

1949

Marion Eugene Harmston v. J. H. Calder : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate
of
MARION EUGENE HARMSTON,
Deceased.

Rogers T. Harmston,
Marion Eugene Harmston,
Helene G. Gillis and
Carl Fredrick Harmston,
Plaintiffs and Appellants.

vs.

J. H. Calder, as the Administrator
of the Estate of Marion Eugene
Harmston, deceased,
Defendant and Respondent.

Case No.
7362

Appellants

Brief of ~~Respondents~~

R. J. HOGAN,
Attorney for Appellants.

J. RULON MORGAN and
ELIAS HANSEN,

*Attorneys for Respondent
and Defendant.*

FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate
of
MARION EUGENE HARMSTON,
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Rogers T. Harmston,
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Carl Fredrick Harmston,
Plaintiffs and Appellants.

vs.

J. H. Calder, as the Administrator
of the Estate of Marion Eugene
Harmston, deceased,
Defendant and Respondent.

Case No.
7362

Brief of Respondents

STATEMENT OF THE CASE

This is an appeal from a judgment and decree (R. 474) in favor of the J. H. Calder, as the administrator of decedent's estate, and against all the beneficiaries of decedent's estate, upon an action filed by the beneficiaries for the revocation of Calder's Letters of Administration

and the appointment of an administrator de bonis non in his stead and in protest to the allowance of Calder's Final Account and Petition for Decree of Distribution (R. 402).

The decedent, Marion Eugene Harmston, died on the 13th day of April, 1922, a resident of Duchesne County, Utah. At the time of his death he left surviving him the following heirs-at-law:

- Isabelle Harmston, a widow,
- Marion Eugene Harmston, a son,
- Helene E. Harmston, a daughter
- Rogers T. Harmston, a son,
- Carl Fredrick Harmston, a son.

Pursuant to a petition of decedent's widow, filed May 29, 1922, (R. 305 - R. 307) and after she had posted a corporate bond in the sum of \$1,100.00 (R. 314) Letters of Administration duly and regularly issued to the widow as administratrix of said estate (R. 313).

June 14, 1926 the administratrix filed her Inventory and Appraisement in said estate and charged herself with the following property.

Lots 29, 30, 31 and 32, in Block nine, Plat "A", Roosevelt, Utah, with a story and a half frame building.	
Appraised at	\$1,600.00
Lots number 5 to 12 inclusive in Block 16, Plat "A", Roosevelt, Utah, frame resident and improvements thereon.	
Appraised at	2,000.00
Lots 8, 9, 10 in Block 32, Plat "A", Roosevelt, Utah, with frame building thereon.	
Appraised at	350.00
Cash in Roosevelt State Bank	200.00
Three Cows and One Calf	

Appraised at	150.00
Three Hundred Shares of stock in Texas Standard Oil Company (half interest) and Ten Shares of stock in Texas Standard Oil Company.	

Appraised at	150.00
--------------	--------

TOTAL	<u>\$4,950.00</u>
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(R. 322-323)

June 28, through July 26, 1922, the administratrix duly published Notice to Creditors (R. 324), pursuant to which August 30, 1937, a Decree of Notice to Creditors was entered in the proceedings (R. 325).

August 18, 1937, the administratrix filed her First Report and Petition for Partial Distribution, J. Rulon Morgan, of Provo, Utah, appeared as her attorney in this petition—the administratrix, among other matters, set forth that all the claims, debts, costs and taxes on all property had been paid; that there were no claims against the estate except fees for the administratrix and for attorney's fees, all of which would not exceed Five Hundred Dollars (\$500.00); that a partial distribution of real property could be had without loss to creditors; that all the heirs-at-law had conveyed to the widow their interest in and to;

All of Lots 29, 30, 31 and 32, in Block 9, Plat "A",
Roosevelt Townsite, together with the improve-
ments thereon.

and prayed that partial distribution be made thereof (R. 327-330).

August 30, 1937, pursuant to the above petition, the court, by its order, distributed the above described real property to the widow, Isabelle T. Harmston (R. 338).

July 31, 1937, thirty (30) days prior to the issuance

of the above Decree of Partial Distribution, Isabelle T. Harmston, as administratrix of the estate of Marion Eugene Harmston, without authority of court and for herself individually, mortgaged the above described real property to Farmers and Merchants Bank, of Provo, Utah, for the sum of Fouth Thousand Five Hundred Dollars (\$4,500.00) (T. 88-93).

December 11, 1937, Isabelle T. Harmston, the administratrix of decedent's estate, died at Duchesne County, Utah. At the time of her death she left as her sole heirs the same four (4) chldren, the heirs of the estate of Marion Eugene Harmston, deceased. (R. 131-135).

April 2, 1938, three (3) months and twenty-two (22) days after the death of Isabelle T. Harmston, the Farmers and Merchants Bank of Provo, through their attorney, J. Rulon Morgan of Provo, Utah, petitioned the court for the appointment of J. H. Calder, cashier of petitioner's bank (T. 16) of Provo, Utah, to be the administrator de bonis non of the estate of Marion Eugene Harmston, deceased. The Farmers and Merchants Bank qualified its petition as an interested party in decedent's estate by alleging that it, the Farmers and Merchants Bank, was a lawful and bonafide creditor of the estate of Marion Eugene Harmston, deceased'' (R. 342-344).

April, 1938, the court made and entered its order appointing J. H. Calder the administrator of decedent's estate, upon his filing a Five Hundred Dollar (\$500.00) corporate surety bond and qualifying (R. 349).

May 5, 1938, Calder filed his corporate surety bond, and Letters of Administration de bonis non issued to him (R. 350 and 351).

February 15, 1939, almost a year after the filing of his letters, Calder filed a petition of leave to sell real property belonging to the estate and as grounds therefore set out that the sale was necessary in order "to pay the costs of administration and the obligation of the decedent" (R. 352 - 353).

March 6, 1939, the court made and entered its order authorizing Calder to sell, at private sale, the following real property belonging to said estate.

Lots 8, 9 and 10, in Block 32, Plat "A", Roosevelt Survey of Building Lots, in Duchesne County, Utah, with a small frame building thereon.
(R. 359-360)

April 21, 1939, Calder, by his attorney J. Rulon Morgan, filed a petition of return of sale of real property and for confirmation thereof and for attorney's and administrator's fees and among other matters alleged; that on the 30th day of March, 1939 that he had sold the said real property to one Harry W. Larson for One Thousand Dollars (\$1,000.00) — One Hundred Fifty Dollars (\$150.00) down and in installment payments of Twelve Dollars Fifty Cents (\$12.50) per month, with interest on the balance at six percent (6%) per annum; that the real property had been appraised within one year from date of order of sale and that the price bid was more than ninety per cent (90%) of the value of said property and for Thirty-Five Dollars (\$35.00) each for fees on account of the administration and his attorney (R. 361 - 365).

September 9, 1939, an order of court was entered appointing Grant Calder, Golden Collins and Howard Calder appraisers of said estate (R. 372).

September 26, 1939, one (1) year and four (4)

months after his appointment Calder filed his Inventory and Reappraisal of said estate and set forth therein that the following property of said estate had come into his possession:

Lots 29, 30, 31 and 32, in Block 9, Plat "A", Roosevelt, with a story and one-half frame building.	Appraised value	\$.....
Lots 5 to 12 inclusive in Block 16, of Plat "A", Roosevelt, Utah, with a frame residence and improvements thereon.	Appraised value	\$1,500.00
Lots 8, 9 and 10, in Block 32, Plat "A", Roosevelt, with small frame building thereon.	Appraised value	900.00
Three Hundred Shares of Stock in Texas Standard Oil Company (half interest) and Ten Shares of Stock in Texas Standard Oil Company.	Appraised value	\$.....

(R. 373-374)

The appraisal was signed by only two appraisers, Golden Collins and Howard Calder, as of September 9, 1939, and approximately six (6) months (April 21, 1939) after the petition for confirmation of sale had been filed setting forth that the property had been appraised within one (1) year of the date of the order of sale (R.373 - 375).

September 25, 1939, the court made and entered its order confirming the sale of the said real property to the said Harry W. Larson for One Thousand Dollars (\$1,000.00), payable One Hundred Fifty Dollars (\$150.00) down and the balance in installments of Twelve Dollars Fift Cents (\$12.50) per month at six per cent (6%) per

annum and the administrator was ordered to pay to each the administrator and his attorney Thirty-five Dollars (\$35.00) each, for and on account of fees (R. 375 - 376); pursuant to the above order of court Calder entered into an installment Contract of Sale with Larson (T. 18).

