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Latsis v. Utah : Amicus Brief

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

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

Deceased.

Case No. 7954

BRIEF OF AMICI CURIAE

This brief in support of the petitions for rehearing in this case is presented pursuant to the application of the undersigned to the Court, and an order entered herein August 18, 1954, authorizing the filing of the same.

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FACTS

We will concern ourselves briefly with some fundamental facts of record, which have a bearing upon the basic matters of law discussed under the points briefed here.

After the probate involved here had proceeded from Feb. 19, 1944 (R. 6) to Feb. 13, 1945, all of the heirs, some acting in person and some by their representative appointed under 75-14-25, U.C.A., agreed upon a division of the estate among them, and upon the portion thereof each was entitled to, and which each would accept as his or her share. They joined in a petition (R. 86) so representing to the Court and asking the Court to determine that the proposed division was a fair one, and recited

(R. 87), "That the Court * * * shall direct the manner of distribution of the said fund."

While the stipulation recited that "it has been agreed * * * subject to the approval of the Court, that the said payment and settlement shall become binding and conclusive as to each upon acceptance of his portion * * * and the execution of the necessary instruments to receipt therefor and to assign his said interest and release the said estate, * * *" (R. 87) it did not say that this was a condition, or that it was not to become binding until these things were done. In fact, the stipulation said, in addition to saying that what was recited was "subject to the approval of the Court," that, as stated above, the Court would "direct the manner of distribution."

If these were conditions, the Court did not adopt them as such, or at all, and did not so limit the distribution. It is plain that neither the Court nor any of the parties to the estate nor their attorneys ever regarded these provisions as conditions at any time during this probate proceeding. All the subsequent proceedings indicate the contrary.

In any event, the trial Court in its order pursuant to the petition (R. 90) made a plain, direct and present distribution to each and all heirs (R. 96-7) with no condition mentioned, and the only reference to its afterward becoming binding upon anybody was the statement in the order that the "distribution shall be binding * * * as to each * * * upon acceptance by him, or by his heirs-at-law of said payments."

And then to make its acceptance certain, the Court

(R. 97) directly "Ordered that the said heirs shall furnish proper receipts therefor and relinquishments of all interests in the estate and release of the administrators herein * * *."

There is other language emphasizing the intention of the Court to make a present and unconditioned distribution and to insure that the heirs would receive their share, such as that charging the appellants' attorney representative with the duty of getting the money to these heirs and taking their receipts therefor, and in authorizing the payment of his fees in full (R. 96) upon such distribution being completed, and also reciting that the delivery of checks for the making of such distribution, "shall relieve the administrators herein from further responsibility." There seems to be nothing conditional in this February order, and little room for interpretation there, and there is none whatsoever in the final decree entered about eight months later.

This final decree, October 4, 1945, recites the full statutory administration of the estate, full satisfaction of all claims and other obligations, except a balance on the distribution due to heirs under the order of February 27, 1945 (R. 109), and says that funds have been provided and deposited to take care of this by the widow. There was filed an acknowledgement (R. 121) by the bank of the receipt of the funds to be used for the purpose of completing the delivery by the heirs' attorney representative.

The decree seems to refer to the February order for the purpose only of stating the amount due the foreign

heirs thereunder, and then stating its approval of the "foregoing" provisions made for funds to comply therewith. It contains no approval of the order of February 27 as the opinion here seems to say, and it contains no intimation that the former order was a conditional one. On the contrary, after approving the aforesaid provisions, it recites that the estate is in condition to be closed and then discharges the administrators, and then closes it completely.

It would appear to have no legal bearing upon the force or effect of this decree if the decree had mentioned any earlier understanding or representation to the Probate Court as to receipts being required from heirs. It may be added, however, that this final decree makes no mention of any such matter. It certainly does not condition its immediate effect upon these, and, of much greater importance, *it contains no condition wthin itself as to its not then becoming effective.*

STATEMENT OF POINTS

Point 1.

THIS DECREE IS A FINAL AND VALID JUDGMENT AND NOT A VOID ONE.

Point 2.

A DECREE CANNOT BE SET ASIDE UNTIL ASSAILED IN THE MANNER AND WITHIN THE TIME PRESCRIBED BY LAW, AND IN AN ACTION AGAINST ALL PARTIES WHO WOULD BE AFFECTED BY SETTING IT ASIDE.

