

1954

## In the Matter of the Estate of James John Latsis : Petition of Appellants for Rehearing

Utah Supreme Court

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Gustin Richards and Mattson; White, Arnovitz and Smith; Attorneys for Appellants;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

In the Matter of the Estate of  
JAMES JOHN LATSIS (some-  
times known as "Latses")  
*Deceased.*

No. 7954

PETITION OF APPELLANTS  
FOR REHEARING

GUSTIN RICHARDS and MATTSON  
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# IN THE SUPREME COURT

## of the

### STATE OF UTAH

In the Matter of the Estate of  
JAMES JOHN LATSIS (some-  
times known as "Latses")  
*Deceased.*

No. 7954

#### PETITION OF APPELLANTS

#### PETITION FOR REHEARING

1. This Court on rehearing holds that the October decree is unconditional ~~and~~ that it afforded no notice to bonafide purchasers of the conditions contained in the February decree. This court erred in holding that Mrs. Latses, who had complete knowledge of the conditions, was also protected by this decree.
2. On rehearing this Court reversed its first opinion by assigning a different meaning to the word "refer" than to the word "incorporate" when in fact they are synonymous. When an order refers to an earlier conditional order, it is the same as incorporating the earlier conditional order within itself.
3. This Court falls into the error Mr. Justice Wolfe cautioned against in the estate of McLaren. Even though the rights of heirs in their separate capaci-

ties as contracting parties could be put in issue in a probate proceeding, process must be served on the heirs to bring them before the Court. If no process is served upon them, in their separate capacities as contracting parties, they have not had their day in Court and the October order would be a void order.

4. The petition for final distribution did not invoke the jurisdiction of the probate court on a matter of probate, namely - distribution under the laws of succession. Probate includes a determination of the persons who by laws of succession are decreed to be the distributees of the property of the decedent and secondly an adjudication of the proportions or parts which each has received upon the death of the ancestor. A probate proceeding is not completed until these steps are taken.

This Court failed to accord the same dignity to another decree of the probate court, namely - the February decree which is itself a final judgment on the matters there passed on by the Court. The February decree could only be reversed in a direct proceeding for that purpose. To initiate such a direct proceeding, service of citation upon the heirs is required. The statutory notice, held to be sufficient in *Barrette vs. Whitney* is not such a notice as meets this requirement.

5. That the error set forth in the next preceding paragraph, raises a constitutional question under the due process clause of the 14th Amendment to the Constitution of the United States. The property rights vested by a judgment of this Court in the February decree are taken away from the non-resident heirs without due process. The opinion of this Court on rehearing holds that the February Court Order made a binding agreement for the parties. The vested contract right of the non-resident heirs, to receive

their full distributive share of this estate, was taken from them without due process of law by the October decree.

6. Even if the Court adheres to its opinion that the October order is a valid probate decree and conclusive, the non-resident heirs have pleaded a cause of action for negligence against the administrators and of fraud and collusion between the administrators on the one hand and Mrs. Latses as one of the heirs on the other hand.

### PRELIMINARY STATEMENT

This preliminary statement is intended as background to the principles of law set forth in this Brief in support for the petition for rehearing.

A proceeding in probate is a special proceeding and the only types of decrees or judgments that are binding are those which deal with "matters of probate." Originally probate courts would hear only probate matters in a probate proceeding. The Utah Code has relaxed the rule and permits a probate court to pass upon matters of equitable jurisdiction which are not matters in probate. The statutory notice provided for in a probate proceeding can give notice only of the matters in probate. Whenever matters other than matters in probate are brought before the probate court, in order to provide due process of law, it is necessary that process be served upon all parties who are intended to be bound by the judgment in the non-probate proceeding.

As applied to the Latses case, the petition which is relied upon by Mrs. Latses as invoking the jurisdiction of this court to make "distribution" of the assets of this

estate, was in fact a non-probate proceeding. This is made fully apparent by a reading of the petition (R. 107, paragraph~~s~~ 5 and 6). These two paragraphs show the petition invoked the jurisdiction of the court to give affect to a stipulation entered into between all of the heirs, to divide the estate of the decedent, not according to the statutes of ~~the~~ descent, but in accordance with a contract entered into by the heirs. To divide an estate in a manner other than provided by the laws of succession (where the decedent does not leave a Will) constitutes a non-probate matter. The order which that petition gave rise to made no probate determination, it nowhere appearing in the order, the shares or the proportions of the estate which each of the heirs was entitled to receive, according to the laws of succession. The only matter which it purports to adjudicate is the rights of each of the heirs as contracting parties under the stipulation and February order of the court and it is a non-probate order and it is not a decree of "distribution."

#### POINT I.

THIS COURT ON REHEARING HOLDS THAT THE OCTOBER DECREE IS UNCONDITIONAL BECAUSE IT AFFORDED NO NOTICE TO BONAFIDE PURCHASERS OF THE CONDITIONS CONTAINED IN THE FEBRUARY DECREE. THIS COURT ERRED IN HOLDING THAT MRS. LATSES, WHO HAD COMPLETE KNOWLEDGE OF THE CONDITIONS, WAS ALSO PROTECTED BY THIS DECREE.

When the former opinion was entered, Amici Curiae had not submitted a Brief. Some of the attorneys represented Amici Curiae who actually were persons who had purchased real property from Virginia Latstes, dis-

tributee of this estate. These attorneys brought to the attention of the Court the problems of such subsequent purchasers of the real property of this estate and the opinion on rehearing indicates that the Court had in mind the rights of such subsequent purchasers and desired to protect the property rights which had been acquired by these subsequent purchasers. The Court's second opinion concerns itself wholly with the right of such subsequent purchasers and considers not at all the substantive property rights of the immediate parties to the probate proceeding.

Of all of the property affected by these probate proceedings, Blackacre alone was sold. Greenacre, Whiteacre and Redacre still stand in the name of Mrs. Latses. Agreeing fully with the rationale of the courts opinion, we could understand why the October decree would protect the bonafide purchasers of Blackacre, but there are no bonafide purchasers of Greenacre, Whiteacre and Redacre. The rights of the non-resident heirs in Greenacre, Whiteacre and Redacre are not prejudiced by any intervening rights of bonafide purchasers for value. If it be conceded that the non-resident heirs have lost their title insofar as Blackacre is concerned by reason of the intervening rights of purchasers for value, still, they have not lost their vested property rights in Greenacre, Whiteacre and Redacre, which properties are still retained by Mrs. Latses and as to which properties, the rights of bonafide purchasers for value are not involved.

Under the provisions of Section 75—14-16 UCA 53, this Court could very well hold that the rights of subse-



quent purchasers for value are fully protected by the October decree. That Statute reads :

“When a judgment or decree is made determining any matter affecting the title to property a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situated; and from the time of filing the same notice of the contents thereof is imparted to all persons.”

