1967

In the Matter of the Estate of Dallas Bedford Lewis, Also Known as D. B. Lewis, Deceased. Lucille Parker, Jack Heldt and Robert Gaston v. Ernest L. Lewis : Appellant's Brief

In the

Supreme Court of the St

IN THE MATTER OF THE
ESTATE OF DALLAS B
FORD LEWIS, ALSO KNO
AS D. B. LEWIS, DECEAS

LUCILLE PARKER, JACK
and ROBERT GASTON,
Appellan

vs.

ERNEST L. LEWIS,
Respond

APPELLA

Appeal From The
Fifth District Co
Honorable C.

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Delta, Utah

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& McCARTHY
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TABLE OF CONTENTS

TABLE OF CONTENTS — (Continued)

CASES CITED

STATUTES CITED

Texts Cited

In the
Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE OF DALLAS BEDFORD LEWIS, ALSO KNOWN AS D. B. LEWIS, DECEASED.

LUCILLE PARKER, JACK HEIDT and ROBERT GASTON,
Appellants,
vs.
ERNEST L. LEWIS,
Respondent.

Case No. 10719

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is a contest between executors appointed at the domicile and a brother of the decedent, a Utah resident, each seeking the probate in Utah of the foreign will of the decedent and the appointment of the contesting party as the representative of the estate for the purpose of conducting ancillary proceedings in the State of Utah.

DISPOSITION IN LOWER COURT

The lower Court admitted the will of the decedent to probate as a foreign will, denied the petition of the

executors who had been appointed as such at the domicile of the decedent and appointed the petitioning brother as administrator with the will annexed for the conduct of ancillary probate proceedings in the State of Utah.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the order appointing respondent brother as administrator with the will annexed of the estate of the decedent and directing the lower Court to enter an order appointing appellants as executors under the will for the conduct of ancillary proceedings in the State of Utah.

STATEMENT OF FACTS

The record on appeal here is somewhat confusing. It consists of three files, namely (a) the pleadings file, pages numbered 1 through 11, and 98 through 111, with Exhibits 1, 3 and 4 attached, here designated as "R."; (b) the so-called Original File, which is the copy of the will and the probate thereof authenticated by the California Court, pages numbered 12 through 97, here designated as "Of."; and (c) the Reporter's Transcript, pages numbered 1 through 130, here designated as "Tr." No substantial issue of fact is involved, the questions presented are essentially issues of law.

Dallas Bedford Lewis, herein termed the decedent, died a resident of the State of California, on April 25, 1966, leaving an elaborate will dated December 7, 1965, which he had himself prepared. (Of. 13-33, Tr. 69)

Decedent was a successful business man engaged primarily in the operation of the Lewis Food Company. This company prepares and markets pet foods under the well-known name of "Dr. Ross Dog and Cat Food." (Of. 13-33) Decedent had other property holdings in California, Idaho, Oregon, Tennessee and Utah. (Tr. 4) The value of decedent's estate is in excess of $5,000,000. (Of. 12, 89)

The will did not name any executors as such, but named appellants Lucille Parker, Jack Heidt and Robert Gaston to perform certain duties and enjoy certain powers in connection with the administration of decedent's estate and denominated these persons as "Trustees." (Of. 13-33)

On May 2, 1966, Lucille Parker filed a petition in the Superior Court of California for Los Angeles County, praying for the probate of the will, for interpretation of the same, for designation of executors thereunder, or in the alternative for issuance of letters of administration with the will annexed. On the following day Robert Gaston and Jack Heidt filed their petition for probate of the will. (Of. 87-88)

These petitions came on regularly to be heard before the California Court on May 25, 1966. Respondent Ernest L. Lewis, who is a brother of the decedent, received notice of such hearing, engaged an attorney and appeared in person and by attorney at the hearing. (Of. 87-89)

The California Court, upon hearing on the petition, entered an order dated May 25, 1966, that the decedent died testate on April 25, 1966, a resident of the State of California, leaving an estate therein, that the document dated December 7, 1965, be admitted to probate as the will of the decedent, that Lucille Parker, Robert Gaston and Jack Heidt were named as executors under the will appointing said persons as executors and ordering that letters testamentary be issued to them upon furnishing a corporate surety bond in the sum of five million dollars. (Of. 87-89)

On the same day, Parker, Gaston and Heidt, hereunder termed "executors" furnished a corporate surety bond in the sum of five million dollars (Of. 90) and letters testamentary were issued to them on May 26 1966. (Of. 96)

The property interests of decedent in the State of Utah consist of rights with respect to some seventeen thousand acres of mining properties in Millard and Beaver Counties, Utah, together with a small plant located thereon and miscellaneous machinery, equipment and personal property used in connection with the operation of the plant and mining property. (R.