Point 3.

WHAT RELIANCE, IF ANY, MAY NOW BE PLACED UPON 75-14-25 U.C.A., 1953?

ARGUMENT

POINT 1.

THIS DECREE IS A FINAL AND VALID JUDGMENT AND NOT A VOID ONE.

The opinion here says only (270 P. 2d at 974) that "the decree of distribution and order discharging the administrator * * * was conditional * * *." However, the effect of that opinion is to make the decree wholly void.

Tested by all the standards heretofore relied upon, particularly in testing decrees affecting real property, this was and is a conclusive and binding decree, and not a void one.

Some of these standards heretofore established and relied upon will be briefly referred to:

First, there is no lack of jurisdiction of the property and of all the parties. This Court held in *Barrette v. Whitney,* 106 P. 522, approving *Snyder v. Murdock,* 73 P. 22, that probate proceedings are "in their nature *in rem,*" and that

> "the notice which is given upon the filing of the petition for letters of administration is the jurisdictional notice, the giving of which, * * * brings not only the property, but the persons interested therein, within the jurisdiction of the Court."

Later, in *Weyant v. Ut. Sav. & Trust Co.,* 182 P. 189, 9 A.L.R. 1119 at 1129, this Court said:

> "This Court is committed to the doctrine * * * that probate proceedings are *in rem,* and that where the statutory notice has been given, all who are interested in the estate are bound by all orders or decrees duly entered in a particular case, and that, ordinarily, the only remedy is by direct ap-

peal." * * * "The Court has also held that judgments and decrees entered by Courts of competent jurisdiction, where jurisdictions of the subject of the action and of the person has been legally acquired, can only be assailed on direct appeal or in equity for extrinsic as contradistinguished from intrinsic fraud. Cantwell v. Thatcher Bros., 47 U. 150, 151 P. 986."

Such general jurisdiction is not questioned here, and under 75-1-7 and 8, and 75-14-12, U.C.A., it cannot be.

It may be added that as to property over which the Court has jurisdiction and as to all parties to a probate proceedings, such a judgment as we have here is conclusive.

31 Am. Jur., p. 101:

> "449. Conclusiveness. — Judgments *in rem* are regarded as conclusive by the courts. Indeed, the rule limiting the conclusiveness of a judgment to the parties to the proceeding in which it was rendered, and their privies, has been subjected to an exception in the case of a judgment *in rem,* which, the court having jurisdiction, is binding on third persons, or on all parties in interest, or, as it is frequently said, on the whole world."

This Court has so held:

In *Snyder v. Murdock,* 73 P. 22, the Court held a decree of distribution final, even though it distributed exempt property of the estate to a judgment creditor who, it was claimed in this case, was not entitled thereto.

In *Tiller v. Norton,* 253 P. 2d 618, it was held that the decree of distribution was final and conclusive even though it took away entirely the inheritance of two known

children of the decedent and made no provision for them. It was also held again that such decree could be attacked only upon allegation and proof of extrinsic fraud.

The conclusiveness of decrees and orders in probate, as well as the importance of making such conclusive, has been emphasized by a number of Utah decisions as well as the decisions of Courts generally. This Court has applied the provisions of 75-11-37 generally to probate orders and decrees. This section reads:

> "75-11-37. *Conclusiveness of Settlement.* — The settlement of the account, and the allowance thereof by the court or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; * * *."

Utah cases so applying the provisions of this section generally to orders and decrees in probate have been summarized in the annotation to this section.

In re *Rice's Estate,* 182 P. 2d 111, at 117. There this Court, in a case alleging a failure to distribute the property of the estate properly to an heir entitled thereto, cites some of these cases, and states the law, as follows:

> "A decree of distribution in probate proceedings after due and legal notice, by a court having jurisdiction of the subject matter, is conclusive as to the fund, property, 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 In re Evans *et al.,* 42 Utah 282, 130 P. 217.

"In the case of In re Raleigh's Estate, 48 Utah 128, 158 P. 705, 709, this court held that an executor's or administrator's account has the same force and effect as a final judgment and is conclusive as to all items included therein, where the statutory requirement of notice has been complied with, and where, as here, the heir is not laboring under some legal disability. Further, in connection with the procedure to assail an account, the court said:

"'It is apparent, therefore, that an executor's or administrator's account which has been allowed can be assailed only in equity and upon the same grounds as other judgments. * * *'"

The Court then cites and quotes Section 102-11-37, *UCA,* 1943, which is the same as 75-11-37 above quoted. The case held that extrinsic fraud had been alleged and established and this was the ground of the relief granted.