Bonafide purchasers having constructive notice of the October decree from the date of recording could rely upon it and be protected by it. Thus, the purchaser of Blackacre would be protected, but that statute would not protect Mrs. Latses who had actual notice rather than constructive notice of the fact that the distribution to her was conditional upon the execution and delivery to her of assignments of the interest of the non-resident heirs and of the execution and delivery to her of releases of their interests in the estate.

W respectfully submit to this Court that it should be zealous to protect the interests of bonafide purchasers who had no notice of the conditions, but that it should not permit Mrs. Latses, who had full and complete notice of the conditions to be complied with before she could acquire title, to profit from her own wrong. With full knowledge of the fact that she was not entitled to have all of the property of the estate, save \$10,000.00 distributed to her, she nevertheless committed the wrong of deeding the property over to herself. Mrs. Latses,, as

co-administrator of the estate is in a position of trust and confidence to the heirs. As this Court has aptly stated in *Graham vs. Street*, 166 Pac. 2d, 524 at 536 "Equity will not allow a party in a relationship of trust and confidence, to profit from his own wrong." She must not be permitted to keep Greenacre, Whiteacre and Red-acre in ~~the~~<sup>her</sup>. She should be required to transfer to the non-resident heirs, their respective undivided interests.

This Court should again examine the petition filed to initiate the proceeding now before this Court. The facts there set forth are the reasons why this court should not attempt to decide the rights as between Mrs. Latses and the heirs, without having before it all of the evidence that will be adduced. This Court should have before it full and complete evidence as to the value of the property left by the decedent. This Court should take judicial knowledge of the fact that the appraisal made, both for the County inventory and for the State Inheritance Tax inventory, are not the same values that would be established in an adversary proceeding. The last item in the estate tax inventory (R 81) is a mortgage executed by Peter Latses and Hattie Latses, to secure a note in the amount of \$6,000.00 together with interest. This note is valued in the inventory at \$9,670.00. Six days after the October decree was entered, a release of a mortgage was executed by Virginia Latses. This release was given to Peter Latses one of the heirs who accepted \$2500.00 in payment of his interest in the estate. Evidence will be adduced to show that this re-

lease of mortgage was given without any monetary consideration. A certified copy of this release of mortgage, Instrument 1063725 in the Office of the County Recorder of Salt Lake County, is being filed with the record before this Court.

It is respectfully submitted that with the full facts before this Court, a complete and equitable disposition could be made of this case.

## POINT II.

ON REHEARING THIS COURT REVERSED ITS FIRST OPINION BY ASSIGNING A DIFFERENT MEANING TO THE WORD "REFER" THAN TO THE WORD "INCORPORATE" WHEN IN FACT THEY ARE SYNONYMOUS. WHEN AN ORDER REFERS TO AN EARLIER CONDITIONAL ORDER, IT IS THE SAME AS INCORPORATING THE EARLIER CONDITIONAL ORDER WITHIN ITSELF.

The rationale of the Court's reversal of its original opinion is expressed in the single sentence: "Since the order here in question fails to put the inquirer upon notice that there are conditions precedent to its becoming final, it demands the respect to which a final decree is entitled under the statute."

The Court finds the fact which is acknowledged by all the parties, that the earlier order of February 27, 1945 does contain conditions. In the second paragraph of the opinion the Court states, "Upon rehearing our attention is called to the fact that the 'Order Approving Final Accounting and Distribution' does refer to the earlier order containing conditions . . . ."

This Court states that it "reaffirms the principles

of law stated in its first opinion” and continues “Though we need make no modification in the legal principles enunciated, we find it necessary to reconsider our construction of the facts.” The Court proceeds with this process which it denominates “a construction of the facts” and concludes that the Order Approving Final Accounting “does refer to the earlier order containing conditions.” In its original opinion the Court concluded that the Order Approving Final Accounting “*incorporates* a prior conditional order”. Upon this untenable peg hands a diametrically opposite decision. This Court is holding that whereas notice is given when an order “incorporates by reference” a previous order that notice is lacking when the subsequent order only “refers” to a previous order. This Court has taken a single well recognized legal phrase, divided it into two parts and assigned wholly different meaning and results to the constituent words of the phrase. It seems to us that notice is given regardless of whether the previous order is incorporated into a subsequent order by setting it out in haec verba or simply by referring to it. Each method gives the same notice. To incorporate means to cause to be “united in one body—to bodily insert”. (Toledo Railroad Company vs. Cupp, 8 Indiana Appeals 388, 35 Northeastern 703.) To refer is “to bring, carry, or send back, as to refer a student to a book” (*State vs. Innes*, 89 Kansas 168, 130 Pacific 677 at 680.) Thus to refer a person to a particular order is to carry back the person or his attention to that order. When one’s attention

is referred to an order, he is being given notice of the contents of that order. The October Order refers to the order containing conditions, and those conditions are thus carried into the October 9, 1945 order.

We respectfully submit that the reasons assigned by the Court to demonstrate that the October order is unconditional do not support its conclusion. In fact the Court's recognition of the fact that the "Order Approving Final Accounting. . . . does refer to the earlier order containing conditions" lends weight to the propriety of its original opinion and militates against the conclusion reached by the Court in its second opinion.

### POINT III.

THIS COURT FALLS INTO THE ERROR MR. JUSTICE WOLFE CAUTIONED AGAINST IN THE ESTATE OF McLAREN. EVEN THOUGH THE RIGHTS OF HEIRS IN THEIR SEPARATE CAPACITIES AS CONTRACTING PARTIES COULD BE PUT IN ISSUE IN A PROBATE PROCEEDING, PROCESS MUST BE SERVED ON THE HEIRS TO BRING THEM BEFORE THE COURT. IF NO PROCESS IS SERVED UPON THEM, IN THEIR SEPARATE CAPACITIES AS CONTRACTING PARTIES, THEY HAVE NOT HAD THEIR DAY IN COURT AND THE OCTOBER ORDER WOULD BE A VOID ORDER.

There is a great reluctance to file a petition for rehearing after the court has granted one rehearing, but our full duty to our client and to the court demands our best efforts to demonstrate to this court that its second opinion has fallen into the error which Mr. Justice Wolfe cautioned against in the case of, *In re McLaren's Estate*, 90 Utah 340, 106 Pac 2d 766. Justice

Wolfe's opinion was referred to with approval by the entire court in the case, *In re Rice's Estate*, 111 Utah, 182 Pac 2d 111.

A probate decree is conclusive only in so far as the decree decides a step in a probate proceeding. The Utah probate court states the several steps in a probate proceeding. Utah decisions permit non-probate matters to be considered in a probate proceeding, but require that process be served upon an heir, who is also a party to the non-probate proceeding. The rule in *Barrette vs. Whitney*, 36 Utah 574, 106 Pac. 532, concerning notice, is not applicable when non-probate matters are before the court in a probate proceeding.

In this case the petition (R 107) labeled as a petition for "distribution" is not a step in a probate proceeding. This may sound as a shocking and unrealistic statement to the court at first blush.