The decedent acquired his interest in this property by reason of entering into a joint venture agreement with Thomas N. Neale and Sulphurdale Mining Company, a Nevada corporation, under date of March 23, 1961. Pursuant to the agreement, the property was to be operated under the joint venture name of "S

phurdale Chemical Company." Decedent was the managing joint venturor and was to be in charge of all operations of the joint venture. In the event of the death of a joint venturor, his executor or administrator should carry on in his place and be subject to the obligations of the deceased joint venturor under the agreement. The interest of the decedent in the venture was 51%. (Exhibit 3 to R.)

Immediately following the death of the decedent, respondent Ernest L. Lewis was instrumental in causing the Lewis Food Company to exercise an option to purchase from Neale and Sulphurdale Mining Company for $415,000 a 46.55% interest in the joint venture. Under this transaction, respondent obtained from the purchase price unknown to the executors, a payment of $24,000. (Tr. 112)

The joint venture has never proved to be profitable. In order to keep this venture going, it was necessary for the decedent or the Food Company to pour in excess of $600,000 into the venture. (Tr. 49) This was accomplished, prior to decedent's death, by creating an account into which the decedent or the Food Company deposited funds which were withdrawn and charged to the venture. Upon the death of the decedent, it was necessary to continue to pour money into the venture. The executors determined that this should be done by advancing money from the Food Company. Under this procedure there was advanced to the venture the sum of $8,556 between April 28 and June 30, 1966. Included in these advances was salary to respondent which was

to be $650 per month, with an expense allowance of $200 per month, one-half of which was to come from the Food Company and the other half to be charged to the joint venture. (Tr. 36, 43)

Necessarily the only means of paying the cost of maintaining the joint venture property will be to continually advance money for such purposes which, until the property is sold, must come from the Food Company. This Company during the pendency of the probate proceedings is under the direction and control of the executors. The joint venture could, accordingly, be a substantial drain upon the funds of the estate. This the decedent recognized and accordingly made provision in his will that the Utah property should be sold for cash or traded for listed stocks within six months, if possible, and if not sold by the executors within six months, then the property should be sold at public auction by professional auctioneers identified in his will. (Will - page 1 Of. 13)

Under date of June 2, 1966, respondent Ernest L. Lewis filed in the District Court of Millard County, Utah, a petition for the appointment of himself as ancillary administrator with the will annexed of the estate of the decedent. The petition alleged that decedent died leaving a will which was duly admitted to probate on May 25, 1966, as hereinabove set forth. The petitioner did not present with his petition a copy of the will and the probate thereof duly authenticated as required by the provisions of Section 75-3-23, U.C.A.

1953, but alleged that such production would be made at the hearing on his petition. (R. 1-3)

Respondent Ernest L. Lewis was in touch with the representatives of the estate and in close contact with the proceedings in California. On June 2, 1966, a conference was held between the executors and their counsel at which Ernest Lewis appeared with his attorney, who announced that Mr. Lewis had filed for ancillary letters of administration in the State of Utah. On the same day, consideration was given to the appointment of Utah counsel, the names of certain recommended attorneys were obtained, and on June 5, at the meeting of the executors, employment of Utah counsel was authorized. On June 8, attorneys for various executors came to Utah and employed Messrs. Crafts and Waddingham as counsel for the executors, who on June 9th prepared and transmitted objections to the petition of respondent and their own petition for the probate of the will of decedent as a foreign will and for the issuance to executors of letters testamentary. (Tr. 7-9) This was filed on June 14, 1966. (R. 4-11) Copy of the will and the probate thereof duly authenticated by the California Court was filed in support of the executors' petition. (Of. 12-96)

The two petitions came on for hearing before the lower Court on July 29, 1966. The lower Court made findings and conclusions that:

> 1. Ernest L. Lewis is a competent person to be named as administrator with will annexed

in this matter, and is in no way precluded from so serving.