April 22, 1940, Rogers T. Harmston, one of the beneficiaries of decedent's estate, by his attorney Merril H. Larsen, filed his petition seeking revocation of Calder's letters, on the grounds that he had prior rights and that Calder was not entitled to act without consent of all the heirs (R. 377 - 378).

May 10, 1940, Calder, by his attorney J. Rulon Morgan, Demurred to the above petition (R. 382).

June 3, 1940, the court made and entered its Minute Order granting the petition of Rogers T. Harmston upon the payment of all proper charges incurred by the administrator and directed the administrator to file a report (R. 384).

September 4, 1940, the court made and entered another Minute Entry as follows:

This matter having heretofore come on for hearing on petition to revoke letters of administration and grant them to a person claiming under prior rights, and the court having granted said petition, subject to payment to administrator and attorney of all proper charges, and subject to the administrator filing his report, and it now appearing to the court that such matters have been properly taken care of, the court ordered that the bond of the administrator Rogers T. Harmston be fixed at \$500.00, if a corporate surety bond, and \$800.00, if a personal bond.

(R. 385)

October 15, 1942, Rogers T. Harmston filed a cor-

porate surety bond in the sum of Five Hundred Dollars (\$500.00) but it does not appear anywhere in the record that Letters of Administration ever issued to Rogers T. Harmston or that up to this time Calder had ever filed an account in said proceedings (R. 386).

May 9, 1941, Farmers and Merchants Bank, as plaintiff, by their attorney J. Rulon Morgan of Provo, Utah, filed its civil complaints in the Fourth Judicial District Court of Duchesne County, Utah, in two (2) actions against J. H. Calder, as administrator of the estate of Marion Eugene Harmston, deceased, designated by the clerk of said court as files number 1931 and 1932 (T. 79 to 130) and (T. 256 - 304C), whereby and wherein the bank in action 1932 sought to foreclose the mortgage of Four Thousand Five Hundred Dollars (4,500.00), given to the bank by Isabelle T. Harmston, as the administratrix of the estate of Marion Eugene Harmston, deceased, and which was never authorized by the court.

In the civil action 1931, the plaintiff bank sought to foreclose another mortgage against Calder, as administrator of decedent's estate, for the sum of Two Thousand Five Hundred Dollars (\$2,500.00), which represented a note and mortgage given by Isabelle T. Harmston in here individual capacity (T. 264).

Service of Summons, wherein J. Rulon Morgan appeared as attorney, was had in each of these actions upon J. H. Calder, as the administrator of decedent's estate, on the 8th day of May, 1941 (T. 93D - 93C) and (T. 273C and 273D)

July 16, 1941, J. Rulon Morgan, as attorney for his client Farmers and Merchants Bank, a corporation,

caused to be entered the default of his client J. H. Calder, as the administrator of the estate of Marion Eugene Harmston, deceased, in both of said actions. (T. 94 - 274).

July 17, 1941, the court, in both of said civil cases, pursuant to said default, entered its Findings of Fact and Conclusions of Law and Decree of Foreclosure in favor of the plaintiff and against the defendant, J. H. Calder, as administrator of the estate of Marion Eugene Harmston, deceased (T. 97 - 116) and (T. 277 - 297).

August 22, 1941, pursuant to the said Decrees of Foreclosure the alleged mortgaged property was sold, by the sheriff of Duchesne County, and purchased by Farmers and Merchants Bank for the amount of its judgment (T. 130) and (T. 303).

January 20, 1941, Larsen, the purchaser of the real property from the estate, (R. 359) defaulted in installment payments, therefore, as a consequence, March 10, 1942, Calder had him ousted from the premises and Calder picked up vendees Contract of Sale, (T. 17, 18, 19) thereafter, without order or confirmation of court, Calder re-sold the property under another Contract of Sale, dated the 28th day of February, 1942, to one Charles W. Jenkins and Edna Mae Jenkins, his wife, for the sum of One Thousand Seventy-Five Dollars (\$1,075.00), payable Three Hundred Dollars (\$300) down and Fifteen dollars (\$15.00) per month, installments at six per cent (6%) per annum (See appellants' Exhibit I—also T. 18, 19, 20).

May 21, 1941, Calder, as the administrator of decedent's estate, permitted an auditors tax deed to be issued to Duchesne County, Utah, for the delinquent taxes

on the real property of decedent's estate represented by lots:

5 to 12 inclusive in Block 16, Roosevelt Townsite, Duchesne County, Utah, listed and appraised in his inventory at One Thousand Five Hundred Dollars (\$1,500.00)
(R. 374).

the delinquencies for which this property was sold, was for the four (4) years previous taxes (T. 39, 40, 41) and Calder was appointed and qualified as administrator May 5, 1938 (R. 350 - 351).

October 9, 1941 Duchesne County, Utah, sold the aforesaid lots belonging to the decedent's estate to Charles W. Jenkins for the sum of Four Hundred Fifty-nine Dollars Eighty-seven Cents (\$459.87), the amount of the delinquent taxes (T. 40).

August 30, 1947, more than nine (9) years after his appointment, Calder filed his First Account (R. 387 - 391) despite the orders of the court requiring him to account, issued June 3, 1940 and Sept. 4, 1940 (R. 384 - 385).

Calder's account was also a petition for distribution; in his petition Calder alleged:

That all the creditors of the estate had been paid.

That he had on hand\$1,172.01

That \$187.66 was a reasonable sum for administrator's commissions.

That \$306.10 was a reasonable attorney's fee.

That Lots 8 to 10 inclusive, in Block 32, Plat "A", Roosevelt had been sold to Harry W. Larsen and subsequently to Charles W. Jenkins, Larsen's successor.

That Lots 5 to 12, in Block 16, Plat "A", had been purchased by Isabelle T. Harmston, widow of decedent.

Petitioner denies he has any knowledge of the oil

stock listed in his inventory or of any cash or cows listed in the original inventory; thereupon he prays for distribution (R. 387-389).

Calder sets out in his account statement of receipts, from the sale of the real property from Larsen and Jenkins, a sum equal to One Thousand Five Hundred Thirty Nine Dollars (\$1,539.00).

Expenditures

Administration Costs	\$ 7.65	
Administrator's and attorney's fees	70.00	
Taxes	261.28	
Borrowed money	25.66	
Court exp. to oust Larsen.....	2.40	
	<hr/>	
	\$366.99	366.99
		<hr/>
BALANCE		\$1,172.01

(R. 387-391)

Calder and J. Rulon Morgan had already been paid Thirty-Five Dollars (\$35.00) each, for services, the estate was appraised by Calder's appraisers at Two Thousand Five Hundred (\$2,500.00); Calder sought an additional One Hundred Eighty-seven Dollars Sixty-six Cents (\$187.66) or a total of Two Hundred Twenty-two Dollars Six Cents (\$222.06), when the statutory commission on such an estate was only One Hundred Ten Dollars (\$110.00) (Utah Code Annotated 1943, 102-11-25); J. Rulon Morgan had been paid Thirty-five Dollars (\$35.00) and he sought an additional Three Hundred Six Dollars Ten Cents (\$306.10) as attorney's fees from a Two Thousand Five Hundred Dollars (\$2,500.00) estate; they preposed to dstirbute to the heirs Six Hundred Seventy-four Dollars Seventy-Five Cents (\$674.74) (R. 391).

October 15, 1947, all the heirs of said decedent appeared in said proceedings by their attorney R. J. Hogan of Salt Lake City, Utah, and filed their amended petition for revocation of Calder's letters and for the appointment of Rogers T. Harmston, as the administrator of decedent's estate, in Calder's stead and protested the approval of Calder's Final Account and Petition for Final Distribution (R. 402 - 409); in their petition for revocation of Calder's letters, among other matters, the heirs of decedent's estate alleged:

(a) That the original estate consisted of three (3) pieces of real property (numerated and described) and personal property represented by cash, corporate stock and cows all valued at Four Thousand Nine Hundred Fifty Dollars (\$4,950.00).

(b) That one piece of real property had by partial distribution been distributed to Isabelle T. Harmston, who died the 11th day of December, 1937.

(c) That Farmers and Merchants Bank, of Provo, Utah, a stranger to the estate, had fraudulently and falsely alleged itself to be a bona fide creditor of decedent's estate and by virtue thereof, without authority of law and contrary thereto, had J. H. Calder appointed the administrator of decedent's estate.

(d) That Calder, during all the time he purported to act as administrator of said estate, mismanaged and wasted the estate in the following particulars.

(1) Falsely represented to the court that it was necessary to sell property of the estate and by reason thereof sold the same.