In the course of this presentation, we expect to show:

1. That the petition for final distribution does not plead the facts, looking to a "distribution" by virtue of the laws of succession requiring a determination of heirship and the proportions or parts which each of the heirs is entitled to receive under the laws of succession.

2. That on the contrary, it pleads a court approved agreement and asks distribution according to the court approved agreement in a manner other than required by the law of succession.

3. That a proceeding for the approval of an agree-

ment to provide for distribution in a manner other than required by the laws of succession "is not a matter of probate".

4. That since it is not a matter of probate, a citation must be served upon the persons to be affected by that determination, in order to bring that person before the court.

5. That the probate notice is not sufficient for this purpose.

6. That an adjudication of the rights and obligations of one of the parties to the court approved agreement, even if he be an heir, without having a process served upon him, is a void adjudication and judgment.

We shall undertake to demonstrate that the October order is void because it violated the fundamental principle referred to by Mr. Justice Wolfe in the McLaren case, namely - that there has been an adjudication of title to property, in essence an equitable proceeding, by an adjudication in a probate proceeding, without the requisite personal service of a citation to secure the appearance before the court, of the other heirs.

This court has held - (In re McLaren - ), *supra*

"There seems to be no reason, under our Constitution and laws, why a district court in a probate proceeding may not when necessary to a due administration of an estate exercise powers which ordinarily pertain to equity jurisdiction so that the business may proceed without interruption or unnecessary delay"

but Justice Wolfe continues - (page 773 of 106 P (2))

“But again, warning should be sounded regarding the situation where a civil case is tried as a probate matter and probate matter tried as a civil case when they are respectively purely matters cognizable only as civil and as probate. It is one thing to determine a civil matter as a probate matter or a probate matter as a civil case and quite another thing to try a probate matter as a probate matter and a civil case as a civil case, although they may be addressed to the wrong divisions of the court. The first is a matter of substance; the second a matter of labels and ministerial adjustment. An example of the first class of cases would have been furnished if judgment had gone against Aurelius McLaren in the lower court when he was in a proceeding in which he was in a probate by reason of the fact that he was an heir. The probate division by virtue of its jurisdiction of the estate and the heirs for general purposes of administration could not in probate proceedings wherein the party was served by the mailing to him of a probate notice of the contest, have given judgment against him in a matter essentially civil in its nature.”

Likewise, Mr. Justice Wolfe notes the difference between a person being before the court as a heir and as a party to an equitable proceeding - (pg 770)

“If the matter had gone against the assignee it may be that he might have shown that he was not personally served as required in a civil suit and therefore had not his day in court. He was served as an heir by a mailed probate notice, but he was not served as a party. He, however, pre-



vails and does not object that he was not properly in court as assignee. The appellant appeared personally, therefore he cannot object that he did not have his day in court nor can he claim a new trial because his successful adversary was not properly served. The adversary adopts the judgment in his favor as assignee by making no objection and joining issue on appeal."

The probate court cannot, in the course of a probate proceeding adjudicate a non-probate matter, depending for its jurisdiction over the heirs, upon the probate forms of notice, and without citing the heirs into court as parties, by serving a proper citation upon them.

"If in the course of probate and as a part of the probate procedure the court should adjudicate controverted matters involving title the result might not stand because probate is essentially in rem. But if the parties were all before the court and the pleadings contained all the allegations necessary to invoke the jurisdiction to try title and the court tried it as an action to quiet title, the mere fact that it was captioned in probate would not make the judgment invalid." (R 9771.)

We apply this legal principle to this proceeding in probate consisting of the PETITION FOR APPROVAL OF FINAL ACCOUNT AND FOR DISTRIBUTION AND THE ORDER APPROVING FINAL ACCOUNT AND MAKING DISTRIBUTION AND DISCHARGING ADMINISTRATOR ( R 125)

The petition for distribution did not present to the court a matter of probate. That petition invoked the jurisdiction of the court "to adjudicate controverted

matters involving title," as Mr. Justice Wolfe states in the McLaren case. We shall hereafter discuss the allegations contained in the petition for distribution which shows that the courts jurisdiction was not invoked upon a matter of probate, but rather for a determination of the title to property and the rights and obligations under a contract between Mrs. Latses and the other heirs. Assuming, for the moment, that the matter passed upon was not a matter of probate and the record failed to disclose that process was served upon the heirs citing them to appear before the court to have the matter of title adjudicated, the October order~~ed~~ entered would be a void order for the reason<sup>that</sup> the three heirs did not have their day in court.

"Upon death title to property of which the decedent died possessed, immediately passes to and vested <sup>in</sup> ~~to~~ the heirs subject to the administration and payment of debts," *Chamberlain v. Larsen*, 83 Utah 420, 29 Pac. 2d 355. Section 74-4-2 UCA 53, is the statutory recognition of this principle. Our court has further held that title vests in the heirs "subject to divestment for debts and expenses," *Jones v. State Tax Commission*, 99 Utah 373, 104 Pac. 2d 210.

"The purpose of an adjudication of heirship is not to vest title, but to adjudicate where the title of the decedent has already vested." *Chamberlain v. Larson* at page 351, 29 Pac. 2d. One of the two steps of "distribution" is to determine heirship. In the Latses case, no proceeding was taken to adjudicate where the title of the decedent had already vested. This involves more

than merely naming the persons who are heirs, because that alone determines nothing as to where the title has vested. To properly determine heirship, the proportions or parts which each heir as an heir has received, must be adjudicated.

A decree of distribution is supposed to only declare a title and not create a title. However, the decree of distribution in this case created a title different from the title to the property established by the laws of succession. This attempted adjudication of title cannot stand and is a void judgment because the persons being divested of the title were never personally served. In the case *In re Rice's Estate*, supra, the court recognized that its jurisdiction over the persons was acquired because the persons voluntarily submitted to the jurisdiction of the court. In the Latses case, the only notice given of the petition for the approval of the final account, as set forth in the record at page 105, is the ordinary ten day notice given in probate proceedings. No notice of this hearing was served upon the Attorney for the non-resident heirs. Accordingly, if, as we trust we can demonstrate in the next sub-heading, that this petition invoked the jurisdiction of the court on a matter involving the contract rights of the heirs, then the order is void.

The order of distribution must be an order determining what property the law has cast upon each heir. The situation is analogous to the principle as to the relief which may be granted when a complaint is filed. When a complaint is filed and a summons served on a defendant,

the judgment entered cannot go beyond the allegations of the complaint which has been served on the defendant. If the defendant fails to appear when the summons is served upon him, the judgment taken against him is limited to the matters set forth in the complaint. Similarly, in a probate, the original notice (which according to *Barrette v. Whitney* is sufficient to give the probate court jurisdiction) only involves the heirs that were being summoned before the court for all matters in probate. The heirs are justified in assuming that only matters of probate will be passed upon in that proceeding. The ultimate end of a probate proceeding in a case of intestate succession is to adjudicate the two facts as to — No. 1. What persons have succeeded to the property of the decedent, No. 2. What property the law of succession has cast upon each heir. If the heirs wish to enter into agreements to divide the property in a manner different than provided by the laws of succession, they have the right to enter into such a contract. Before courts permitted non-probate matters to be tried in a probate proceeding, this agreement if controverted would have been the subject of an independent action. With the break down of the rule limiting probate proceedings to strictly probate matters and permitting adjudication of non-probate matters in a probate proceeding, such agreement of the heirs could be considered in a probate proceeding. However, when so considered, as stated in the case *In re McLaren*, it is necessary that process be served on the heirs in their new capacity as contracting parties.