2. Lucille Parker, Jack Heidt and Robert Gaston were named in the will as "trustees" but not as executors, and hence as non-residents of the state of Utah are incompetent to serve here.

3. However, it is immaterial whether they were named as "trustees" or executors in the will inasmuch as they did not petition this Court within the 30 days required by Section 75-3-4 U.C.A. 1953. Further they did not show good or any cause for the delay.

4. From the verified petition herein it appears the rental value of the real property in Utah approximates $47,000 per year and the value of the personal property approximates $9,000. There was no dispute as to such figures.

5. The will was in all respects executed as required by law, was admitted to probate in California on May 25, 1966 as appears from the exemplified copies of the will and the Court proceedings there which have been filed in this Court.

Pursuant to said findings and conclusions, the Court ordered that the will of the decedent be admitted to probate in Utah, that Ernest L. Lewis be appointed administrator with the will annexed, that the objections of Parker, Heidt and Gaston be overruled and denied and their petition for appointment of themselves as executors be denied. (R. 98-104)

ARGUMENT

POINT I.

THE LOWER COURT ERRED IN HOLDING THAT APPELLANTS WERE NOT NAMED AS EXECUTORS UNDER THE WILL OF THE DECEDENT.

At the threshold of this argument we are confronted with the question of whether appellants are named executors under the will of the decedent. If they are not executors, they are disqualified from acting in these ancillary proceedings because they are nonresidents. If they are executors, their nonresidence does not disqualify them. *In re Love's Estate,* 75 Utah 342, 285 Pac. 299; *In re Raat's Estate,* 102 Utah 482, 132 P. 2d 136; *In re Howard's Estate,* 108 Utah 294, 159 P. 2d 586.

As shown by the foregoing statement of facts, the will of the decedent does not designate executors by that term. The decedent employs the term "trustees." This situation required judicial construction of the will to determine whether the persons named as trustees were in law executors under the will. This the California Court undertook to do pursuant to the petition of appellants. The California Court, upon a consideration of the provisions of the will hereinafter further considered, held that appellants were named as executors under the will and made the order for their appointment. (Of. 87-89) The Utah Court notwithstanding the judgment and determination theretofore made by the California Court at the domicile, held otherwise as hereinabove shown. In so doing, we submit the lower Court erred.

(a) The Order of the California Court Appointing Appellants as Executors Is Binding Upon Respondent and the Lower Court.

The Utah trial court as indicated herein admits the will of the decedent to probate on the record and order of the California Court. The lower Court, however, undertakes to fragment the order of the California Court and while admitting the will to probate, in effect strikes down the order of the California Court in appointing appellants as executors thereunder. This the Utah Court may not properly do.

As herein shown, respondent Ernest L. Lewis appeared in person and by attorney in the California proceedings in which that Court held that appellants were named as executors under the will and ordered their appointment. Respondent was accordingly a party to such proceedings and is bound thereby. He may not now bring those proceedings to the Utah Court as a basis for the admission here of the foreign will of the decedent and avoid a portion of the judgment of that Court pursuant to which appellants were appointed as executors under the will of the decedent.

The foregoing controlling principle is announced and fixed in this jurisdiction by the landmark case of *Barrette v. Whitney,* 36 Utah 574, 106 Pac. 522, 37 L.R.A. N.S. 368. The decision of *Barrette* establishes in this jurisdiction the proposition that where statutory notice has been given, all persons who are interested in the estate and in fact all the world are bound by all orders or decrees duly entered. Not only was respondent

Ernest L. Lewis given notice of the proceedings held before the California Court but he appeared and participated therein. He is accordingly bound by those proceedings and cannot now object in ancillary proceedings in Utah, to the result obtained in the very proceedings in which he participated. If respondent were dissatisfied with the result reached in California, his remedy is by appeal in the California Courts. In order to test the soundness of the foregoing principle one need only consider for a moment the havoc which would result from a contrary rule. If the judgment of the California Court can be assailed in Utah it can be assailed in every other state in which the decedent held property. Moreover, if the appointment made by the lower Court were permitted to stand, respondent might very well seek refuge behind the Utah judgment and refuse to account to the executors upon the ground that their appointment in California was void. This demonstrates the necessity of having this question resolved at the domicile and if attacked there only by appeal in the courts of that state. He cannot in effect collaterally attack those proceedings by the ancillary proceedings in the State of Utah. The rule is stated in Bancroft, Probate Practice, 2nd Ed., Vol. 1, Section 40, as follows:

