or of administration; for sales of real estate, and confirmations thereof, settlements, partitions, and distribution of estates setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof — the court may, in its discretion, appoint some competent attorney at law to represent in all such proceedings the devisees, legatees, heirs, or creditors of the decedent who are minors and have no general guardian in the county, or who are non-residents of the state; and those interested who, though they are neither such minors or nonresidents, are unrepresented. The order must specify the names of the parties so far as known for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may

receive a fee, to be fixed by the court, for his services, which must be paid 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. If, for any cause, it becomes necessary, the court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided. The non-appointment of an attorney will not affect the validity of any of the proceedings."

At the time it was adopted from California, there were two California court decisions construing this statute. One was the case of the *Estate of James Devoe, Deceased*, Myrick's Probate Reports, page 6. This case was decided in San Francisco in 1872. The deceased died and left his widow, an adult son and a minor son surviving him. The adult son was named executor under the will. At the time the petition for probate of the will was heard, the court appointed an attorney to represent the minor. A contest of the will was filed by the widow and the minor. Later the contest was withdrawn and the will was admitted to probate upon the stipulation of the widow and the attorney appointed to represent the minor. A year later a general guardian was appointed for the minor and he filed a contest of the will. The executor objected and the court held:

"Held, an attorney appointed by the court cannot waive any right of his ward: the infant was not bound by the acts of the attorney. Objection overruled."



(The above volume is not available at the State Capital but may be found at the University of Utah Law Library.)

The other case, decided in 1892, was the *Estate of William P. Fuller, Deceased*, 2 Coffey's Probate Decisions 521:

"Mr. Lyons was appointed by an order of this court, dated June 13, 1890, to represent certain minor heirs of decedent in proceedings in probate of will and administration of estate in this department. \* \* \*

Mr. Lyons was not, and could not have been, appointed to represent the estate. The attorney for the executrix was employed and is allowed compensation to manage the legal affairs of the estate. He is accountable for the proper performance of his duties as such attorney. He prepares all the papers, appears as the principal representative in the court, is looked to by the court as responsible for the conduct of the legal affairs, while the appointed attorney is an auxiliary of the court, and his service is, in a sense, subordinate. He acts as a scrutineer of the affairs of administration, a challenger and critic of the management of the estate, and is expected to advise the court, from time to time, as to any default or dereliction on the part of the administrator or executor."

Since the adoption of the California statute by Utah, the following interpretations have been placed upon the California statute:

11 Cal. Jur., Section 793, Page 1204 :

"Sec. 793. In General. — A statute, in force for many years, but now repealed, provided that at or before the hearing of petitions and contests for probate of wills, for letters, for sales of real estate and confirmations, settlements, partitions and distributions of estates, setting apart homesteads, and all other proceedings where all parties interested in the estate were required to be notified, the court might in its discretion appoint some competent attorney to represent the devisees, legatees, heirs or creditors of the decedent, who were minors and had no general guardian in the county or who were nonresidents of the state, as well as those who, though neither minors or nonresidents, were unrepresented. It was further provided, however, that the nonappointment of an attorney would not affect the validity of any of the proceedings. It was solely for the probate court to determine whether to appoint such attorney, and the appointment was in its discretion. The rule was, however, that the court would not make an appointment except in cases where manifestly necessary, and in no case upon the suggestion of the executor or administrator or other person in adverse interest. *Such attorney acted only as a scrutineer of the affairs of administration, to advise the court of any default or dereliction on the part of the executor or administrator.* He could not institute proceedings, but could only be appointed after some other person had instituted proceedings of which the court had jurisdiction of the heirs, and he could not invest the court with jurisdiction of the person of the minor heirs which it had not already acquired, *nor waive any right of the heir.* Such an

attorney could not be appointed for an absent heir already represented by an attorney, and as soon as the absent heir was represented by an attorney employed by himself the functions of the appointee ceased. Absent heirs who were *sui juris* were entitled to a substitution of an attorney of their own selection. While the section was in force, there was no need for the appointment of a guardian ad litem for a minor heir. And since the repeal of the statute, the court has no power to appoint an attorney to represent minor heirs as such, and seems to be limited to the general laws of guardianship.