In order to make clear the application of this principle to the Latses estate, it is necessary to set forth the provisions of the Utah Probate Code, setting forth the steps in probate and secondly, to review the proceedings in the Latses case to establish the fact that the proceedings taken were non-probate in character and therefore not binding in a case where process was not served upon the heirs who were necessary parties to the non-probate proceeding.

#### POINT IV.

THE PETITION FOR FINAL DISTRIBUTION DID NOT INVOKE THE JURISDICTION OF THE PROBATE COURT ON A MATTER OF PROBATE, NAMELY—DISTRIBUTION UNDER THE LAWS OF SUCCESSION. PROBATE INCLUDES A DETERMINATION OF THE PERSONS WHO BY LAW OF SUCCESSION ARE DECREED TO BE THE DISTRIBUTEES OF THE PROPERTY OF THE DECEDENT AND SECONDLY AN ADJUDICATION OF THE PROPORTIONS OR PARTS WHICH EACH HAS RECEIVED UPON THE DEATH OF THE ANCESTOR. A PROBATE PROCEEDING IS NOT COMPLETED UNTIL THESE STEPS ARE TAKEN.

The last order in this case dated October 9, 1945 did not complete these probate proceedings. The petition upon which this order is based did not invoke the jurisdiction of the Court to make distribution in accordance with Section 75-12-7 and the decree does not fulfill the requirements of Section 75-12-8 in order to make it binding on all parties as directed by Section 75-12-9.

The case *In re Evans* 42 Utah 282 130 Pacific 217:

“A decree of distribution in probate proceedings, after due and legal notice by a Court having jurisdiction of the subject matter is con-

clusive as to the fund, items, and matters covered by and *properly* included within the decree until set aside or modified by the Court entering the decree in the manner prescribed by law or until reversed on appeal.”

See also *In re Rice's Estate*, 111 Utah 428, 182 P. (2) 111.

It is our contention that the alleged decree of distribution is in fact not a decree of distribution but a transfer of property by way of partition or a transfer of property as the result of an alleged contract between the heirs. The alleged distribution is not in conformity with the fundamental law set forth in the Probate Code and, therefore, it is a nullity. *In re Evans* supra at page 266 of 130 Pacific:

“A fact apparent from the mandatory record showing that fundamental law was disregarded in the establishment of the judgment will render it null and void for all purposes. And a judgment founded upon such a record is subject both to direct and collateral attack, and will, sua sponte, be noticed by Courts and acted upon by them without regard to the wishes or the relation of the parties named upon the record.”

By setting out the applicable statutes which a probate proceeding must follow, we hope to demonstrate to this Court that the alleged decree of distribution is void.

Section 74-4-1. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

It should be particularly noted here that succession does not include the vesting of property as a result of

contract. *Quarles v. Clayton*, 87 Tenn. 308, Tenn. S.W. 505, 3 LRA 170:

“The word ‘succession’ is a word of technical meaning, and refers to those who by descent or will take the property of a decedent. It is a word which clearly excludes those who take by deed, grant, gift, or any form of purchase or contract.”

The rules of succession in this State are set forth in Section 74-4-5 which reads:

“When any person having a title to an estate . . . dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this title or in the Probate Code . . . in the following manner: (3) If the decedent leaves no issue, all of the estate, real or personal, of which the decedent died seized or possessed, of not over \$25,000 in value exclusive of debts and expenses, goes to the surviving husband or wife; and if over that value, \$25,000 in value thereof goes to the surviving husband or wife and the other half to the decedent’s father and mother, in equal shares, and if either is dead, the whole of said half goes to the other; if there is no father or mother, then one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children or grandchildren of any deceased brother or sister by right of representation:”

The only exception where distribution may be made in a manner other than as set forth in Section 74-4-5 appears in Section 74-12-15 which allows real estate to be distributed to the grantees of heirs. That Section reads:

“Partition or distribution of the *real estate* may be made as provided in this chapter, although

some of the original heirs, legatees or devisees may have conveyed their shares to other persons, and such shares must be assigned to the persons holding the same in the same manner as they otherwise would have been to such heirs, legatees or devisees."

(There may be a second exception set forth in Section 7-12-9 on the subject matter of advancements made, which we should refer to later in connection with our discussion of the case of *In re Howard's Estate*, 159 Pacific 2d 586 (Utah).)

The foregoing statutes outline the only means by which property of an intestate is succeeded to. Section 75-1-6 states "that the Judges of District and Supreme Court setting in probate matters shall exercise all such powers *consistent with the provisions of this title*, as are or may be conferred upon those Courts or Judges respectively in other proceedings."

This is the only source of the power <sup>or</sup> ~~of~~ jurisdiction of the Judge of the Probate Court: "The source of the administrator's power and that of the Probate Court must be found in the Probate Code. *In re Harris Estate*, 99 Utah 464, 105 Pacific 2d 461. The Sections of the Probate Code outlining the procedure by which these powers of the Probate Court are exercised and which are material ~~have~~ are here set out. Section 75-12-7:

"Section 75-12-7: Upon the final settlement of the accounts of the executor . . . upon the petition of the administrator or of any heir, legatee, or devisee, and upon notice the Court must proceed to distribute the residue of the estate in the



hands of the executor or administrator among the persons *who, by law*, are entitled thereto;

“Section 75-12-8: In the order or decree the Court *must* name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for and recover their respective shares from the executor or administrator or any person having the same in possession.”

As an addendum to Section 75-12-9 our statutes state the result of the entry of a decree, if the statutes are complied with, and that result is set forth in these words:

“and the final judgment or decree of the Court is binding on all parties interested in the estate, subject only to be reversed, modified, or set aside on appeal.”

In a probate proceeding only matters of probate may be determined and it shall be our function to show that in this case the necessary matters of probate have not yet been determined but that what is purported to be determined is something which is beyond the jurisdiction of the Probate Court, namely, to decide the relative rights of persons who happen to be heirs of an estate based upon a contract entered into by those heirs.