> "Where statutory notice has been given, all who are interested in the estate, and, in fact, all the world, are bound by all orders or decrees duly entered. And such notice, where the statute so provides, may be constructive and need not be actual." Citing numerous cases including California authorities and *Barrett v. Whitney, supra.*

Moreover, respondent Ernest L. Lewis is bound by the express provisions of Section 75-3-24, U.C.A. 1953, as follows:

> 75-3-24. Hearing and proof. — If on the hearing it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any other state or territory of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and shall have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration shall issue thereon.

The foregoing section is considered carefully in Bancroft, Probate Practice, 2nd Ed., Vol. 1, under Section 145, where the following rule is laid down:

> Under the federal constitution and statutes governing the effect of judgments of one state upon proper proof in another, probate in any state must be considered as conclusive upon the courts of any other in respect of every matter in which it is conclusive in the state of original probate. The original probate is thus conclusive as to personalty everywhere upon all questions of due execution, fraud, undue influence, and other matters affecting the validity and formal sufficiency of the will as the last will of the particular decedent, save for such right to appeal, move to set aside, or contest after probate as may be given by such jurisdiction. And if the statute in another jurisdiction where the will is subsequently offered for probate as a foreign will provides that a will made out of

> the state by one not domiciled therein is as valid when executed according to the law of the place in which it was made or in which the testator was domiciled at the time as if made in conformity with domestic law, such statute, interpreted in the light of the requirement of the federal constitution that full force and effect be given judgments from sister states, makes probate upon the record of probate in the other state conclusive as to sufficiency of the will as a muniment of title to domestic realty. The fact that a foreign will is subject, in the jurisdiction of its original probate, to attack or contest and to review on appeal does not militate against its conclusiveness in the jurisdiction of ancillary probate, unless and until such attack or appeal is made or taken in the original jurisdiction. Nor does such fact warrant like attack or review in the ancillary jurisdiction.

Specifically, the determination of the right to letters testamentary is conclusive upon all parties who were participants in and bound by the proceedings in which that determination was made. This rule is stated in Bancroft, Probate Practice, 2nd Ed., Vol. 2, Section 276, as follows:

> The order granting letters adjudges of necessity the right of the person to whom they are granted to such letters.

It is accordingly clear that the determination of the California Court on the question as to whether appellants were named as executors under the will of the decedent and the order appointing them to this office is conclusive upon respondent and the lower Court here.

(b) The Will Names Appellants as Executors.

Assuming *arguendo* that the Utah Court was not bound by the order of the California Court appointing appellants as executors, and that the Utah Court could examine the will *de novo* on this question can there be any serious doubt that the California Court was right in the determination which it made? We think not.

It appears that three sections of the Utah Code, 1953, are involved here. They are respectively Sections 74-2-2, 74-2-24 and 74-3-17, which provide as follows:

> 74-2-2. Intention to be ascertained from words of will. — In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.
>
> 74-2-24. Imperfect descriptions to be corrected — Evidence admissible. — When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence: but evidence of the declarations of the testator as to his intentions cannot be received.
>
> 74-3-17. Although not named executor, one intended entitled to letters. — Where it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in

the same manner as if he had been named executor.

Of the foregoing Sections, 74-3-17 is controlling here. This Section is substantially the same as Section 402 of the California Code. Historically, of course, our probate code was largely taken from that of California, and the construction of the California Courts should be given considerable weight in construing the Utah Code provisions. *In re Raat's Estate, supra.* The question here is simply whether the named persons are charged with the performance of the duties of executors. That they are designated "trustees" is not material.