It is still provided as to proceedings to determine heirship that the court may appoint an attorney for any minor mentioned in said proceedings not having a guardian." (*Italics ours*).

*In re Lux's Estate*, (Cal.) 66 Pac. 30. The court, in discussing Section 1718 of the Code of Civil Procedure, states as follows:

"The statute is a very extraordinary one, but some of its provisions have been in force since 1851, without any serious challenge of its validity. *The court can no more appoint an attorney with authority to bind a person who is sui juris, to waive his rights, or concede claims made against him, or to institute proceedings for him, and incur costs chargeable to him, than it can do all these things without an attorney.* And this, I think, indicates the functions of an attorney so appointed. The court can do nothing with the aid of the attorney which it could not have done without him. He receives his authority only from

the court, and not at all from the absent heir. *As friend of the court, his function simply is to aid the court in conserving the rights of unrepresented parties.* In all the proceedings specified there might be a reason for securing such aid. Witnesses might be examined; and although, as a rule, whenever there was reason for a controversy, some heir would be on hand to perform the duty, still, on rare occasions, the contrary might be the case. On any other view as to the nature of the duties of such attorney, the validity of the statute could only be sustained on the theory that succession being a matter of legislative control, the legislature has the power to authorize a probate judge to give some portion of each estate to such attorneys as he should designate. We are not at liberty to attribute such motive to the legislators; nor was it, I am convinced, so in fact. The appointment is authorized only for a devisee, legatee, heir, or creditor. Before the appointment can be made, the court must be satisfied that such persons exist, and the order must designate who they are, or otherwise the fee allowed cannot be charged to the person represented by the attorney. If their names are not known, they must still be identified in some mode in the order. It is evident that an attorney cannot be appointed for an absent heir who is already represented by an attorney. A provision for the appointment of an attorney in such a case would serve no useful purpose, and it would add greatly to the objections to the statute to suppose that it was intended to forbid a party the right to be represented by his own attorney, *and compel him to accept and be bound by the acts of an attorney appointed without his consent.* And it follows that, as soon as the absent heir is represented

by an attorney employed by himself, the functions of the appointee cease. These last consequences would follow though the validity of the statute were conceded to the fullest extent." (Italics ours).

The Supreme Court of South Dakota in the case of *In re Otting's Estate*, (S. D.) 252 N. W. 740, approves the same limitation placed on a similar statute as was construed in the Lux case. The court states:

"The justification for the appointment of an attorney under section 3195 and his function when appointed we believe to be rightly stated in the Lux case when the court said: 'The court can no more appoint an attorney with authority to bind a person who is sui juris, to waive his rights, or concede claims made against him, or to institute proceedings for him, and incur costs chargeable to him, than it can do all these things without an attorney. And this, I think, indicates the functions of an attorney so appointed. The court can do nothing with the aid of the attorney which it could not have done without him. He receives his authority only from the court, and not at all from the absent heir. As friend of the court, his function simply is to aid the court in conserving the rights of unrepresented parties.'

It is clear from the foregoing authorities that an attorney appointed under our statute has merely limited power, and that is to protect the rights of heirs and minors, and does not have the general power to compromise or waive any of their rights or claims.

## POINT 3.

DECREE OF DISTRIBUTION OF OCTOBER 9, 1945, IN ITS PRESENT FORM, IS VOID.

As the above authorities indicate, the court cannot do with an attorney what it could have done without having appointed an attorney, and there can be no question that the court would not have ordered distribution in the manner it has in this estate unless the heirs had consented and acquiesced thereto. The court would have required the estate to be distributed in accordance with our laws of succession. In fact, it would not have had the power to do otherwise. The court was without judicial power to render the particular judgment or decree. The decree of distribution of October 9, 1945, in its present form, is void. *Winona Oil Co. v. Barnes*, (Okla.) 200 Pac. 981:

“In the body of the opinion the court, using part of its own language and quoting from Bailey on Jurisdiction, stated as follows:

‘A court must proceed and determine within the limits of the power conferred. If it renders a judgment in an action or proceeding, where jurisdiction has attached, that it was not authorized or empowered to render at all, such judgment or decree is in excess of its jurisdiction, and for that reason a nullity. So, if it render a judgment or decree which is within its authority as to part only, but includes also that which is not within its power, the excess will be a nullity, and if the valid and invalid parts are independent of each other, the whole will not be void, but only such part as is in excess of the powers of the court.’