As to the matters which may be heard on a petition for distribution we quote from the Utah case *In re Howard's Estate*, 159 Pacific 2d 586 at 590:

“This matter came before the Court on the Executor's final account and for *petition for distribution of the estate to the persons entitled to receive the same*, and for release and discharge of the executors. Proper notice was given on the

filing and time for hearing of both the account and the petition. This constituted notice not only of the hearing of the account and the petition, but of all issues and questions that might arise from objections thereto. All matters involved therein were before the Court for hearing and determination. Cases cited. Whether additional notice should be given is a matter of discretion of the Court below and in the absence of anything to show abuse of such discretion Appellate Court will not interfere. Cases cited. What matters may be adjusted on such hearing? In general, the only items which can be properly settled in executor's account ~~and~~<sup>are</sup> matters relating purely to his administration of the estate; payment of debts and charges of administration; but upon the *petition for distribution*, the Court, in harmony with its general equitable power, can *hear* and 'adjust all matters between the executors and the legatees and distributees, and give the former credit against the latter for all advances made to either under the terms of the will.' UCA 1943, Section 102-12-9." (Note by appellant: This is the section referred to in our brief above which we mentioned might also be an exception to the distribution statutes permitting distribution to someone other than the heirs.)

"Jurisdiction of 'matters of probate' includes determinations of what persons succeeded to the estate whether as devisees, legatees, and heirs and the part of amount of the estate to which each is entitled; Section 102-12-8 UCA 43 *Martinvich v. Marsicano*, 137 Cal. 354 70 Pacific 459."

Several matters in this quote should be noticed. The first is—that the petition which invokes the jurisdiction of the Court is "A Petition for Distribution of the Estate

to the persons entitled to receive the same." The petition filed in this case was a petition for transfer of the assets to persons who claimed them under an antecedent contract. The Probate Court has no jurisdiction to hear a petition for the transfer of property to persons who claim the property in any capacity other than as heir, legatee, or devisee. It must not be thought that the rule is any different because of the fact that the same persons occupied the two separate relationships, namely, of heirs on the one hand and contracting parties on the other hand. See *Parr v. Reyman*, California, 12 Pacific 2d 440 at 442:

"In the other authority cited above it is pointed out that the claimant was not an heir, legatee, or devisee of the deceased and had obtained his title during the pendency of the probate proceeding through a deed or other legal conveyance from an heir, devisee, or legatee while in the present action each of the parties to the deed from Virgil to Willard was an heir of his deceased mother and was properly before the Probate Court at the time of the distribution of her estate. . . ."

In answering the contention that the rule was different when all of the parties were heirs of the estate and before the Court, the California Supreme Court said:

"The second of the attempted differentiations between the cited cases and the present case is equally unavailing. The quotes from the authorities cited above and the cases themselves plainly show that the Probate Court has no jurisdiction over contracts or conveyances made by heirs, devisees, or legatees, either among *themselves* or with others' " (the underlining is by the Supreme Court of California in its decision).

This case of *Parr v. Reyman* will be discussed in this memorandum more fully in its course both through the District Court of Appeal and the Supreme Court of California.

In the case of *In re Howard*, supra the Court is outlining what may be heard on a petition for distribution of the estate to the persons entitled to receive the same. The petition referred to is strictly a probate petition and not as in the instant case a petition for transfer of all but \$10,000.00 of the estate to one heir of the estate who claimed it by virtue of an alleged agreement and as a contracting party and not as an heir. It is evident that it is not a petition for distribution because it does not meet the definition of a petition for distribution. See *Robinson v. Fair*, 128 U.S. 53, 9 Supreme Court 30, 32 L. Edition 415:

“Distribution neither gives a new title to property nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests, while partition in most, if not all of its aspects, is a adversary proceeding in which the remedial right to the transfer of the property is asserted, and resulting in a decree which either ex proprio vigore or as executory accomplished such transfer.”

It is to be particularly noted that a petition such as was filed in the instant case gives rise to an adversary proceeding, separate and distinct from a matter in probate and, of course, a Probate Court does not have jurisdiction over these adversary proceedings excepting as

granted by Statute. This Court has already held that the proceeding did not attempt to comply with our statutory requirements for partition. Accordingly, the petition presented to the Court allegedly as a petition for distribution in fact was not a petition for distribution but instead asserted the rights of Mrs. Latses as a contracting party to receive all of the assets of the estate save \$10,000.00. In the alleged petition for distribution Mrs. Latsis states that she contracted to receive all of the estate save \$10,000.

The petition and the order following it did not name the persons and the proportions or parts which each party was entitled to receive by law. The order named only the amount which each person was entitled to receive under and by virtue of an alleged contract.

The matters herein argued are fully presented in a decision of the Courts of California in the course of the progress of the case of *Parr v. Reyman*, supra, both before the District Court of Appeals of California and the Supreme Court of California. The first opinion is in 6 Pacific 2d 107. An opinion superseding the opinion by the District Court of Appeals, was written by the Supreme Court of California and it appears at 12 Pacific 2d 440. In that case the question of the extent to which a probate decree was conclusive was raised. California has the same statute as our Section 75-12-8 and with an addition similar to the portion which we quoted above from Section 75-12-9 the California Statute in full reads as follows:

“Section 1666 Code of Civil Procedure: In

the order or decree the Court must name the persons and proportions or parts to which each shall be entitled and such person may demand, sue for and recover their respective shares from the executor or administrator or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

When the case was before the District Court of Appeal the Court in its decision made certain assumptions as to what the record would show as to the decree of distribution. The District Court of Appeal held that the decree was conclusive because the only record that was before the Court indicated that the party to whom the property was distributed received the property in his capacity as heir of the estate rather than in his capacity as a contracting party. The Court made this assumption as shown by the following statements of the Court taken from 6 Pacific 2d 109:

"This case is before us on the judgment rule alone. It is, therefore, our duty to assume that any and all evidence necessary to support the judgment was introduced in the Court below. There is nothing in the record that would tend to indicate that the distribution to Willard A. Parr in the decree in the estate of Elizabeth Parr, deceased, was made to him as a purchaser of the interest of his brother, Virgil, the appellant here."

When the matter came before the Supreme Court of California it appeared that distribution was made to one who was an heir of the decedent but who received his interest in the estate by contract. The Supreme Court

of California interpreted its Code provision on distribution which is the same as that of Utah and quoted from an earlier case in California as follows:

12 Pacific 2d 441: "Section 1666, Code Civil Proc., provides that a decree of distribution 'is conclusive as to the rights of heirs, legatees, or devisees;' but it is conclusive against them only as heirs, legatees, or devisees, — only so far as they claim in such capacities. The probate court has jurisdiction to determine who are the legal heirs of a deceased person who died intestate, and who are the devisees or legatees of one who died testate; but its determination of such matters does not *create* any new title. It merely declares the title which accrued under the law of descent, or under the provisions of the will. *The decree of distribution has nothing to do with contracts or conveyances which may have been made by heirs, devisees, or legatees of or about their shares of the estate, either among themselves or with others.* Such matters are not before the probate court, and over them it has no jurisdiction. An heir may contract about or convey the title which the law had cast upon him on the death of his ancestor; and the validity of force of such contract is not affected by the fact that a probate court afterwards, by its decree of distribution, declares his asserted heirship and title to be valid." Our courts have in innumerable cases affirmed this doctrine. Estate of Burton, 93 Cal. 459, 461, 29 P. 36; Estate of Brudick, 112 Cal. 387, 391, 44 P. 734; Estate of Crooks, 125 Cal. 459, 58 P. 89; Martinovich v. Marsicano, 137 Cal. 354, 356, 70 P. 459; Estate of Ryder, 141 Cal. 366, 74 P. 993; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; Estate of Howe, 161 Cal. 152, 118 P. 551; Estate of Lyon 163 Cal. 803, 127 P. 75; Archer v. Harvey,