(2) Failed and neglected to pay the taxes on the estate and thereby lost the property thereof.

(3) Failed and neglected to marshall the assets of the estate, including cash, cows and corporate stock.

(4) Wasted the money of the estate.

(5) Continued to employ counsel for adverse interests to represent him in the administration of the estate and permitted such counsel to take default judgment against the estate.

(6) Negligently delayed accounting and closing said estate.

And as a protest against the allowance of Calder's account the protestants alleged:

(1) That Calder was not the lawful administrator of said estate.

(2) That a true inventory and appraisement had not been filed by Calder.

(3) That the amount claimed for disbursements in Calder's accounting were illegally paid and should be recharged.

(4) That the amounts claimed for closing the estate, including attorney's fees and administrator's fees, were unreasonable, illegal and not properly chargeable against the estate.

(5) That the receipts failed to account for interest thereon.

(6) That the account did not include all the property of decedent's estate, which should have been marshalled.

(7) That Calder was not a fit and proper person to represent said estate.

(a) To disallow the account.

(b) To recharge to the administrator the moneys expended by him from the estate.

(c) To disallow the claims for attorney's fees and commissions.

(d) Vacating the order appointing Calder administrator and revoking his letters.

(e) To appoint Rogers T. Harmston administrator and directing an accounting to Harmston. (R. 402-409)

About March, 1948, Calder through his attorneys, J. Rulon Morgan and Elias Hansen, filed his Answer and Reply to the foregoing Petition (R. 423 - 429); by his answer Calder generally and specifically denied the allegations of appellant's petition and upon the issues thus formed. March 31, 1948, Joseph E. Nelson, one of the judges of the above entitled court setting without a jury, proceeded to hear the matter, at the conclusion of which the court took the matter under advisement (T. 78).

On the 28th day of July, 1948, the parties entered the following stipulation:

IT IS HEREBY STIPULATED by and between parties hereto through their respective counsel as follows:

That in the event of a revocation, by the court, of the Letters of Administration of J. H. Calder in these proceedings then the appointment by the Court of Raymond A. Gillis of Salt Lake City, Utah, as administrator de bonis non, in the place and stead of the said J. H. Calder will be satisfactory and agreeable to the parties.

Dated this 28th day of July, 1948.

(R. 434)

July 31, 1948, the court made and entered the following Minute Entry in the proceedings:

THE ARGUMENT of counsel to the Report and Petition for Distribution filed by J. H. Calder, and the protest thereto and petition for revocation of letters of administration, and the

said matters having been submitted to the Court for consideration, and further upon the stipulation of counsel for the respective parties, it is hereby ordered that Raymond A. Gillis, be and he is hereby appointed as administrator of the said estate, the bond to be furnished is ordered in the sum of \$1400.00 if corporate surety and personal bond in the sum of \$2600. The Court reserves the making of an Order with respect to the Report and petition filed by J. H. Calder until the matter is further heard, and Mr. Calder, is ordered to account to Mr. Gillis of monies had and received. The hearing on Mr. Calder's Report etc. is ordered continued for sixty days from this date.

(R. 435)

August 26, 1948, pursuant to the foregoing Minute Entry, Raymond A. Gillis filed his bond and Letters of Administration issued to him as the administrator of decedent's estate (R. 436 - 437).

December 31, 1948, entered January 3, 1949, the court made and entered the following Findings of Fact and Conclusions of Law and Decree in the said matter (R. 463 - 475).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

J. H. Calder, the duly appointed, qualified and acting administrator De Bonis Non of the estate of Marion Eugene Harmston, deceased, has filed herein his Final Account and Report and Petition for Final Distribution. To the Final Account and Report and Petition for Final Distribution so filed by said J. H. Calder, administrator, aforesaid Roger T. Harmston filed an Amended Petition for Revocation of Letter of Administration, and for the appointment of himself as administrator De Bonis Non of said estate, and

protested the allowance of the Final Account and Petition for Final Distribution and to the objection and petition so filed by said Roger T. Harmston, the petitioner J. H. Calder filed his reply. Upon the issues raised by the Final Account and Report and Petition for Final Distribution of said J. H. Calder, and the objections to the granting of said Account and the Amended Petition for Revocation of Letters of Administration and appointment of Roger T. Harmston and for the issuance of Letters of Administration to himself, and the reply, came on duly and regularly for hearing on the 31st day of March, 1949, and on the 18th day of December, 1948, and the Petitioner, J. H. Calder was represented by his attorney, J. Rulon Morgan and the protestant and cross-petitioner, Rogers T. Harmston was represented by his attorney, R. J. Hogan, and each of the parties offered evidence in support of the allegations of their pleadings and the Court having heard all the evidence and being now fully advised in the premises, the Court now makes and enters the following:

FINDINGS OF FACT

1. That the petitioner, J. H. Calder, in the duly appointed, qualified and acting administrator De Bonis Non of the estate of Marion Eugene Harmston, Deceased.

2. That Marion Eugene Harmston died at Roosevelt, Duchesne County, State of Utah, on the 13th day of April, 1922, and at the time of his death, he was an actual and bona fide resident of Duchesne County, State of Utah, and left therein an estate consisting of both real and personal property.

3. That said deceased died leaving surviving him the following named heirs at law, who are the only heirs at law of said deceased, to-wit:

Isabelle T. Harmston, widow, who died in
December, 1937.

Marion Eugene Harmston, son, residing at
351 Wilson Avenue, Salt Lake City, Utah.

Mrs. Helene H. Gillis, daughter, residing at
Cottage No. 30, Ambassador Hotel, Salt
Lake City, Utah.

Roger T. Harmston, son, residing at 117 East
27th South, Salt Lake City, Utah.

Fred Harmston, son, residing at 117 East
27th South, Salt Lake City, Utah.

4. That Notice to Creditors has been published in this matter and the Decree of the Court has been duly entered herein showing that due and legal notice to creditors has been given. That the time within which creditors may present claims herein has expired; that all debts and claims against said estate have been paid.

5. That an inventory and appraisement of all the property of the estate of said deceased has been filed herein by Isabelle T. Harmston, the former administratrix of said estate and that the only property described in the Inventory and Appraisement of decedent's estate which came into the possession of said J. H. Calder, administrator De Bonis Non of said estate, consisted of a tract of land which was duly and legally sold by said J. H. Calder, administrator De Bonis Non of said estate, consisted of a tract of land which was duly and legally sold by said J. H. Calder, administrator De Bonis Non of said estate. That all creditors of said estate have been paid and there are no outstanding obligations against said estate.

6. That the petitioner, J. H. Calder, herein presented to the Court his Final Account and Report of all his receipts and disbursements handled by him in connection with the estate of said deceased, and requested that the Court approve the same.

7. That the only assets of the estate of said deceased in the hands of said J. H. Calder consists of \$1168.51 in cash. That from the said amount, the said J. H. Calder is entitled to retain the sum of \$50.00 in payment of the balance of his fees for acting as administrator of said estate and is entitled to pay to his attorney, J. Rulon Morgan, the sum of \$100.00, leaving the balance of \$1,018.51 for distribution or delivery to Raymond A. Gillis, his successor, as administrator of said estate who is now the duly appointed qualified and acting administrator De Bonis Non of the estate of said decedent.

8. That at the time the Inventory and Appraisement was filed by Isabell T. Harmston, the former administratrix, in said estate of her deceased husband, Marion Eugene Harmston, there was reported as belonging to said estate of Marion Eugene Harmston, the following described real property in Duchesne County, State of Utah, to-wit:

All of Lots 29, 30, 31 and 32, in Block 9, Plat "A", Roosevelt Townsite in Duchesne County, State of Utah. Together with all improvements thereon and all easements and right-of-way incident thereto.

That during the administration of the estate of said deceased, said Isabelle T. Harmston, had distributed to her, by the order of this Court, all of the property above described and none of said property ever came into the possession of said J. H. Calder.

9. That the following described real property was sold by said J. H. Calder, administrator, to Harry W. Larsen, to-wit:

Lots 8, 9, and 10, in Block 32, Plat "A", Roosevelt City Survey of Building Lots, in Duchesne County, State of Utah, with a small frame building thereon.

That said sale was duly approved and confirmed by this Court on the 25th day of September, 1939, and that the full purchase price has been collected by said administrator, and that said property was subsequently conveyed by said administrator to Charles W. Jenkins as successor in title and interest to said Harry W. Larsen.