In re *Linford's Estate* (Utah) 239 P. 2d 200:

"* * * As hereinabove stated, decrees of the probate court can be assailed only in equity and upon the same grounds as other judgments. In re Raleigh's Estate, 48 Utah 128, 158 P. 705; in re Brooks' Estate, 83 Utah 506, 30 P. 2d 1065; and 4 Bancroft's Probate Practice, 2d Ed., Sec. 1011, et sequi."

* * *

"We rule that the decree of summary distribution, having been procured in good faith, and no fraud having been proved, is conclusive against the petitioners as to the property included in the original inventory. . . ."

In *Intermill v. Nash,* 75 P. 2d 157, this Court again discusses the matter of conclusiveness of judgments where titles are involved. This case is an effort to avoid a judgment entered in foreclosure. The plaintiff brought an action to quiet title to real property involved. She had purchased the property from Hoffman Bros. over a period of 14 years commencing in 1910. She received a deed in 1924. She had paid the taxes from 1910 to 1929 and her name and address appeared in the deed to her which was of record, and also in the assessment records.

Hoffman, prior to her deed, had mortgaged the properties to the predecessor of defendant Nash and she had brought foreclosure proceedings and served or pretended to serve summons upon the plaintiff by publication in a Salt Lake newspaper, without a sufficient affidavit of the jurisdictional facts authorizing such service.

In her answer in this action to quiet title, the defendant denied that plaintiff was the owner, and in a counterclaim alleged that she was the owner, and that plaintiff had no title or interest, and sought to quiet title in herself.

To this counterclaim, plaintiff filed an answer stating the facts above as to her purchase from Hoffman Bros., etc., and attacking the judgment of foreclosure as a cloud upon her title. Upon the trial, the District Court sustained objection to the offer by plaintiff of the affidavit to procure service of summons by publication upon the ground that it was an attempted collateral attack upon the foreclosure judgment. This Court, in a unanimous opinion, held that it was such, and, pointing

out the importance of maintaining the validity and integrity of judgments "where property rights are involved, said:

> "The courts, functioning to determine and settle property rights, upon which persons may rely and the security of society be built, should enjoy, in their formal pronouncements, every possible degree of conclusiveness. To permit their determinations to be lightly regarded or easily evaded would render them nugatory, and be a source of litigation and friction rather than to put an end thereto."
>
> * * *
>
> "A judgment, once entered by a court of competent jurisdiction, having the res and the parties duly brought before it as provided by law, imports verity, proves itself, and is invulnerable to attacks by any indirect assaults. It can only be questioned in the manner and the proceedings *established by law*. And since a judgment is established and proved by the record thereof, unless an inspection of that record establishes its invalidity, *shows it to be void,* the judgment is conclusive and may not be questioned collaterally by any matters dehors the record thereof. Amy v. Amy, 12 Utah 278, 42 P. 1121, 1124; Hoagland v. Hoagland, 19 Utah 103, 57 P. 20; Liebhart v. Lawrence, 40 Utah 243, 120 P. 215."

The opinion proceeds and points out that, "a judgment that is voidable cannot be attacked collaterally."

It also says:

> "Any question, therefore, as to jurisdiction or as to the validity of the judgment, which does not show up on the face of the record, must be raised and brought to the attention of the Court by appropriate pleadings."

The Court alludes to the delay upon the part of plaintiff in proceeding to assert title for over six years, knowing that the defendant was claiming the property and says:

> "By the provisions of 6619, Comp. Laws 1917, she had one year after entry of judgment, or until May, 1930, still more than six months in which to apply to the Court for leave to be heard on the merits."

The concurring opinion of Justice Wolfe, at page 164 of the report, states some principles applicable here:

> "* * * I see no reason why in a suit based on a purported judgment or defended on the strength of a supposed judgment which is null, it may not be avoided in the same suit in which such judgment is to be introduced and used by laying the proper foundation for introducing evidence of the voidness of the supposed judgment. * * * But so jealous is the law of its judgments recorded as such, that only such type of direct attack can be made when it is claimed the *judgment is void,* not when it is only voidable, and only *can evidence be introduced of its voidness when the pleadings set up wherein it is void.* The one exception is, of course, where the judgment is void on its face."
>
> * * *
>
> "But where its voidness is not self-revealed, the pleadings must set out wherein and why it is void."