164 Cal. 274, 128 P. 410; Shaw v. Palmer, 65 Cal. App. 441, 224 P. 106.

In the case of *Martinovich v. Marsicano*, *supra*, this court stated the law applicable to the question now under discussion as follows: " 'Matters of probate' include the ascertainment and determination of the persons who succeed to the estate of a decedent, either as heir, devisee, or legatee, as well as the amount of proportion of the estate to which each is entitled, and also the construction or effect to be given to the language of a will; but do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contact or in invitum; nor is the determination of conflicting claims to the estate of an heir or devisee, or whether he has conveyed or assigned his share of the estate a 'matter of probate.' "

(2, 3) An attempt is made to distinguish the line of authorities just cited from the present case. In the first place, it is contended that the appellant in this action is not claiming under the decree of distribution but adversely to it, while in certain of the authorities relied upon above the claimant is a grantor claiming under a decree of distribution adversely to the terms of his prior grant. In the other authorities cited above it is pointed out that the claimant was not an heir, legatee, or devisee of the deceased, and had obtained his title during the pendency of the probate proceeding through a deed or other legal conveyance from an heir, devisee, or legatee, while in the present action each of the parties to the deed from Virgil to Willard was an heir of his deceased mother, and was properly before the probate court at the time of the distribution



of her estate. As to the first of these attempted differentiations between this case and the authorities cited, we are unable to see any difference in principle, in so far as the question of the conclusive effect of a decree of distribution is concerned between parties where the grantor is claiming under a decree of distribution notwithstanding his grant deed divesting himself of all interest in the estate, and a grantor claiming adversely to the decree of distribution, which distributes the property conveyed by him in accordance with the terms of his grant. It is claimed that in cases where a grantor is claiming under a decree of distribution adversely to his deed, they might have rested upon the broad principle of law that a grant deed passes subsequently acquired title. Admitting for the present purpose that those cases might have been so decided, the decisions therein show that they were not. The decisions rested upon another equally well-recognized principle of law that the probate court has no jurisdiction over "contracts or conveyances which may have been made by heirs, devisees, or legatees, of or about their shares of the estate, either among themselves or with others. Such matters are not before the probate court, and over them it has no jurisdiction." *Chever v. Ching Hong Poy*, supra. Or, as was said in *Martinovich v. Marsciano*, supra, "'Matters of probate' \* \* \* do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contract or in invitum. \* \* \*"

The second of the attempted differentiations between the cited cases and the present case is equally unavailing. The quotations from the au-

thorities cited above and the cases themselves plainly show that the probate court has no jurisdiction over contracts or conveyances made by heirs devisees, or legatees, "either among themselves or with others."

Thus, in the decision of this case before the District Court of Appeal of California and the Supreme Court of the State of California we find a history which is the reverse of the history of the instant case before this Court. The second opinion of this court in effect follows the District Court of Appeal of California and the original opinion in its result, if not in its reasoning, follows the Supreme Court of California. It should be noted here that Section 75-12-15 UCA 53 does give jurisdiction to the Probate Court to distribute property to persons other than the heirs only when there is a valid conveyance made in conformity with the requirements of the statutes transferring the interest of an heir to a third person. It must be noted, however, that in the petition upon which the alleged decree of distribution is based that there is no allegation of a conveyance by one of the heirs to the other heirs so as to give the Court jurisdiction to make distribution to a person other than the one upon whom the law cast the title. In the instant case it is clear that the petition directed to the Court set forth the alleged rights of the one heir, Virginia Latses, to secure a transfer of all of the assets of the estate save \$10,000.00 to her by reason of the fact that she had entered into a contract with the other heirs to accomplish that. The petition does not set forth that she is requesting distribution to herself of all the property

save \$10,000.00 in accordance with the requirements of Section 74-4-5. Her petition does not set forth that she is asking for the property as the sole successor to it but on the contrary, that she is asking for the property by virtue of the fact that she entered into a contract subsequent to the death of the decedent to receive that property. There is no allegation in the petition that the three non-resident heirs assigned or conveyed their interests in the estate to her so that she could be entitled to claim distribution of that part of the property normally distributable to the three non-resident heirs to herself by virtue of the assignment and conveyance by the three non-resident heirs of their interests in the estate to her.

We conclude, therefore, that because there was no petition for distribution as required by the Probate Code but rather a petition to obtain contractual rights which, not being a matter of probate, passed upon without process, was void, that there has not yet been entered a decree of distribution in this estate. Until a decree of distribution is entered, the cause of action given the the heirs to claim their share of the estate has not arisen. Section 75-12-8 gives the rights to the heirs to demand and sue for and recover their respective shares from the administrator when the decree names the persons who are the heirs of the estate and the proportions or parts of the estate to which each heir, as an heir, is entitled. Until such an order is entered, the heirs do not have their cause of action to demand and sue for and recover their respective shares.

The petition filed and the order based upon the peti-

tion were not carrying out matters of probate but were asking the Court to adjudicate the rights of one of the heirs as a contracting party. Such a matter is beyond the jurisdiction of the Probate Court and such is a void order, without the requisite service of process; that attempted proceeding was an adversary proceeding which could have been brought as a partition proceeding if the single heir who took the estate, ~~stating~~ <sup>SAVE</sup> \$10,000.00 would have been willing to abide the judgment of the referees appointed by the Court as to how the estate should be partitioned. Evidently they were not willing to bring this matter before the Court in the manner authorized by the Statute. They had the alternative right of proceeding in an independent action to enforce their alleged rights under the contract if they considered they had any, or under our relaxed rule of presenting the matter to the probate side of the court, but only after the service of process to bring the parties before the court. Instead, the heir persuaded and induced the Court to enter a judgment based upon a contract right which judgment was directly opposite and contrary to the judgment which the Court, should have entered. It is clear that if the rules of law had been followed and this alleged contract submitted to a Court for its consideration in an adversary proceeding, as it should have been, that a Court reading the stipulation and agreement would have entered a judgment directly opposite to the judgment entered. No opportunity was given for an adversary proceeding. Process should have been served on the three non-resident heirs or at least on their attorney to be present at the hearing.

Even though the October decree passed upon a matter of probate, the order is void inasmuch as no process was served upon the other heirs, in a proceeding brought to modify an order of court which was final and conclusive.