10. That Lots numbered from 5 to 12, inclusive in Block 16 of Plat "A", Roosevelt, Utah, with frame residence and improvements thereon which is described in the Inventory on file herein was administered by Isabelle Harmston, widow of said deceased, and that she purchased from Duchesne County, said property, and received a Quit-Claim Deed from Duchesne County dated May 1st, 1934, recorded May 1st, 1934, in Book 13 of Deeds, page 106, Entry No. 51915. That said Lots 5 to 12 inclusive are now being duly administered in the matter of the estate of Isabelle T. Harmston estate. That the heirs at law of Isabelle T. Harmston and the heirs at law of Marion Eugene Harmston, are the same.

11. That the petitioner J. H. Calder, has never received possession of the 300 shares of stock in Texas Standard Oil Company, nor the ten shares of stock in Texas Standard Oil Company, nor the cow and calf mentioned in the Inventory, nor the money in the bank, and said administrator has made diligent search to find the same but is unable to do so, and that none of said property or any part thereof can be located or possession obtained of the same, except the tract of land which the said J. H. Calder sold to Harry W. Larsen and later conveyed to his successor.

12. That the account attached to the Petition of J. H. Calder is, in all respects, true and correct and the same and the whole thereof is hereby allowed, approved, and settled excepting only that the balance of the administrator's fee is fixed at

\$50.00 and the balance of the attorney's fee to said administrator's attorney, J. Rulon Morgan is fixed at \$100.00, which amounts the petitioner, J. H. Calder is hereby authorized and empowered to pay as and for a full settlement as administrator's fees to J. H. Calder, and said attorney's fee to said attorney, J. Rulon Morgan.

13. That Roger T. Harmston, is a resident of Salt Lake City, Salt Lake County, State of Utah, over the age of 21 years, to-wit: 38 years of age, and is one of the heirs of said decedent, but it appeared at the trial in this cause, that he probably will claim some interest against the estate of Marion Eugene Harmston, deceased, and therefore the Court has deemed it improper to appoint him as administrator of said estate and he has waived his rights to serve as said administrator of said estate in favor of Raymond A. Gillis.

14. That decedent Marion Eugene Harmston departed this life intestate in the City of Roosevelt, County of Duchesne, State of Utah, at the time of his death, he left surviving him the following persons as his sole and only heirs at law.

Isabelle Harmston, widow, 53 years of age, now dead.

Marion E. Harmston, a son, then 23 years of age, now residing at 351 Wilson Avenue, Salt Lake City, Utah.

Helene E. Harmston, a daughter, then 15 years of age, now Helene E. Gillis, residing at Cottage No. 30, Ambassador Hotel, Salt Lake City, Utah.

Roger T. Harmston, a son, then 13 years of age, now residing at 117 East 27th South,

Fred Harmston, a son, then 10 years of age, now residing at 117 East 27th South, Salt Lake City, Utah.

15. That on the 13th day of June, 1922, Letters of Administration were duly and regular-

ly issued to the aforesaid Isabelle Harmston, as administratrix of the estate of the said Marion Eugene Harmston, deceased, and said administratrix duly qualified as such by filing her oath and bond in the sum of \$1,100.00, wherein the United States Fidelity and Guaranty Company appeared as Surety.

16. That the said Isabelle Harmston, as administratrix of the estate of the decedent, Marion Eugene Harmston, caused due notice to creditors to be published and in accordance therewith, the last day to file claims in the said estate expired the 1st day of September, 1922, pursuant to which a Decree of Notice to Creditors was entered in said proceedings, and there was no return of any claims ever having been filed in said estate.

17. That on the eighth day of August, 1922, the Administratrix, Isabelle Harmston made and executed her Inventory of Appraisement in said decedent's estate whereby and wherein she charged herself with having received the following property belonging to said decedent.

REAL PROPERTY

Lots 29, 30, 31 and 32, in Block 9,
Roosevelt, Utah, with a story and
one-half frame building thereon.

Appraised at \$1,600.00

Lots 5, 6, 7, 8, 9, 10, 11, 12, in
Block 16, Plat "A" Roosevelt, Utah,
with a story and one-half frame
building.

Appraised at 2,000.00

Lots 8, 9, and 10, in Block 32, Plat "A"
Roosevelt, Utah, with a building
thereon.

Appraised at 350.00

PERSONAL PROPERTY

Cash in Roosevelt Bank \$ 200.00

Three Cows and one calf 150.00

One-half interest in 300 shares of
Stock in Texas Standard Oil
Company, and ten shares of Stock
in Texas Standard Oil Company.

Appraised at 150.00

Total Appraised value \$4,950.00

That said Inventory and Appraisement was duly and regularly filed in said probate proceedings of said estate on the 14th day of June, 1926.

18. That on the 18th day of August, 1937, the said Administratrix, Isabelle Harmston, filed her first accounting and petition for partial distribution in said estate, pursuant to which the above entitled Court did, on the 30th day of August, 1937, make and enter its Decree of Court, wherein and whereby, the said Court found that all claims and debts chargeable against said estate and against said decedent with exception of fees for the administratrix and her attorney were fully paid and satisfied and thereupon distributed to the beneficiary, Isabelle Harmston the widow of said decedent as here sole and separate estate the following described property then belonging to said estate.

All of Lots 29, 30, 31, 32, in Block 9, Plat "A", Roosevelt Townsite, Duchesne County, State of Utah, Together with all improvements located thereon and all easements and rights of way incident thereto.

19. That on the 11th day of December, 1937, Isabelle Harmston, the administratrix of the said estate of Marion Eugene Harmston, departed this life in the City of Roosevelt, State of Utah.

20. That during the time that Isabelle T. Harmston was acting as administratrix of the estate of her deceased husband, Marion Eugene Harmston, she secured a loan of money from the Farmers and Merchants Bank, for the purpose of

improving a part of the real property belonging to said estate, and the said Isabelle T. Harmston, executed a note and mortgage as the administratrix of said estate of Marion Eugene Harmston, and also executed the same in her individual capacity, as security for the money so loaned to her by the said Farmers and Merchants Bank, and that the money so borrowed by said Isabelle T. Harmston, was used by her for the erection of a service station and building on the property belonging to said estate. That on the 2nd day of April, 1938, said Farmers and Merchants Bank, a banking corporation of Utah, a creditor and claimant against the estate of said Marion Eugene Harmston, deceased, made and entered its petition in said probate proceedings wherein and whereby it petitioned the Court to appoint J. H. Calder, of Provo, Utah, as the administrator De Bonis Non of the estate of Marion Eugene Harmston, deceased.

21. That the appointment of said J. H. Calder as administrator De Bonis Non of said estate was, by and with the consent of all of the heirs at law of said deceased.

22. That pursuant to the petition of the petitioner, Farmers and Merchants Bank of Provo, Utah, the above entitled Court did, on the 5th day of May, 1938, make and enter its order in the above entitled proceeding, appointing the aforesaid J. H. Calder, the administrator De Bonis Non, of the estate of the said Marion Eugene Harmston, deceased fixing his bond at the sum of \$800.00.

23. That on the 5th day of May, 1938, pursuant to the order of the Court aforesaid Letters of Administration, issued out of the above entitled Court in the said J. H. Calder, pursuant to which the said J. H. Calder became and ever since has been the administrator of said decedent's estate.

24. That the said J. H. Calder has not neglected mis-managed, nor wasted said estate as set out in paragraph 11 of the Objections of said Roger T. Harmston, or otherwise. That he has not faulsely or fraudulently represented to the Court that it was necessary to sell part of the real property of said estate to defray the expenses of administrations nor has he unlawfully sold any of the real property of said estate. That said J. H. Calder has not unlawfully neglected to pay the general taxes leveid and assessed against the real property of said estate as alleged in paragraph 11-B of the protest of said Roger T. Harmston, or otherwise, nor have any of the real property or assets of said estate thereby become lost as part of the assets of decedent's estate or otherwise. That said J. H. Calder did not pay the taxes on said Lots 5 to 12 inclusive in Block 16, Plat "A", Roosevelt Townsite for the reason that Isabelle T. Harmston, the former administratrix and surviving widow of said deceased, Marion Eugene Harmston, had, during her lifetime, and during the time she was acting as administratrix of her deceased husband's estate, permitted the property to be sold to Duchesne County, for taxes, and secured a Quit-Claim Tax Deed from Duchesne County to herself in her individual capacity and claimed and asserted that she was the owner thereof and that said real property was and is claimed as part of her estate upon her death by her administrator and is being probated as part of her estate.

25. That said J. H. Calder did not fail nor neglect to marshall, collect or preserve the assets of said estate in the form of three cows and one calf or cash in the sum of \$200.00, nor the 310 shares of Standard Oil Company stock, but on the contrary, said J. H. Calder was not able after he was appointed administrator, to find said prop-

erty or any part thereof and the same has not been lost to said estate by reason of any failure on the part of J. H. Calder to marshall the assets of said estate.