The foregoing case was approved in *Glenn v. Rich,* 147 P. 2d 849, where at page 851, the opinion by Judge Wolfe, says:

> "The defendant next contends that the trial court erred in finding that the guardianship pro-

ceeding was void. *The attack on the order appointing a guardian is a collateral one for it is a denial of the legal and binding effect of a judgment in a proceeding not instituted for the purpose of annulling or changing it.* See Mosby v. Gisborn, 17 Utah 257, 281, 54 P. 121; Intermill v. Nash, 94 Utah 271, 75 P. 2d 157. Unless the proceedings show on their face that the court *was without jurisdiction* to make the order of appointment or to conduct the proceedings leading thereto, the appointment of a guardian cannot be questioned in such a collateral proceeding. 25 Am. Jur. p. 35, Sec. 49."

Later, in the case of *Zions Ben. Bldg. Soc. v. Geary, et al.,* 189 P. 2d at 966, this Court in an opinion by Justice Pratt again approved the decision in *Intermill v. Nash,* supra.

Not a Conditional Decree:

As stated above, this decree is in fact held to be void. This holding comes by reason of a statement in the opinion that, "The decree was conditioned on these acts being done which condition has not been satisfied." This statement is preceded immediately by mistaken statements as to what the decree itself says.

The Court, although mistaken as to this, recognizes a principle of law which appears to be universal, that a judgment to be a conditional one must itself contain the condition, such as, a condition which must be satisfied in order for it to come into effect, or a condition by which its effectiveness shall be terminated. There is plainly no condition contained in this judgment.

The errors in this respect have been demonstrated

in some detail, and we believe correctly, at pages 15 to 25 of the Ut. Sav. & Trust Company's petition for rehearing. A careful reading of this final decree discloses no condition as to the effect or the finality of the decree; no condition as to when or how it shall take effect; and no condition by which it may be rendered ineffective. It seems important and fundamental here that what is referred to as a condition — that is, the giving of receipts and releases — is not mentioned in the decree, and *furthermore that this is something* which the appellants had been directly ordered by the Court to do.

Parish v. McConkie, Dis. Ct. Judge, 35 Pac. 2d 1001, is a case in this State in which this Court has discussed the question of "alternative or conditional" judgments. In that case, a judgment was entered in a divorce proceedings by which the defendant husband was ordered to "transfer and deliver to the said plaintiff stock in the Western Loan and Building Company of the present cash value of $2,900.00, or in lieu thereof shall assign, transfer, set over and deliver to said plaintiff life insurance certificates having a present cash value of the same amount, or in lieu thereof shall deliver to the said plaintiff $2900.00 in cash." Defendant had apparently disposed of the stocks and certificates mentioned, and upon citation for failure to comply with this order, was sentenced for contempt for failure to pay the $2900.00 in cash. This Court, upholding this, said:

> "A judgment in the alternative gives the right of option to the judgment debtor and his election is binding upon the judgment creditor. State ex

rel Gordon v. Smith, 98 Wash. 100, 167 P. 91, 169 P. 468. * * * the judgment settling property rights is final and a bar to any action afterwards brought by either party to determine the question of property rights. Smith v. Smith, 77 Ut. 60, 291 P. 298 and cases there cited."

The Court then refers to some authorities cited that a judgment cannot be alternative or conditional and says that as applied to the facts in the case that was cited, the statement would be correct, and then adds:

> "But as in contracts, a condition sure to happen or an alternative one or the other of which a party is *bound* to elect, the happening or election making the judgment absolutely certain and definite eliminates the condition. For example: Thirty days from this date plaintiff shall be entitled to recover $1,000 is not a judgment, while, plaintiff shall have and recover $1,000, payable 30 days from the date hereof, is a judgment."

This is because in the latter case he is "bound" to pay it, but it is no more certain that defendant was bound there than that the appellants are bound to give the receipts and instruments referred to here. The order (R. 97) above quoted is direct and positive. Certainly, a party cannot upset a judgment on the ground that he refuses to comply with an order made therein, and contend that by his election to refuse to obey the order, it becomes void.