This court's second opinion states as a principle of law, "that counsel appointed to represent absent heirs has not the power of an Attorney in Fact to bind the heirs by his own action, though ratification of such action by the probate court can make it binding." Accordingly, this court of last resort in this State, establishes that the "order approving petition and stipulation for settlement with certain heirs" is binding upon the parties, namely—Mrs. Latses on the one hand and the other four heirs on the other hand. In this order it is recited "the court finds the facts as set forth in the petition to be correct" and then orders "that the stipulation and petition entered into and presented by and between the parties herein be, and the same is hereby, approved and confirmed," and "it is further ordered that the said agreement and distribution shall become binding and conclusive as to each of the four said heirs upon the acceptance by him, or by his heirs-at-law of said payments.

It is further ordered that the said heirs shall furnish or that their Attorney shall procure from the said recipients of said payments, a proper receipt therefor and an assignment and relinquishment of all interest in this said estate and a release of the administrator herein, which receipts and relinquishments shall be delivered to the administrator." (R. 97).

One of the terms of the stipulation which was approved by the court reads, (R. 87) "That the said payment and settlement shall become binding and conclusive as to each of the four said heirs, Peter J. Latses, William J. Latses, Nick G. Latses and John G. Latses, upon the acceptance of his portion of the said estate and the execution of the necessary instruments to ~~receive~~<sup>receive</sup> therefore, and to assign his said interest and release ~~the~~<sup>the</sup> said estate. That the said settlement shall become binding as to each of the said heirs accepting the same and executing such instruments." Thus the agreement was, that unless each of the four heirs executed releases and assignments of their interests in the estate, they were each to receive their full distributive share allowed them by the laws of descent. This is the converse of saying, that if they do execute the releases and assignments, they are each to receive only \$2500.00 or that they are not to take according to the laws of descent. Thus, in addition to the statutory right to the share allotted to them by the statute of descent, they had a contract right to their full share. Mrs. Latses petitioned the court to give the other four contracting parties, the amount they had conditionally contracted to accept, freed from the condition of executing the releases and assignments of their interests.

That decree of February 27, 1947 is conclusive upon the matters adjudicated. Generally speaking, an adjudication as to any step in the administration is not subject to review in a subsequent stage of the administration,<sup>1</sup> 1 Bancroft Probate Practice, 2d Ed, Page 175, Note 15. "Intermediate decrees are often final as to mat-

ters which <sup>Per part</sup>~~proper~~ to be concluded thereby," 1 Bancroft Probate Practice, 2d Ed, Page 167, Note 1.

It is implicit that even though a decree or judgment which adjudicates the rights of parties is called into question or is sought to be reviewed or modified at a later date, that process must be served upon all the parties sought to be effected by the modification. Unless process is served, the parties to the original order have not had their day in court on the question of whether the original order should be modified or changed. See *Adams v. Lewis*, 111 Utah 387, 180 Pac. 2d 865. In that case, the court confirmed a sale of real property for cash and subsequently, without further notice to the heirs, ordered that the party purchasing the property could apply towards the purchase price, the value of a distributive share of the estate. The court held that notice was required before the first order could be changed.

We submit that the February Order was conclusive; that there is no way to change the existing order by a direct attack. This can be accomplished only by serving process upon the heirs—those whose rights are sought to be affected.

In the Latses case, there was no service on the heirs and no service on the Court Appointed Attorney for the heirs. Not even a copy of the petition that was filed to undo the judgment already entered, was served upon the Court Appointed Attorney for the heirs. How can any Court change a properly docketed judgment of the Court without serving any kind of process on any party?

## POINT V.

### CONSTITUTIONAL QUESTION

Taking away the right vested in the heirs by the February decree, without the service of a citation upon them, constitutes the taking of property without due process of law. That February decree is itself a decree of distribution. It ordered that all of the property of the estate, save \$10,000.00, should be distributed to Virginia Latses, but only on condition that assignments were executed. The inference in the order is that if the assignments were not executed, that distribution must be in accordance with the laws of succession.

The petition filed in September 1945 and upon which is based the October order, did not invoke the jurisdiction of the Court to change the February order. No citation was ever served on the non-resident heirs or the court appointed Attorney, to give them notice of any proceeding to change or modify that decree. The order modifying the decree was entered without service of a citation and therefore, constitutes the taking of property without due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States. *ESTIN v. ESTIN 334 U.S. 541, 68 S.Ct. 1213*  
*AT 1218*

## POINT VI.

EVEN IF THE COURT ADHERES TO ITS OPINION THAT THE OCTOBER ORDER IS A VALID PROBATE DECREE AND CONCLUSIVE, THE NON-RESIDENT HEIRS HAVE PLEADED A CAUSE OF ACTION FOR NEGLIGENCE



AGAINST THE ADMINISTRATORS AND OF FRAUD AND COLLUSION BETWEEN THE ADMINISTRATORS ON THE ONE HAND AND MRS. LATSES AS ONE OF THE HEIRS ON THE OTHER HAND.

This Court has assumed that the non-resident heirs, upon failing to receive their distributive share of the estate have not pleaded fraud and collusion. Paragraph 8 (R. 163) pleads that the administrators (one of whom Mrs. Latses, was the heir taking all of the estate save \$10,000.00) had personal knowledge of the contents of the February order, and that it was in full force and effect and a binding court order to distribute according to the laws of succession unless assignments of the heirs interests were presented and filed. The petition here passed upon further alleges (R. 165); "That the administrators and the attorney appointed by the court to represent the non-resident heirs knew that the distribution to the widow of all of the assets other than the sum of \$8,000.00 was to be made only when the order of court was complied with, namely, when each of the heirs accepted payment of the proffered settlement and after they deeded over their interest in the real property to the widow," and at (R. 166); "That the remaining \$1,500.00 of this contemplated settlement to each non-resident heir was never out of the possession of the administrator, the Utah Savings & Trust Company and that it well knew that the non-resident heirs had not accepted the payment and settlement, and had not assigned their respective interests to widow; that it had this sum in its possession on October 9, 1945, and had not then attempted to transmit the respective sums of the additional \$1,500.00 of the

proffered settlement. That the Utah Savings & Trust Company well knew that it was not authorized to distribute the rest of the estate to the widow unless it had receipts and assignments, but nevertheless and in violation of the order of the court, and in collusion with the widow who was the co-administrator of the estate, the Utah Savings & Trust Company did distribute all of the property of the estate to her. The administrators were aware of the fact that the said order of final distribution provided ~~that~~ the remaining assets of the estate were to be distributed to the widow only ~~after~~ <sup>after</sup> the payments and distribution aforesaid. The payments and distribution aforesaid were never made. That the Utah Savings & Trust Company well knew that it was impossible to correspond with the non-resident heirs at that time because of existing guerilla warfare in Greece. That even if it would have been possible to correspond with them, it probably would have required at least thirty (30) days to forward the necessary funds and to receive an acknowledgement thereof, and the necessary receipts, even if the correspondence was carried on by air mail. That in violation of the order of the court, and in complete disregard of the rights of the heirs, the administrators on the very same day as the order of distribution was signed, and without attempting to forward the proceeds of the proffered settlement to the heirs, delivered all of the rest of the estate excepting the sum of \$8,000.00 to the widow. That this act of the administrators was collusive and made in an effect to force and compel the non-resident heirs to accept an unfair and grossly insufficient settlement."