26. That said J. H. Calder did not spend or waste \$366.99, or any part thereof which belonged to said estate.

27. That J. H. Calder, as administrator De Bonis Non of said estate did employ J. Rulon Morgan as his attorney to conduct some of the proceedings had in said estate, but he did not employ said J. Rulon Morgan as his attorney in the proceeding had against said estate for the foreclosure of any interest the estate may have had in the property upon which the Farmers and Merchants Bank was the mortgagee, nor did the said J. H. Calder employ any attorney to represent him in said foreclosure proceedings for the reason that for him to have employed any attorney to represent said estate, would have been to squander and waste the assets of said estate because said estate had no defense whatsoever to said foreclosure proceedings taken by the Farmers and Merchants Bank as mortgagee, and that at the time said foreclosure proceeding was had, the estate of the decedent, Marion Eugene Harmston, had no interest in the property which was being foreclosed in that the same had been theretofore, distributed to Isabelle T. Harmston.

28. The Court further finds that there is no judgment against the administrator of the estate of Marion Eugene Harmston in the sum of \$4,539.29, together with interest thereon, in the sum of \$82.07, or in the sum of \$450.00 attorneys fees, or costs in the sum of \$34.68 or any other sum or at all, and that the judgment rendered in the mortgage foreclosure proceeding in favor of the Farmers and Merchants Bank, and against the defendants in that action, has been fully satis-

fied and discharged by the sale of the property foreclosed on by the sheriff of Duchesne County, State of Utah, and the estate of Marion Eugene Harmston has paid no part of said judgment or in any manner become obligated to pay any money whatsoever by reason of said mortgage foreclosure proceeding.

29. That the petitioner J. H. Calder, has not negligently delayed the closing of said estate for more than nine years, but on the contrary, the estate could not be closed until the balance of the purchase price for the sale of the real property of said estate had been fully collected and the heirs at law of said deceased made no request that said estate be closed.

30. The Court finds that the petitioner, J. H. Calder, did not file any account other than that involved in this controversy.

31. The Court further finds that:

(a) That said J. H. Calder has heretofore been the lawful, duly appointed, qualified, and acting administrator of said decedent's estate.

(b) That a complete and full Inventory and Appraisal of said estate has been filed by Isabelle T. Harmston, the former administratrix of said estate and said J. H. Calder has accounted for the property belonging to said estate which has come into his possession.

(c) That the amounts claimed for disbursements in said accounting on behalf of said administrator are not illegal nor should the same be recharged to the said J. H. Calder, except only that the fees of administrator and attorneys fees are reduced as heretofore found.

(d) That the amounts claimed for closing said estate and for posting notices, attorney fees, and administrators fees are not unreasonable or illegal, but the same are proper charges against said estate except that the attorney fees and ad-

ministrator fees are reduced to the amounts hereinbefore found.

(e) That no interest was received by said administrator, J. H. Calder, and he should not be charged with interest for the small amount of money which he had on hand during the time he was acting as such administrator.

(f) That the account rendered by said petitioner J. H. Calder, contains all the assets which have come into his possession and there are no other assets to be marshalled or accounted for other than those accounted for by said J. H. Calder.

32. That the said petitioner, Roger T. Harmston is qualified to act as administrator of said estate but he had an interest in said estate adverse thereto and has consented that Raymond A. Gillis be appointed administrator of said estate and such appointment has been consented to by all the heirs of said deceased.

33. That said J. H. Calder is a fit and proper person to continue to act as administrator of said estate but he has, through his attorneys expressed his desire to be relieved of the duties of acting as such administrator and has no objections to the appointment of said Raymond A. Gillis as the administrator of said estate if it is deemed that there is any further duties to be performed by another administrator.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. That J. H. Calder is entitled to have his account as administrator De Bonis Non allowed, approved, and settled excepting that the attorney fees sought to be allowed is reduced to \$100.00, and the administrators' fee to \$50.00 in addition to those heretofore allowed by this Court.

2. That the said petitioner, J. H. Calder is entitled to be relieved of further administration in this estate and to have his bondsmen exonerated from any and all liability in connection with the administration of said estate upon his turning over to Raymond A. Gillis administrator De Bonis Non of said estate of Marion Eugene Harmston, the sum of \$1,018.51, and file a voucher showing that the same has been so paid.

3. That the said J. H. Calder is entitled to have approved all other acts performed by said J. H. Calder during the time he has acted as administrator De Bonis Non of the estate of Marion Eugene Harmston, deceased.

Dated this 31st day of December, 1948.

BY THE COURT

Signed: Joseph E. Nelson
JUDGE (Nelson)

JUDGMENT AND DECREE

J. H. Calder, the duly appointed, qualified and acting administrator De Bonis Non of the estate of Marion Eugene Harmston, deceased, has filed herein his Final Account and Report and Petition for Final Distribution. To the Final Account and Report and Petition for Final Distribution so filed by said J. H. Calder, administrator, aforesaid, Roger T. Harmston, filed an Amended Petition for Revocation of Letters of Administration, and for the appointment of himself as administrator De Bonis Non of said estate, and protested the allowance of the Final Account and Petition for Final Distribution and to the objection and petition so filed by said Roger T. Harmston, the petitioner J. H. Calder filed his reply. Upon the issues raised by the Final Account and Report and Petition for Final Distribution of said J. H. Calder, and the objections to the granting of said Account and the Amended Petition for Revocation of Letters of Administration

and appointment of Roger T. Harmston and for the issuance of Letters of Administration to himself, and the reply, came on duly and regularly for hearing on the 31st day of March, 1948, and on the 18th day of December, 1948, and the petitioner, J. H. Calder was represented by his attorney, J. Rulon Morgan and the protestant and cross-petitioner, Roger T. Harmston was represented by his attorney, R. J. Hogan, and each of the parties offered evidence in support of the allegations of their pleadings, and the Court having heard the evidence and being now fully advised in the premises, and the Court having heretofore made its Findings of Fact and Conclusions of Law, and being now fully advised in the premises:

IT IS NOW, THEREFORE, BY THE COURT HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the account heretofore rendered by J. H. Calder as administrator De Bonis Non of said Estate of Marion Eugene Harmston, deceased is allowed, approved, and settled excepting only that the administrator's fee asked for by J. H. Calder is reduced to \$50.00, and the attorneys fee to \$100.00

2. That said J. H. Calder as administrator of this estate of Marion Eugene Harmston, deceased hereby directed to pay to Raymond A. Gillis as administrator De Bonis Non of the estate of Marion Eugene Harmston,, deceased, or to this attorney, the sum of \$1,081.51, and that when the money is so paid and a voucher is filed in this Court showing that the same has been paid, that the said J. H. Calder is relieved from all liability growing out of his administration of the estate of said Marion Eugene Harmston, deceased, and his bondsmen are hereby exonerated from any and all liability growing out of the administration of said estate.

3. That all acts performed by the said J. H. Calder in the administration of the estate of Marion Eugene Harmston, deceased, are hereby approved.

Dated this 31 day of December, 1948.

BY THE COURT

Signed: Joseph E. Nelson

JUDGE (Nelson)

January 6, 1949, the appellants filed their Motion for a New Trial on the following grounds (R. 478).

Now comes Roger T. Harmston, Marion Eugene Harmston, Helene E. Gillis and Carl Frederick Harmston, the heirs-at-law and beneficiaries in the above entitled estate herein referred to as plaintiffs, and moves the above entitled court for a new trial of the issues in the above entitled cause upon the following grounds:

1. Insufficiency of the evidence to justify or support the Findings of Fact, Conclusions of Law and Decree herein.

2. That the Findings of Fact, Conclusions of Law and particularly the Decree are contrary to the law.

3. Error in law occurring at the trial and excepted to by the plaintiffs.

That the above and foregoing causes materially effect the substantial rights of the parties hereto.

This motion is based upon the files and records and minutes of the court in said action.

Dated this 4th day of January, 1949.

January 6, 1949, entered January 17, 1949, Joseph E. Nelson, as judge of the Fourth Judicial District Court, made and entered the final discharge of J. H. Calder as the administrator of decedent's estate and discharging his sureties on his bond. (R. 482).

January 20, 1949, the plaintiffs filed their Motion to Vacate and Set Aside the Order of the Court finally discharging Calder (R. 487).

March 26, 1949, the court overruled and denied plaintiff's Motion for a New Trial and to Vacate the Order of Final Discharge of Calder (R. 488).

May 14, 1949, the appellants duly filed their Notice of Appeal to this court.