If there were ever any conditions in this probate proceedings at all, such things were in proposals of the parties long prior to the final decree. These things — claimed to be conditions—were not carried as such even

into the prior order entered upon such proposals; but these things, instead of being perpetuated as conditions, were there ordered to be done and performed. They are not even referred to or mentioned in the final judgment of distribution and discharge. Judgments cannot be relied upon if they may be destroyed at any remote time by such incidental outside matters.

In *31 Am. Jur.*, p. 93, Sec. 433, it is said:

> "Conditions to a judgment may be annexed by the Court in certain cases, and such judgments are known as 'conditional judgments.' Where the findings order a judgment giving one party an alternative, such party need not indicate his choice of alternatives until the judgment is entered."

Instances involving conditional judgments which were enforced are cited by this author, and we call attention to some of these to illustrate that a condition to operate as such is in the judgment itself:

It has been held that in actions to expel foreign corporations found guilty of violations, the Court, by provision therein, may insert a condition that the decree shall take effect at a future time fixed. *16 Am. Jur.*, p. 676.

It has been said that a garnishee judgment upon the default of a garnishee who has failed to appear may be conditioned upon his being indebted to the debtor in the principal judgment. *5 Am. Jur.*, p. 75.

In actions to enforce oil and gas leases the Court may make an alternative or conditional decree reciting that the defendant shall forfeit unless specified acts are performed. *24 Am. Jur.*, p. 665.

In specific performance cases, it is within the discretion and power of equity courts to condition specific performance of a contract upon the performance of the conditions that the party seeking specific performance is required to perform, such as the return of money, and to require therein that unless such payment be made into Court within a specified time, the proceeding will be dismissed. *49 Am. Jur.* p. 201.

The author, under the above quotation, also cites *Coiron v. Mellandon,* 19 How. 113, 15 L. Ed. 575, where it was held that in setting aside a deed for fraud, a decree could be conditioned by a provision therein for the return of the purchase money upon giving the reconveyance.

Not only do we find no condition stated in the decree here, but there is not the slightest indication that the Court considered such matter at all or that there was any occasion to consider it. And there seems to be no ambiguity in the decree, so as to call for or permit interpretations of it, and if there were, as stated in *Intermill v. Nash,* supra, this would require pleadings and evidence.

And the rule of interpretation seems to be (see *30 Am. Jur.,* p. 834) that "judgments are to be construed like other written instruments. The determinative factor is the intention of the court * * *." It isn't necessary to mention that if two interpretations were permissible the one giving validity to a decree or contract is the one to be adopted.

On the above matter as to conditions which may limit a decree taking effect, or which terminate its effectiveness, this Court has recently said something informative

here, and which is in line with what we have just above said.

Preas v. Phebus, 272 P. 2d 159, involved conditions in a written instrument and in discussing these the opinion at page 162, said:

> "(2-5) In other words, the parties differ as to whether the language used in Exhibit C establishes an estate upon condition subsequent or an estate subject to a conditional limitation. The distinction is that in the case of a condition subsequent the assignor is given the right 'to secure a revesting of the former estate, so that, if no steps are taken to secure a revesting, the estate granted remains as before, while the happening of the event described by a conditional limitation ipso facto determines the estate.' 51 A.L.R. 1473."

This note discussing this matter says:

> "The distinction between an estate upon condition subsequent and one subject to a conditional limitation (sometimes characterized as 'a condition in law') is that in the case of the former the words creating the condition do not originally limit the term, but merely permit its termination upon the happening of the contingency, while in the case of the latter the words creating it limit the continuation of the estate to the time preceding the happening of the contingency."

In any event, it seems clear, that judgments are neither conditional because of, nor should their validity be made to depend upon, interpretations of some prior understandings or representations not mentioned therein, or ever made of record. Probate decrees affecting real property "should enjoy" complete dependability. Section

75-14-15, U. C. A. as to the required contents of decrees in probate says that "it shall only be necessary that they contain the matters ordered and adjudged," therein; and then 75-14-16 says as to a decree "determining any matter affecting the title to real property a certified copy * * * must be recorded * * *; and from the time of filing * * * notice of the contents thereof is imparted to all persons." Then, 17-21-10 requires County Recorders to record all such decrees.