This proceeding is maintainable in this probate case, in which the facts giving rise to the cause of action arose. The three non resident heirs did not receive their proper distributive share of the estate because of the negligence of the administrators and their disregard of the courts order of February 27, 1945. This brings the case squarely within the rule of *Tiller v. Norton*, ..... Utah....., 253 Pac. 2d 618 (1953). The rule is better set forth in the case of *Welch v. Flory*, 200 Northeastern 900, 106 ALR 813. It holds that "a decree directing a distribution of the estate does not protect the executors or administrators against the claims of persons entitled to share in the distribution who have been omitted from the order as a result of negligence on the part of the executors or administrators."

In *Welch v. Flory*, in the probate proceedings, an order was made to correct the decree to order the administrator to make payments to the heirs of his distributive share and secondly at the same time it established the rights of the administrator to collect the amount of the overpayment made to each of the distributees. No injustices to innocent third parties would result, if proceedings were permitted in this action to accomplish the same result. Thus, the result would be exactly what it should have been under proper probate proceedings.

With reference to *Tiller v. Norton*, it is our opinion that that case is not authority for the proposition that an administrator can distribute less than the entire distributive share of an estate to which an heir is entitled and be protected. It is only authority for the proposition

that when the court record shows that there is only one heir, when in fact there are three, the other two heirs being unknown, that the administrator is not liable for failing to distribute to the two unknown heirs. The case is completely distinguishable from the *Latses* case, in that the heirs were all known and there was no element of facts lacking to enable the court to enter a judgment that would completely adjudicate the rights of the parties.

We believe that the case of *Short v. Thompson*, 56 Idaho 361, 55 Pac. 2d 163, (cited in the footnote), is not substantial authority. In this case, (at page 167 of 55 Pac. 2d) the Idaho Court seems to contemplate that the decision would be different even in just such a case as the *Latses* case. At the top of the page, just referred to, the court cites the case of *Gile v. Wood*, 32 Idaho 752 at 88 Pac. 36, where the court held that a judgment of the court entered upon a matter upon which the jurisdiction of the court was not invoked is a void judgment.

## CONCLUSION

We respectfully urge this court to again give full consideration to the problems raised in the several briefs that have been filed. It is, of course, necessary that there be an end to litigation but the end must be an equitable one. Courts must not dispose of cases simply because the litigation may be vexing. This case has only been before this court on the pleadings and it has not had a long judicial history. It is true that some 7 or 8 years elapsed between the entry of the order of October 1945 and the

commencement of these pleadings. That, however, is no reason to reject the efforts of these non-resident heirs to secure just treatment in the courts of this State.

The Court's opinion on rehearing may be more far reaching than can be comprehended at the moment. For example—A & B, the two heirs of an estate being probated in San Juan County are entitled to undivided one-half interests in uranium claims, Nos. 1 to 10 inclusive and they make an agreement between themselves that A should take claims No. 1, 2 and 3 and B the remaining 7 claims and such agreement is approved by the Court and provided that this agreement was to be effective only if A would execute assignments to B and B would execute assignments to A. It is then found that claims 1, 2, and 3 are productive and claims 4 to 10 inclusive are wholly unproductive. B is out in the mountains working the productive claims and stays away from his home in Monticello for a full year. He knows that he has not executed any assignments of his interest in these productive claims 1, 2 and 3 and he assumes that he has a one-half undivided interest in these claims. A, the administrator petitioned the court to distribute the estate, alleging in the petition that an agreement has been made and approved by the court by which A is to receive claims 1, 2, and 3 and B the remaining claims. H doesn't plead nor prove that B executed the assignments. A ten day statutory notice of the hearing of the petition is mailed to B's home, but there is no one there to receive it. Nevertheless, the court on A's petition distributes the valuable claims, 1, 2, and 3 to A and the worthless claims 4 to 10 inclusive to B.

One year later B returns from the mountains where he has mined \$1,000,000.00 worth of ore from the claims 1, 2 and 3 and finds that a decree of distribution was entered distributing the three valuable claims to A and the 7 worthless claims to B. Is this decree to be held conclusive against B and deprive him of his one-half undivided interest in the good claims? Title to an undivided one-half interest in these good claims vested in him upon the death of his ancestor. There was no proceeding to divest him of his title. Such an opinion as the second opinion in this case would uphold the distribution of the good claims to A and thus take his property from him without due process of law.

We respectfully submit that that is what happened in the Latses case. If this opinion of the court is permitted to stand, that type of a probate proceeding will be sustained in the Latses case and is likely to be sustained in many future probate cases. Of course, it can be said that when another such case is presented, the court could over-rule the decision in the Latses case, but that is tantamount to this court applying sound principles of law to one case and not to another, making the principle of “stare decisis” useless.

Respectfully submitted,

WHITE, ARNOVITZ & SMITH  
GUSTIN, RICHARDS &  
MATTSSON

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Recorded at Request of

*Hattie Latsis*

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Ref: *D34-223-21*RELEASE OF MORTGAGE

The undersigned, Virginia Latsis, hereby represents and declares that that certain mortgage between Peter Latsis and Hattie Latsis, his wife, as mortgagors, to James Latsis, mortgagee, recorded November 5, 1931 in Book "91", page 294, as Entry No. 685741, in the records of the County Recorder of Salt Lake County was, by general decree, in the matter of the Estate of James John Latsis, No. 25644 in the District Court of the Third Judicial District, in and for Salt Lake County, distributed to the said undersigned, and she is the holder and owner thereof.

The said James John Latsis was the same person as James Latsis, the said mortgagee.

The property described in said mortgage is situate in Salt Lake County, State of Utah, and described as follows:

Beginning at a point 65.7 Rods East from the Northwest corner of Section 34, Township 2 South, Range 1 West, Salt Lake Meridian, thence South 32.4 Rods, thence East 49.4 Rods, thence North 32.4 Rods, thence West 49.4 Rods to the place of beginning. Containing 10 acres, more or less.

The undersigned further acknowledges that the said mortgage has been fully paid and satisfied, and the same is hereby released and discharged.

Witness

STATE OF UTAH

) ss.

COUNTY OF SALT LAKE )

On the *16<sup>th</sup>* day of *Oct.*, 1945, personally appeared before me VIRGINIA LATSIS, the signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

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My commission expires

City.

# Certificate

STATE OF UTAH

COUNTY OF SALT LAKE

ss.

I, Hazel Taggart Chase, Recorder in and for the County of Salt Lake, State of Utah, do hereby certify that the foregoing is a full, true and correct copy of the original  
.....Release of Mortgage - Virrinia Latsis for James Latsis to Peter and Hattie Latsis.....  
No. ....1063725....., as appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand  
and affixed my official seal, this 16th day  
of September, A. D. 1953.

HAZEL TAGGART CHASE, COUNTY RECORDER

By *A. B. [Signature]* Deputy Recorder