The duties of an executor are essentially to marshal the assets of the estate, pay the debts of the decedent and the costs of administration and to sell such property as may be necessary for these purposes, and then to distribute the remainder of the estate to the parties entitled thereto under the will. In a large estate such as this, the payment of estate and inheritance taxes is one of the most important duties of the executor, and often necessitates the sale of property to do so. The functions of a trustee arise when the probate proceedings as such have been completed. It is quite common in large estates today to name the same person or persons as executors and trustees under the will, the reason being that thereby a continuity of control over the estate property can be achieved. The persons so named would accordingly perform their duties as executors until those duties were discharged and thereafter per-

form their duties as trustees. The essential inquiry should accordingly be directed to an examination of the duties imposed upon appellants. If the appellants are required to perform the duties of executors under the will, they are named as such regardless of the term employed to identify them.

An examination of certain of the provisions of the will quite clearly demonstrate that the duties required to be performed by appellants here were duties of executors. This is made clear by the following provisions:

Under Section Thirty-First at Page 14 of the will (Of. 25) the following duties are imposed upon the parties named:

> For the purpose of carrying out the terms of this Will I shall appoint as trustees: my niece, LUCILLE CASSO-PARKER as head trustee, ROBERT GASTON as attorney and co-trustee, and JACK HEIDT now of the Union Bank of Los Angeles, as the third trustee, and CAROLYN M. ALEXANDER as an alternative trustee. However, LUCILLE CASSO-PARKER would have the right to replace ROBERT GASTON with or without cause, and hire any attorney that she sees fit and also to appoint any additional co-trustee in case one of the others resigned for any reason. In the case of the death of LUCILLE CASSO-PARKER, then CAROLYN M. ALEXANDER shall assume the responsibilities of trustee. In the case of the death or resignation of LUCILLE CASSO-PARKER or CAROLYN M. ALEXANDER, then JACK HEIDT will assume the trusteeship.

The usual language for the appointment of an executor is substantially as follows: "I nominate and appoint as executor hereunder (*the named person.*)" The language hereinabove employed is of the same import. The duty of carrying out the terms of the will is certainly that of an executor. It may also be the duty of a trustee if trusts are created but it is nonetheless the duty of an executor.

The will provides for the sale of various parcels of property under Paragraph First, Page 1 (Of. 13) thereof as follows:

> FIRST: Inasmuch as my mineral and mining holdings are substantial and somewhat complicated, and even though they may have considerable value, I would instruct my trustee or trustees to attempt to sell them for cash or trade for listed stocks at a reasonable or fair value, if possible, within six (6) months. If they were unable to find a satisfactory buyer for those mineral properties within the six (6) month period, then I would instruct that such trustee or trustees employ the Milton J. Wershow Company or the David Weiss Company to offer the mineral property holdings, namely Sulpherdale Chemical Company, my interests in Nuclear Fuel and Rare Metals for public auction, and sell them at the best possible price that they would bring at public auction; and that the auctioneer be instructed to publicize the sale to reach the greatest number of potential buyers. If the Milton J. Wershow Company or the David Weiss Company are no longer in business, a similar capable organization may be used for this purpose.

The sale of these assets is quite clearly the function of an executor especially where the sale is to be made immediately.

The will in Paragraph Second, Page 2 (Of. unnumbered following 13) provides for the sale of property for the purpose of payment of inheritance taxes as follows:

> . . . If the total business could not be sold at the minimum of three (3) times book value then I instruct my trustee or trustees to sell at fair market value the properties owned by LEWIS FOOD COMPANY located at 817 East 18th Street, and Charlotte and Soto Streets to Chicago Street which is not now being used in the business, both properties in the City and County of Los Angeles, and other assets mentioned, other than the LEWIS FOOD COMPANY itself and its property located at 6700 Cherry Avenue, North Long Beach, and that the revenue received from these sales be used to pay the inheritance tax on my estate, if sufficient. If it is not sufficient and if possible, a long-term loan should be obtained on other assets of LEWIS FOOD COMPANY that would liquidate the balance of the inheritance tax, . . .

One of the most arduous duties of an executor of an estate of the size involved here will be the payment of Federal Estate Taxes. The performance of this duty is imposed by law upon the executor. He cannot complete his probate duties or gain his discharge until such taxes are paid.

The will, Paragraph Sixth, Page 5 (Of. 16) makes provisions for partial distribution:

> . . . Partial distribution, either of the dividends of the operation or the sale of its assets over and above the requirements for inheritance tax may be made at the discretion of the trustee or trustees so long as ample and sufficient funds are retained to maintain the business operation of the LEWIS FOOD COMPANY. . . .