The matters "ordered and adjudged" as to the distribution of the properties of this estate are set forth in this decree, without any limitations; and the recorded decree gave the notice, and was relied upon as contemplated by these statutes. And this Court said in *Intermill v. Nash,* supra, such decrees affecting real property "upon which persons may rely and the security of society be built, should enjoy, in their formal pronouncements, every possible degree of conclusiveness." The record of this decree has been and will be, under continuous examination, and this decision will raise doubts as to other like decrees, which also are under continuous examination.

Our concern and our appeal here arise because of the effect of this decision upon the marketability and the mortgageability of real property, where decrees in probate have been entered, and also because of the added inconvenience and costs of determinations caused in these fields if final decrees and distribution are not to be relied upon.

Point 2.

A DECREE CANNOT BE SET ASIDE UNTIL ASSAILED IN THE MANNER AND WITHIN THE TIME PRESCRIBED BY LAW, AND IN AN ACTION AGAINST ALL PARTIES WHO WOULD BE AFFECTED BY SETTING IT ASIDE.

While it does seem important here, as pointed out in the petitions for rehearing, that the matter of the validity of this judgment was not at all involved in the matter presented on appeal, and also that this final judgment had not been assailed by any pleadings at all, we will merely supplement these contentions by calling attention briefly to some other basic matters.

The manner prescribed for assailing a decree is by appeal within the time therefor; or, 75-14-23, in the probate proceedings "before final settlement and discharge and after the time by an action in equity, * * *." Rule 60(b) as to judgments generally says that "any relief from a judgment" after three months "shall be by an independent action, * * * to relieve a party from a judgment * * * for fraud upon the court, * * *."

As to decrees affecting the title to real property in probate matters, 75-1-7, as applicable here, provides that where notice of the original appointment of the administrator is given, "no objection to any subsequent order or decree * * * can be taken * * * on account of any * * * defect or irregularity * * * other than on direct application * * * at any time before distribution or on appeal." While this may not apply so as to prevent an equity action based on extrinsic fraud, it does seem to bar any objection that might be covered by appellants' petition here.

As is sufficiently stated in the Utah cases above cited, any attack upon the decree claiming it to be void would necessarily have to be upon pleadings which must "set out wherein and why" it is void.

A matter perhaps of more basic importance in this case, is that the parties who would be affected if this decree is finally held to be void are not before the Court at all; only the two former administrators appear to be parties to this proceeding.

On this, this Court said in *Intermill v. Nash,* 75 P. 2d at 161, supra:

> "(6) The parties to the proceeding may be important, because in direct attack, the parties to the judgment who would be affected thereby must be made parties, as their rights under the judgment are directly involved. Borders v. Highsmith, supra; Dunn v. Taylor, 42 Tex. Civ. App. 241, 94 S.W. 347; Smith v. Perkins, 81 Tex. 152, 16 S.W. 805, 26 Am. St. Rep. 794; 1 Freeman on Judgments, (5th Ed.) Sec. 308."

Because of this situation, we feel we should call the court's attention to the fact that these appellants have started another action based on the same claims made here in which there are 30 defendants, besides the former administrators, all of whom are alleged to have acquired or who claim to have some interest in the property distributed by this decree. We will file herewith a certified copy of the complaint in the said action, together with sufficient copies for members of the Court.

It would thus seem that the appellants may not have complete confidence in the proceeding here undertaken by them, or that this other case may constitute an aban-

donment of this proceeding. We mention this because we too have difficulty in seeing how they can get any practical benefit from this proceeding even if, in fact, they have not already received under the decree below all that they are entitled to receive. And the finding of the trial Court was that this $10,000.00 constituted their "distributive share" of the estate (R. 252) and "considering the properties of the decedent" (R. 95) this was a "reasonable amount."

POINT 3.

WHAT RELIANCE, IF ANY, MAY NOW BE PLACED UPON 75-14-25 U.C.A., 1953?

We mention this point because of the doubt created as to this statute. It has had considerable application and use in Utah. In fact, in Salt Lake County, printed forms of orders, such as those admitting wills to probate, have for many years contained a clause reciting, "and the attorney duly appointed to represent the minor heirs consenting," etc.