STATEMENT OF ERROR

(1) That the Order of court, made on the 21st day of December, 1948, and entered on the 24th day of December, 1948, is contrary to and is not supported by the law.

(2) The uncontradicted evidence does not support the Findings of Fact or Conclusions of Law or the judgment entered herein on the 3rd day of January, 1949.

(3) That the Findings of Fact and Conclusions of Law and judgment entered herein on the 3rd day of January, 1949, are contrary to and are not supported by the law.

(4) That the Order of court, made on the 6th day of January, 1949, entered on the 7th day of January, 1949, is contrary to and is not supported by the law.

(5) That the court erred in denying appellant's Motion for a New Trial.

(6) That the court erred in denying appellant's Motion to Vacate the Court's Order, of the 6th day of January, 1949, discharging J. H. Calder as administrator.

The Statement of Error will be argued under the following points:

(1) That the uncontradicted evidence does not support the Findings of Fact, Conclusions of Law or judgment.

(2) That the Order of the Court of December 24, 1948 and the Findings of Fact, Conclusions of Law and Decree of the 31st day of December, 1948, are not supported by and are contrary to the law.

(3) That the Order of Discharge made the 6th day of January, 1949, is contrary to the law.

(4) That the Court erred in denying appellant's Motion for a New Trial and their Motion to Vacate the Court Order of discharge made on the 6th day of January, 1949.

ARGUMENT

POINT ONE;

Paragraph five (5) of the Findings of Fact (R. 464) the court found:

“*** that the only property described in the inventory and appraisalment of decedent's estate which came into the possession of said J. H. Calder, administrator De Bonis Non of said estate consisted of a tract of land which was *duly and legally sold by said J. H. Calder administrator De Bonis Non of said estate.*”

This is contrary to the uncontradicted fact in said case because Calder, by his inventory, filed on the 26th day of September, 1939, (R. 373), charged himself with having taken into his Possession, as the assets of said estate, three pieces of real property and the following personal property:

Three Hundred Shares of stock in Texas Standard Oil Company (half interest) and Ten

Shares of Stock in Texas Standard Oil Company
(R. 374).

Calder's explanation as set forth in his accounting (R. 387) for his failure to account for this property is:

“Lots 29 to 32, Block 9, Plat “A”, were distributed to Isabelle T. Harmston.”

We think that is correct.

Calder in his accounting further alleges—

“That Lots 8 to 10, Block 32, Plat “A”, were sold to Larsen and later conveyed to Jenkins as Larson's successor in title and interest.” (R. 388). He knows that is a false statement, those lots never were sold to Larsen and later were resold under a Contract of Sale to Jenkins (Appellants' Exhibit I), without authority of court and Jenkins never was the successor in interest to Larson (T. 17, 18, 19); that a wholly and complete new contract was made with Jenkins, there is no other evidence in the case of this fact (T. 19).

Calder further states, in his final account (R. 388), that he is informed and believes and upon information alleges that: “Lots 5 to 12 inclusive, in Block 16, Plat “A”, belongs to Isabelle T. Harmston; that she bought the lots from Duchesne County.” Calder knows or should know that Isabelle T. Harmston, when she was the administratrix of decedent's estate, charged herself with possessing those lots for decedent's estate (R. 323) and that she as such administratrix could not purchase an interest in decedent's estate (Utah Code Annotated 1943—102-10-8) and that is the uncontradicted and the only evidence of that fact.

As of the corporate stock, after charging himself in his inventory with possession thereof (R. 374) he now

states it never came into his possession. That to say the least is an easy way to account for the assets of an estate.

Paragraph seven (7) of the Findings of Fact (R. 464) the court further found that the only assets of the deceased, in the hands of Calder, was One Thousand One Hundred Sixty Eight Dollars Fifty One Cents (\$1,168.-51), this is contrary to the admitted facts and records in the case as returned by Calder in his inventory (R. 374).

Paragraph nine (9) of the Findings of Fact (R. 465) is contrary to and are not supported by the uncontradicted evidence in the case it appearing from Calder's own admission that Larsen defaulted in his contract, Calder picked the contract up and subsequently resold the property to Jenkins under another Contract of Sale (T. 17, 18, 19). Calder in his account charged the estate for the service of the marshall in the ouster proceedings of Larsen (R. 391). No place in the entire record is there one statement or showing that the court ever authorized or confirmed the sale to Jenkins; Jenkin's contract on its face shows that possession under it depended upon the ability of Calder to dispossess Larson and obtain confirmation of court (Appellants' Exhibit I).

Paragraph eleven (11) of the Findings of Fact and particularly the finding therein that Calder never received possession of the corporate stock and that none of the property of the estate can be located, except the tract of land sold to Larson (R. 466), is contrary to the evidence in the case. Calder by his inventory charged himself with this property (R. 374); he must have had possession of it and he never accounts for what became of it.

In paragraph thirteen (13) of the findings (R. 466) the court found that it appeared at the trial of the cause, "that Rogers T. Harmston will probably claim some interest against the estate of Marion Eugene Harmston, deceased, and therefore the court has deemed it improper to appoint him as administrator of said estate."

There is no evidence in the record to sustain such a finding, Raymond A. Gillis was appointed administrator on stipulation of the parties (R. 434).

Paragraph twenty (20) of said Findings of Fact (R. 468) and particularly that portion thereof which finds that Farmers and Merchants Bank was a creditor of the estate of Marion Eugene Harmston, deceased, is contrary to the evidence in said case and is not supported by one syllable of evidence to sustain such a finding.

Paragraph twenty-one (21) (R. 468 - 469) of the Findings of Fact is not supported by any evidence in respect thereto.

Paragraph twenty-four (24) of the Findings of Fact (R. 469) is contrary to the uncontradicted evidence in said case for it appears from such evidence:

That Calder filed a petition to sell real property of the estate nearly a year after his appointment, February 11, 1939 (R. 352), and before he ever filed an inventory, in his petition to sell, asked leave to sell the assets of the estate to pay the *obligations of the deceased* (R. 352). This in the face of the fact that the court, by its Order of August 30, 1937, (R. 338), found all the debts, taxes and claims against the estate, with the exception of administratrix's commission and attorney's fees, had been paid (R. 338). Mrs. Harmston, the former administra-

trix, was dead (11th day of December, 1937) (T. 131) and the record does not disclose that her estate ever made a claim for commission, so there could only be attorney's fees payable or owed, outside of that one item, when Mrs. Harmston died, this estate was ready to be closed and it must be noted that the mortgage note, dated July 31, 1937, (T. 89), for Four Thousand Five Hundred Dollars (\$4,500.00) and upon which they rely as making the bank a creditor of this estate and signed by Isabelle T. Harmston, as administratrix, was then in existence and was in the possession of the bank as payee—J. Rulon Morgan, the bank's attorney and also Mrs. Harmston's attorney, filed this first account for Mrs. Harmston, as administratrix, (R. 330) he set up therein that there were no debts against the estate and he no doubt prepared and filed the Order of the court settling the account (R. 338 - 340) finding there were no debts against the estate it is obvious, on the face of the record, that they did not rely on this void note and mortgage as a debt and they knew there were no obligations of the deceased or his estate owing the Bank, to be paid and that the allegation to that effect was false.

Calder makes no allegation in this petition for sale of this real property that the same had been appraised within one year (R. 352), yet he asks for leave to sell, at private sale, for One Thousand Dollars (\$1,000.00) (R. 353). On the 20th day of April, 1939, (R. 361) Calder made his return of sale and asked for confirmation thereof, he made representations to the court that the property had been appraised within one year of sale (Par. 3, R. 361). He knew this was false for the appraisers

did not appraise this property until the 9th day of September, 1939 (R. 373).

September 26, 1939, one year and four months after his appointment, he filed his Inventory and Appraisement (R. 373).

He did not file an accounting for nine (9) years, from May, 1938, (R. 354) to August 28, 1947, (R. 387).

In his inventory he set-forth Lots 5 to 12, Block 16, Plat "A", came into his possession (R. 374). He failed to pay the taxes on this property, allowed the county to sell them to a stranger (T. 37, 38, 39) (T. 48) (T. 57). Calder resold the property of the estate without authority of court (T. 13, 17, 18) (Appellants' Exhibit I) (T. 20-24), nowhere in the entire record is there any authority or confirmation of court for this sale and it might not be amiss to add that an action is now pending for the recovery of this property.

From 1939 (R. 391) to the 4th day of January, 1949, he held the moneys of this estate without accounting to the beneficiaries for interest (R.40) thereon.