Distribution whether partial or complete is a function of the executor.

Numerous trusts are created under the will of the decedent. In none of these are all the executors named as trustees. In each of these trusts Security First National Bank is named as trustee, with an individual (usually Lucille Parker) or individuals, as co-trustees. (Of. 13-33) There is accordingly a separation of functions and personnel between appellants as executors and the parties charged with the duties of administering the trusts.

The foregoing analysis clearly demonstrates the proposition that appellants were named as executors, that the California Court was correct in its construction and the lower Court erred.

(c) Property Involved Here Is Personalty Which Is Controlled by the Law of the Domicile.

The foregoing argument under this Point I should dispose of the question of whether appellants were named as executors under the will. This question is one

which of necessity must be determined at the inceptio of probate proceedings. The ownership of or distribu tion of property is not involved in that determinatio The general rule is, however, that the validity and in terpretation of wills with respect to realty is governe by the law of the situs and with respect to persona property by the law of the domicile.

As herein shown Paragraph First of the will re quires the executors immediately to sell the Utah prop erty or to trade the same for listed stocks, in othe words to convert the same into personal property.

Section 74-2-22 of U.C.A., 1953 dealing with th question of when realty is deemed personalty provide as follows:

> 74-2-22. When realty deemed personalty. - When a will directs the conversion of real pro erty into money, such property and all its pr ceeds must be deemed personal property fro the time of the testator's death.

Section 74-3-21, U.C.A., 1953, sets forth the abo stated rule with respect to construction, as follows:

> 74-3-21. When law of locus and law of dom cile governs. — Except as otherwise provide the validity and interpretation of wills are go erned, when relating to real property within th state, by the law of this state; when relating personal property, by the law of the testato domicile.

If the Utah property is regarded as realty it is co verted into personalty by the terms of the will and und

the foregoing Section 74-3-21 the will with respect to such property is controlled by the law of the domicile.

As hereinabove shown, the rights of decedent in the Utah property are basically controlled by the joint venture agreement. Generally speaking, joint ventures and partnerships are governed by the same rules of law. *Forbes v. Butler*, 66 Utah 373, 242 Pac. 950. Usually, in the case of the dissolution of a partnership, the provisions of Section 75-11-9 of our probate code apply, pursuant to which the surviving partner has the obligation and duty to wind up the affairs of the partnership and account to the representative of the deceased partner. Respondent does not qualify for such duties because he asserts and the lower Court found that he had transferred his interest in the venture to his wife. However, the matter of the operation and control of the joint venture in the event of the death of a joint venturor is expressly controlled by the provisions of paragraph 15 thereof to the effect that:

> This agreement shall inure to the benefit of and shall be binding upon the respective successors and heirs and assigns of the parties hereto. In this respect, in the event of the death of an individual joint venturor his executor or administrator shall carry on in his place and shall be subject to the obligations of said deceased joint venturor under this contract until distribution and upon distribution the heir of said joint venturor or the purchaser of the joint venturor's interest shall be subject to all of the terms and conditions of this agreement.

(Ex. 3, page 5, R.)

Control of the joint venture is placed in the hand of the decedent under paragraph 5 of the joint ventur agreement which provides as follows:

> Contributions and duties of Lewis. Lewi shall be the managing joint venturor and wil be in charge of all operations of the joint ventur and shall utilize sound business principles in th management and operation of said joint ventur

(Ex. 3, Page 3, R.)

Considering these statutes, the provisions of th will and the joint venture agreement, it is manifest tha the control of the joint venture was intended to be i D. B. Lewis and his executors. As herein shown, th Food Company acquired an additional 46.55% intere in the joint venture immediately after the death of th decedent. Inasmuch as the joint venture had no fund to operate and was dependent in order to keep goin upon funds being supplied from outside sources, suc property should be controlled by the executors name at the domicile. If the matter were fragmented and i the ancillary proceedings an administrator with the wi annexed were able to control this property and mak essential decisions in connection therewith, the unifi administration which is so essential in an estate of th size and complexity would be lost and substantial det ment might result.

The foregoing simply further demonstrates the e sential proposition that the appointment of the execut at the domicile must be binding upon the Utah Court

POINT II.