The opinion in this matter (270 P. 2d 971) leaves its use and application in doubt, because, in one place, it appears to approve a recital subscribed by the attorney here appointed under this section, as something for "safeguarding the rights of these foreign heirs." And then referring also to the same document, says:

> "The attorney had no authority to enter into any stipulation which would preclude the heirs from claiming their share in the estate under the laws of succession."

It then intimates that he may have attempted to so preclude them. Then it says that the attorney "receives his

authority *only* from the Court," and also that the Court "can do nothing with the aid of the attorney which it could not have done without him." So it is a little confusing, and, if these last two quotes are correct, as the statute applies to this case, then not only do they affect the interpretation of this statute, but also the interpretation to be given any other of our statutes where the Court is authorized to appoint agents to act for certain purposes, with the Court's approval; such as referees, masters, conservators, administrators and guardians. It seems plain that the legislature intended under this section to give certain authority to the Court and the attorney, acting together, and that neither was intended to receive all authority from the other. And that the Court can thereby do more with the aid of the attorney, otherwise our statute is utterly meaningless. The opinion does in fact render the statute useless, and this it seems is upon the above quotes, which were taken from a case dealing with different statutory provisions and with matters of authority entirely different from those specifically authorized by our statute and exercised here.

The authority comes not from the Court, but from the legislature. And the authority of the legislature over such matters of probate and succession is absolute.

16 Am. Jur., p. 777:

> "Sec. 12. Legislative Power. — Succession to intestate property is at the will of, and subject to, the sovereign political power of the state in which it is situated. The theory of the law is that any participation in the estate of a deceased person is by grace of the sovereign political power, which

alone has any natural or inherent right to succeed to such property."

This is so basic and so universal as to require no extensive citation of authority. It has been repeatedly recognized in this and other States.

In the case of *In re Mower's Estate,* 73 P. 2d 967 at 973, the opinion says:

> "The privilege to dispose of one's property by will depends on positive law. The right is within the control of the lawmaking power. State Tax Commission v. Backman, 88 Utah 424, 55 P. 2d 171; Evans v. Price, 118 Ill. 593, 8 N.E. 854; in re Little's Estate, 22 Utah 204, 61 P. 899."

Did the legislature then authorize the appointed attorney and the Court to agree to and approve the partition and distribution as made in the order of February 23, 1945?

The entire essence of what was done, was that each of the heirs agreed as to what was the fair share of each in this estate, and expressed to the Court his willingness to accept such share and asked the Court to approve distribution on that basis. The Court did approve, after first finding that the proposed partition of the estate was a fair one.

That any three, or other number, of heirs may agree among themselves to each accept certain properties or proportions of an estate upon the Court's approval, is indisputable. The only question that might be raised in this case is whether the heirs for whom an attorney is appointed under 75-14-25 may so agree through him as

their representative, when his actions in their behalf are approved by the Court.

The statutory language seems fully to authorize the authority here exercised. The appointment was for the parties then entitled as heirs to the interests asserted by appellants, and who were the parties entitled by this statute to have such representation.

The statute itself also specifically says that the attorney appointed, "is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment." "All such proceedings" refers to and includes "settlements, partitions and distributions of estates, setting apart homesteads, and all other proceedings where notice is required or prescribed, * * *." This appears to cover, as plainly as language can make a statute cover, the partition and distribution agreed to and ordered here.

Comparable or similar statutes have been enacted in a number of other States, some of which are cited in the annotation and others cited in the brief of the parties here. Section 15-1513 of the Idaho Code was in 1951, by an order of the Supreme Court of Idaho, adopted as a rule of procedure for the Courts of Idaho. The constitutionality, wherever attacked, has been upheld, and so far as we have found, its language has been given its ordinary meaning and effect.

It seems correct, too, as pointed out in the petitions, that the appointment of the attorney as representative of these appellants was not questioned below, and his authority under this statute to do what he did was not

challenged by allegations there, or by assignment of error here. In fact, after the resignation of Mr. Cotro-Manes was obtained (R. 173), Mr. Arnovitz was appointed as representative of appellants under this same statute and was acting under this authority when this appeal was taken (R. 175).

CONCLUSION

We wish to express appreciation for the privilege of filing this brief; and we sincerely urge the Court to reconsider the decision here, and to take such further action herein as will leave undisturbed the law as to the conclusiveness of final judgments of the Courts of this state, so that property titles may be safely determined and property may be securely held.

Respectfully submitted,

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