Let us apply the same principle to the case at bar. Conceding the petition sufficient, the court had authority to order a sale of the oil and gas lease to the highest and best bidder. The court did not order the sale of an oil and gas lease to the highest and best bidder, but ordered it sold to the Winona Oil Company. This order was void, and the proceedings had in carrying into effect said order was likewise void, for want of authority in the court to make the order.

A judgment is void when it affirmatively appears from an inspection of the judgment roll that any one of three following jurisdictional elements are absent: First, jurisdiction over the person; second, jurisdiction of the subject-matter; and, third, judicial power to render the particular judgment. *Oklahoma City v. Corporation Commission*, 195 Pac. 498; *Roth v. Union National Bank*, *supra*.

In the case of *Pettis v. Johnston*, 190 Pac. 681, this court, in passing upon the effect of a judgment void upon its face, stated as follows:

‘A judgment which is void upon its face, and requires only an inspection of the judgment roll to demonstrate its want of validity, is a ‘dead limb upon the judicial tree, which may be chopped off at any time’; it can bear no fruit to the plaintiff, but is a constant menace to the defendant, and may be vacated by the court rendered it ‘at any time on motion of a party or any person affected thereby,’ either before or after the expiration of three years from the rendition of such void judgment. Such motion is unhampered by a limitation of time.’”

*Freeman on Judgments*, Fifth Edition, Volume 1,  
Section 325, Page 650:

“Broadly speaking, nullity of judgments results from one or more of the following causes:  
1. Want of a legally organized court or tribunal;  
2. Want of requisite jurisdiction over the subject matter or the parties or both; 3. Want of power to grant the relief contained in the judgment.”

*Freeman on Judgments*, Fifth Edition, Volume 1,  
Section 354, Page 733:

“It is very easy to conceive of judgments which, though entered in cases over which the court had undoubted jurisdiction, are void because they decided some questions which it had no power to decide, or granted some relief which it had no power to grant, and yet it will probably not be possible to formulate any test by which to unerringly determine whether the action of the court is in similar cases void, or erroneous only. ‘It is well settled by the authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered though the court may have had jurisdiction over the subject matter and the parties.’ But under such circumstances the court should not be held to have lost jurisdiction unless it clearly appears that it entered a decree not authorized under the facts or not warranted by law. Nevertheless in the actual rendition of the judgment, the court must remain within its jurisdiction and powers. For it is the power or authority behind a judg-



ment, rather than the mere result reached, which determines its validity and immunity from collateral attack. A wrong decision made within the limits of the court's authority is error correctable on appeal or other direct review, but a wrong, or for that matter a correct, decision where the court in rendering it oversteps its jurisdiction and power is void and may be set aside either directly or collaterally. Such excess of authority or power is akin to a want of jurisdiction over the subject matter, the nature and requisites of which are treated in earlier sections of this chapter."

As indicated by the above authorities, the mere appointment of Mr. Cotro-Manes under *Section 75-14-25, Utah Code Annotated 1953*, did not improve the situation or make the manner of distribution legal.

The contention made by respondent Virginia Latsis Zambukos that distribution might have been held up indefinitely is not true. This estate could have been handled in one of two ways. They could have gotten the consent and ratification of the heirs, which was contemplated by the stipulation entered into, or they could have distributed the estate in accordance with the provisions of our laws of succession. As to making actual transfer or delivery of funds or property to the absent heirs, there are ample provisions in our statute for such, but this question is not here involved.

## CONCLUSION

We respectfully submit that the petitions of the heirs should not have been dismissed and that further administration of this estate, including an order for final distribution in accordance with the laws of succession, should be ordered.

Respectfully submitted,

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