THE LOWER COURT ERRED IN DENYING THE UTAH PETITION OF THE EXECUTORS UPON THE ASSERTED GROUND THAT THE SAME WAS NOT FILED WITHIN THIRTY DAYS FROM THE DATE OF THE DEATH OF THE DECEDENT.

As hereinabove shown, the Court concluded that it was immaterial whether the appellants were named as trustees or executors inasmuch as they did not petition the Court within the thirty days required by Section 75-3-4, U.C.A., 1953.

In so holding, we believe the Court was clearly in error.

(a) The California Petition Was Timely Filed.

Decedent died on Monday, April 25, 1966. On the following Monday, May 2, 1966, the petition of appellant, Lucille Parker, was filed in the Superior Court of Los Angeles County and on the following day the petition of the other two appellants. No contention is or can be made that the executors did not proceed in compliance with California law in the timely filing of their petitions.

The most cursory reading of this will demonstrates that the instrument is a classic example of the attempt of a wealthy business man to prepare an elaborate and complicated will without the aid of legal counsel. As herein shown, the decedent did not use the term "exec-

utors'' and throughout the will employed the ter
''trustees.'' At the outset it was necessary for the a
pellants to have a legal determination made of th
representative capacity in which they were authorize
to act. Until that determination was made, they ha
no power to act as executors in California or any othe
jurisdiction. Upon a hearing of the petition, the Cali
fornia Court held on May 25, 1966, that petitioners wer
named as executors under the will. On the very sam
day they furnished a corporate surety bond for fiv
million dollars and signed their oaths as executor
which was filed and letters testamentary issued on th
following day. This was clearly most expeditious co
duct. Within the following week the respondent r
turned to Utah, engaged counsel and filed his petitio
He asserts and the lower Court holds, that the exec
tors were required under Utah law to file their petitio
for ancillary proceedings in Utah on or prior to Ma
25, 1966.

(b) The Utah Petition Could Not Be Fil
Until the Will Was Admitted in California.

The provisions of Section 75-3-4, U.C.A., 1953, r
late to the duty of an executor in control of a will
initiate proceedings at the domicile of the decedent.
we have heretofore observed, the decedent died a re
dent of California. In that jurisdiction the proceedin
were commenced with the utmost expedition. The p
ceedings in Utah involve the admission of a foreign w
to probate. We must accordingly look to our statute
ascertain the requirements of our law in this respe
which requires an examination of Sections 75-3-

75-3-23 and 75-3-24, U.C.A. 1953. Section 75-3-24 has heretofore been considered. The provisions of the other two sections are respectively as follows:

> 75-3-22. Foreign wills — May be admitted to probate. — Wills duly proved and allowed in any other state or any territory of the United States, or in any foreign country or state, may be allowed and recorded in any county in which the testator shall have left any estate.
>
> 75-3-23. Proceedings on production. — When a copy of such will and the probate thereof, duly authenticated, shall be produced by any person interested in the will with a petition for letters, the same must be filed, and the court or clerk must appoint a time for the hearing, of which notice must be given as hereinbefore provided for an original petition for the probate of a will.

The language of Section 75-3-23 is at the outset controlling. From this section it is seen that ancillary proceedings for admission of a foreign will require as a condition precedent, the proof of the will in another jurisdiction. The party seeking to conduct ancillary proceedings under a foreign will cannot produce the original will because this is lodged with the Court at the domicile. He must await the outcome of proceedings at the domicile before he can initiate the ancillary proceedings because he is required to produce the copy of the will and the probate thereof duly authenticated. Under the facts here, the executors could not have filed the petition in Utah until the 26th of May, the day letters were issued to them. This under the ruling of the lower Court would be too late under the provisions of Section 75-3-4.

To further demonstrate the error of the Court' ruling, suppose that a contest had arisen in Californi on the admission of the will or the naming of the exec utors and this had taken a month to resolve. Durin this period compliance could not have been had wit Section 75-3-23 because the required record could n be produced. Could it seriously be contended that unde such circumstances Section 75-3-4 foreclosed the rig of the executors to conduct ancillary proceedings i Utah.

(c) The Utah Petition Was Timely Filed.