Practically every item of expense paid by Calder under his management of this estate (R. 391), is of his own making, including commissions to himself and attorney's fees, all the foregoing are uncontradicted statements of fact setting forth Calder's mismanagement.

Paragraph Twenty-five (25) of the Findings of Fact (R. 470) are contradictory to the uncontradicted evidence in this case for the reason that it is the undisputed record in this case that the decedent left three pieces of real property, cash in the bank and two pieces of personal property (R. 323). Calder charges himself with all the

same property except the cash and the cows (R. 374); later Calder denies he ever received this personal property (R. 387, 388, 389); the record fails to disclose what ever became of it. Certainly, Mrs. Harmston does not claim credit for this property in her accounting (R. 327), it didn't take wings and fly away. It was Calder's duty at the time of his appointment to marshall these assets or recover on the former administratrix bond but he commenced to look for these assets just before filing his account the 28th of August, 1947 (T. 67, 70).

Paragraph twenty-six (26) of the Findings of Fact is contrary to the uncontradicted evidence in this case, for it is the undisputed fact that outside of some real property tax, delinquent for 1936 (R. 391), all the expenses and outlay for the administration of this estate are of Calders making and were unnecessary because from the approved account of Mrs. Harmston (R. 338) this estate was ready for closing on paying attorney's fee.

Paragraph twenty-seven (27) (R. 470) of the Findings of Fact are not supported by any evidence in the record, on the contrary, the record shows that J. Rulon Morgan appeared as the attorney of record for Mrs. Harmston, when she filed her first accounting, the 18th day of August, 1937, and he has been the only attorney of record for the administrator of this estate ever since said date or until Calder's letters were revoked (R. 437) and it appears that J. Rulon Morgan appeared as the attorney of record on the Summons served on J. H. Calder, as the administrator of the estate of Marion Eugene Harmston, in the foreclosure proceedings of the mort-

gage (T. 93D and 93C). If the estate of Marion Eugene Harmston had no interest in the property why did they take a default against Calder, as administrator, (T. 94) and a Decree of Foreclosure and costs (T. 114 - 115) and it might not be amiss to here state there is now an action pending to recover back this property.

Paragraph twenty-eight (28) of the findings (R. 470) is contrary to the uncontradicted evidence in the case because the record shows the judgment entered as of the 17th day of July, 1941, was against J. H. Calder, as the administrator of decedent's estate in the amount stated (T. 113).

Paragraph twenty-nine (29) of the findings (R. 471) is contrary to the undisputed evidence in the case, Calder was appointed the 28th day of May, 1938 (R. 350); he rendered his first account the 28th day of August, 1947 (R. 430), and from the undisputed record could have closed the case at any time after his appointment by distribution the property and installment payments to the heirs.

That Sub-paragraph (f) of paragraph thirty-one (31) of the Findings of Fact (R. 471) is contrary to the uncontradicted evidence in the case as heretofore argued and as will appear from Calder's inventory (R. 373).

Paragraph thirty-two (32) of the findings (R. 472) is not supported by any evidence to the effect that Rogers T. Harmston claims and adverse interest in the estate.

Paragraph thirty-three (33) of the findings (R. 472) is not supported by any evidence that Calder is a fit and proper person to continue as administrator of decedent's estate, to the contrary, as heretofore shown, the uncon-

tradicted evidence is that Calder mismanaged said estate, nor is there one jot of evidence that Calder ever expressed a desire to be relieved of his duties as set forth in this paragraph.

POINT II

(A) THAT THE ORDER OF THE COURT OF DECEMBER 21, 1948, AND THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF COURT OF THE 31ST DAY OF DECEMBER, 1948, ARE NOT SUPPORTED BY AND ARE CONTRARY TO THE LAW.

That said Order of Court, (R. 462) Findings of Fact, Conclusions of Law and Decree of Court, finding, holding and decreeing that J. H. Calder to be the duly appointed and acting administrator De Bonis Non of the estate of Marion Eugene Harmston, deceased (R. 464, 469, 471); decreeing, allowing, approving and settling the account of the said J. H. Calder; fixing, allowing and approving attorney's and administrator's commissions (R. 466, R. 474 and 475); approving all other acts of J. H. Calder during the time he acted as administrator de bonis non of the estate of Marion Eugene Harmston, deceased, (R. 472) and decreeing, releasing and exonerating the bondsmen of J. H. Calder from any and all liability growing out of the administration of said estate (R. 475) are all contrary to and are not supported by the law for the following reasons;

In order to qualify itself, under the law, (Revised Statutes of Utah 1933—102-4-2, 102-4-3) as an interested person (a creditor) in the estate of Marion Eugene Harmston and thereby entitled it to nominate an adminis-

trator of decedent's estate, Farmers and Merchants Bank alleged in its Petition of Nomination (R. 342).

7. The petitioner, Farmers and Merchants Bank, a corporation, is a corporation organized under the Laws of the State of Utah, and said Farmers and Merchants Bank, a corporation, is a lawful and bona fide creditor of the estate of said Marion Eugene Harmston, deceased; that the estate of said deceased and the heirs thereof, and the former administratrix of the estate of said deceased were and are indebted to the petitioner.

9. That more than three months have elapsed since the death of said Marion Eugene Harmston, deceased; that none of the heirs at law, relatives or next of kin of said deceased have petitioned this Court to be appointed administrator of said estate de bonis non, nor have any of the heirs at law, relatives or next of kin of said deceased petitioned this Court asking that some other person be appointed as such administrator or administratrix of the estate of said deceased; that petitioner is informed and believes, and upon such information and belief, alleges that there is no one who is in charge of the property of the estate of said deceased needs the care and attention of an administrator de bonis non.

10. That under the circumstances as alleged in this Petition and under the Laws of the State of Utah in such cases made and provided, petitioner is entitled to have issued to it Letters of Administration of the estate of said deceased, or to petition the above entitled Court to appoint some fit and proper person to act as the administrator of the estate of said deceased.

12. That petitioner does hereby nominate and select J. H. Calder to act as such administrator de bonis non, and requests the above entitled

Court to appoint J. H. Calder as administrator of the estate of said deceased.

(R. 343)

It is patent from the foregoing that petitioner did not rely on or claim any acquiescence or consent on the part of the beneficiaries for this nomination, for the bank alleged the failure of the heirs to nominate within the statutory time required of them to elect (Utah Code Annotated 1943 — 102-4-3) and thereupon alleged *that it (the bank) is a lawful and bona fide creditor of the estate of said Marion Eugene Harmston, deceased;* (italics supplied) thereby qualifying itself to nominate and administrator as a creditor under the provisions of Revised Statutes of Utah 1933, Sections 102-4-2 and 102-4-3 Supra.

A Decree of due and legal Notice to Creditors had long since been published and entered in this estate, August 30, 1937, (R. 325) and all persons having claims arising in contract, unless filed before that date, were by statute barred (Revised statutes of Utah 1933 — 102-9-4) and the record does not disclose that the bank ever filed such a claim. Therefore, any lawful claim the bank had against the estate could only be one that originated after the death of the decedent.

Of course, the bank could not rely on the purported mortgage debt of Four Thousand Five Hundred Dollars (\$4,500.00), represented by the note of July 31, 1937, (T. 89) because Mr. Morgan, the bank's attorney, in preparing and filing the administratrix's account of the 18th of August, 1937, did not include this mortgage debt in the account as a debit against the estate but on the contrary alleged all the debts and claims, except attorney's fees

and administratrix's commissions, had been paid (R. 337) and the court in its Order settling the account of the 30th day of August, 1937, (R. 338) found this to be a fact.

Even though the bank did not rely on this purported mortgage lien to qualify them a creditor of decedent's estate, their position in this regard is not well taken because the entire probate record in this proceeding, which is before this court, disclosed that no authority of the lower court ever issued authorizing Mrs. Isabelle T. Harmston, as administratrix of decedent's estate, to execute and issue such a mortgage lien as is required by statute (Revised State of Utah 1933 — 102-10-34).

The general rule is that an administrator is without authority, in his representative capacity, to bind the estate for which he acts in the execution of a promissory note or other negotiable instruments (21 American Juris Prudence, Page 507—Section 238) or to mortgage or otherwise encumber realty (21 American Juris Prudence, Page 509 — Section 241) and such a mortgage is invalid and void where order was never applied for.

Skebata vs. Bear River State Bank
Utah

205 Pac. 2nd 251

Parks vs. Illinois Life Insurance Company
176 Okla. 63
54 Pac. 2nd 392

The failure of the bank to qualify as a creditor, under its petition, made both the bank and Calder strangers to this estate; the petition to appoint a stranger cannot confer power upon a court to make an appointment and cannot invoke the exercise of probate jurisdiction; the

petition to appoint Calder was a nothingness and he obtained no right to administer decedent's estate as he became an administrator de son tort.