It is accordingly necessary to construe the pro sions of Section 75-3-4 in relation to the sections deali with foreign wills. The proper construction of all the sections is, we submit, that the thirty-day period pr scribed under Section 75-3-4 does not begin to run i the case of a will being admitted in a foreign jurisdi tion until the order has been entered for the admissi of that will to probate, and the naming of an execut under the will. When that has occurred, the pers named as executor is in a position to proceed in co pliance with the foreign will statutes. Until that ord has been issued the hands of the executor are tied a he cannot comply with the provisions of Section 75-3- This the lower Court failed to recognize. Under t construction the executors in filing their petition w the Utah Court on June 14, 1966, complied with requirements of Section 75-3-4 because they w within the thirty-day period following the issuance the California order of May 25, 1966.

No hardship can result from the foregoing construction of these statutes. If any necessity arose for immediate proceedings in any estate in ancillary proceedings in Utah, the assets can be protected under temporary administration.

No Utah decision is contrary to the foregoing. *In re Love's Estate,* 75 Utah 342, 285 Pac. 299, is not in point here. In that case decedent Flora B. Love died a resident of Salt Lake City, Utah, leaving a small estate in this jurisdiction. This was the place of her residence and the situs of domiciliary proceedings. Accordingly, proceedings in her estate were necessarily commenced here. The executor was not under the necessity of first having the will admitted in a foreign jurisdiction and then conducting ancillary proceedings in Utah in compliance with our statute relating to the admission of foreign wills. Accordingly, Section 75-3-4 applies and the case was properly decided.

POINT III.

EVEN IF SECTION 75-3-4 WERE APPLICABLE, GOOD CAUSE FOR DELAY WAS SHOWN.

Assuming *arguendo* that the executors were under the necessity of filing their petition in the Utah Court within thirty days after decedent's death, they have shown good cause for delay. The executors were confronted with the administration of a very large and complicated estate. The principal asset of the estate was a very profitable business in which the decedent

was engaged in the packaging and sale of pet food This business and the conduct thereof required ver important and serious considerations on the part the executors. Moreover, there were properties locate in Oregon, Idaho, Tennessee and Utah which require consideration and attention. (Tr. 68-77) With respe to the property located in Utah, this was under th local management of respondent, the brother of dec dent. He was deriving a salary from the local manag ment of this property and charged with the duty of i care, yet the executors were under the necessity a are now under the necessity of continually advanci money for the preservation and operation of the Ut property. Moreover, at the instigation of the respon ent, Ernest L. Lewis, the Food Company immediate following the death of decedent was induced to pay o $415,000 in purchase of the Neale and Sulphurdale Mi ing Company interests in the Utah venture. (Tr. 32-5

The entire period from the date of death of t decedent until the filing of the application in Utah w less than two months. There is no intimation here th the Utah property was in any manner prejudiced impaired by this delay. The great urgency with resp to the affairs of the decedent was at the domicile the decedent. There the most valuable asset, name the Food Company, was located, and there must generated the money with which to hold together t property of the estate including the property of t joint venture. Had those affairs been neglected to detriment of the estate, the damage would have b incalculable.

The decedent appears not to have reposed confidence in respondent, Ernest L. Lewis. Nothing was left to him directly under the will. A trust was created for Ernest L. Lewis, his wife and his son, but no responsibility whatever was placed in the hands of Ernest in connection with the administration of the estate. The full responsibility for the affairs of the estate is lodged in the executors.

This is a good example of the prejudice and uncertainty which would arise from depriving an estate of unified control. Here the executors were under the necessity of continually pouring money into the property for the purpose of its preservation. The control of the property should of necessity be lodged with the same persons who are responsible for the expenditure of the funds necessary for its operation and preservation.

The rule is well settled in Utah that upon a timely application the Court has no discretion but to appoint a qualified executor. *In re Love's Estate, supra,* p. 353. Nor should the Court set aside the nomination of a testator except upon compelling reasons, none of which are present here. The peculiar facts in this case and the necessity for unified control over the Utah property compel the appointment of the executors named by the decedent.

CONCLUSION

The order of the Court denying the petition of t executors should be reversed and the case remanded the lower Court with direction to grant the petition the executors and for the entry of an order appointi them as executors for the conduct of ancillary prob proceedings in this jurisdiction.

Respectfully submitted,

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