Re. Cloward's Estate

95 Utah 453

82 Pac. 2nd 336

119 A. L. R. 123

And a person without interest except fees and commissions has no right to subject property to debt or expense or distrube the use and occupancy or change title and ownership just for the right to administer. Such right is limited by statute to interested parties and a stranger has no right to interfere and where one who has no right, assumed to administer an estate, he became an administrator de son tort, chargeable by the estate for his conduct, and is entitled to receive only the expense he incurred in preserving the estate and which inured to its benefit and could not recover filing fees, appraisers fees, administrators commissions or attorney's fees.

Re. Cloward's Estate

Supra

(B) THE THE FINDINGS OF THE COURT, THROUGHOUT THE FINDINGS OF FACT, THAT CALDER WAS THE DULY QUALIFIED ADMINISTRATOR OF THE ESTATE OF MARION EUGENE HARMSTON, DECEASED, ARE CONTRARY TO AND ARE NOT SUPPORTED BY THE LAW, BECAUSE CALDER NEVER WAS ANYTHING MORE THAN AN ADMINISTRATOR DE SON TORT.

Re. Crowther's Estate

Supra

(C) THE FINDINGS OF THE COURT, THROUGHOUT THE FINDINGS OF FACT, THAT

THE SALE OF THE REAL PROPERTY, LOTS 8 TO 10 INCLUSIVE, IN BLOCK 32, PLAT "A", ROOSEVELT, UTAH, WAS A VALID SALE (R. 463 TO 472) IS CONTRARY TO AND NOT SUPPORTED BY THE LAW.

Any sale of real estate made by Calder was void, as not complying with the provisions of Revised Statutes of Utah 1933 — 102-10-14 and 102-10-21, in that the petition to sell the real property to Larson (R. 352) contained no statement of the assets, debts or personal property of the estate or had the real property been appraised within one (1) year of the sale, as required by law R. S. U. 1933 — 102-10-21 Supa.

Under the second sale of the real property to Jenkins, Calder ignored the above statutes in their entirety and made no pretense at complying therewith.

The administrator must first obtain approval of the court before disposing of the property of the estate.

Re. Cliff's Estate

108 Utah 336

159 Pac. 2nd 872

Re. Hansen's Estate

55 Utah 23

184 Pac. 197

(D) THE FINDINGS OF THE COURT, THROUGHOUT THE FINDINGS OF FACT, TO THE EFFECT THAT THE FAILURE OF CALDER TO PAY THE TAXES ON LOTS 5 TO 12, IN BLOCK 16, OF PLAT "A", ROOSEVELT, UTAH, WAS NOT UNLAWFUL (SEE PAR. 10-24 OF THE FINDINGS OF FACT — R. 463) IS CONTRARY TO AND AGAINST THE LAW.

It does appear from the record that Isabelle T. Harmston during the time she as administratrix of the estate of Marion Eugene Harmston, to-wit, on the 1st day of May, 1934, purchased from Duchesne County, at tax sale, and received a Quit-Claim Deed therefore, Lots 5 to 12 inclusive, of Block 16, all of which was the property of her deceased husband and which she inventoried as part of said estate (R. 323). Any purchase she made thereof could have been nothing more than a redemption for the benefit of the estate and the beneficiaries thereof (Revised Statutes of Utah 1933 — 102-10-8) and any purchase for herself was void;

Haight vs. Pearson

11 Utah 51

39 Pac. 479

nor could she purchase an adverse interest against her co-tenants, the rule being she purchased as trustee for the benefit of the estate; this rule is well settled and is stated in 14 American Juris Prudence (page 123, section 53 and 54) and especially as the rule applies to the purchase of an interest of a co-tenant at a tax sale, wherein the author states, "The authorities are uniform in affirming the general rule, that where one of several co-owners of property acquires a tax title thereto, his purchase amounts merely to a payment of the taxes of a redemption from the state." (14 American Juris Prudence—Page 124—Note 18 of Section 54). And while the administrator of Isabelle T. Harmston's Estate might have erroneously included these lots in its inventory of that estate, such a mistake would not relieve Calder of his failure to pay the taxes, for he knew those lots were part of the assets of Marion Eugene Harmston's Estate, because

he inventoried them as property that came into his possession (R. 374).

And where a duty to protect the real property exists an administrator is liable for any loss flowing from a breach of such duty. Thus, where he permits land to be sold for non-payment of taxes he may be surcharged for the entire cost of redemption (21 American Juris Prudence — Section 295, Page 548 — Re. Hansen's Estate, 55 Utah 23, 184 Pac. 197 — Revised Statutes of Utah 1933 — 102-12-10).

(E) THAT THE FINDINGS OF THE COURT IN THE FINDINGS OF FACT, HOLDING THAT ISABELLE T. HARMSTON, AS ADMINISTRATRIX OF THE ESTATE OF MARION EUGENE HARMS-
TON, DECEASED, EXECUTED A NOTE AND MORTGAGE IN FAVOR OF THE FARMERS AND MERCHANTS BANK, AS A CREDITOR OF THE ESTATE OF DECEDENT, PETITIONED THE COURT FOR THE APPOINTMENT OF CALDER AS ADMINISTRATOR OF DECEDENT'S ESTATE, (R. 468 PAR. 20) ARE CONTRARY TO AND ARE NOT SUPPORTED BY THE LAW.

For the reason that no permission of the court was obtained for the execution of the said note or mortgage as required by law, (Revised Statutes of Utah 1933 — 102-10-34, now Utah Code Annotated 1943 — 102-10-34, also 21 American Juris Prudence, page 509, Section 241, Supra — Skebata vs. Bear River State Bank, supra — Parks vs. Illinois Life Insurance Company, Supra — Meier vs. Hayes, 67 Pac. 2nd 120 — 20 Cal. App. 2nd 451) therefore said note and mortgage was void and Farmers

and Merchants Bank was not a creditor of decedent's estate.

(F) THE FINDINGS OF THE COURT, IN PARAGRAPH 24 OF THE FINDINGS OF FACT (R. 469), HOLDING THAT CALDER HAD NOT NEGLECTED OR MISMANAGED THE ESTATE AND DID NOT FALSELY MISREPRESENT THE NECESSITY TO SELL THE REAL PROPERTY OF THE ESTATE OR DID NOT NEGLECT TO PAY THE TAXES AND THE WHOLE THEREOF, IS CONTRARY TO AND IS NOT SUPPORTED BY THE LAW;

For the reason that the record discloses, Calder was appointed, April 30, 1938, (R. 350) and did not file his First Account until August 30, 1947, contrary to the statute (Utah Code Annotated 1943 — 102-11-32) requiring an account within six months after appointment and;

He neglected to set out the debts of the estate and the value of the personal property and the need for sale in his said petition for sale of real property (R. 352) as required by statute (Revised Statutes of Utah 1933 — 102-10-14) and to have the estate appraised within one (1) year of sale (Revised Statutes of Utah 1933 — 102-10-21) and;

He falsely stated to the court that it was necessary to sell the real property of the estate to pay the obligations of the decedent (R. 352); this in the face of a Decree of Notice to Creditors that had long since been entered, barring creditors (R. 325) and an Order of court, decreeing that all debts of the deceased had been fully paid (R. 339) and;

He permitted a Judgment of Default to be entered

against the estate (T. 94) and a Judgment of Foreclosure (R. 113) by the same attorney representing him as administrator and defendant as also represented the plaintiff's adverse interest in said action and he failed to marshall the assets of the estate.

One of the chief duties of an administrator is to collect the assets of the estate.

(21 American Juris Prudence, Section 221, Page 495).

Incompetency, mismanagement and want of integrity are often set up as grounds for removal.

Farnsworth vs. Hatch
47 Utah 62
151 Pac. 537

And an administrator is entitled to and must take possession of all the real and personal estate of the decedent. (Revised Statutes of Utah 1933 — 102-11-3).

And immediately after appointment the constructive possession of real estate passes to the administrator for the benefit of those entitled and the administrator is bound to take notice of any one in actual possession.

Mansfield vs. Neff
43 Utah 258
134 Pac. 1160

And it is the duty of every administrator to ascertain and defend the property and the rights of the estate.

Re. Picot's Estate
53 Utah 195
178 Pac. 75

And an administrator may maintain an action against persons who have wasted, destroyed or converted the goods of the estate, including a former personal representative (Revised Statutes of Utah 1933 — 102-11-6 and 102-11-7, now Utah Code Annotated 1943 same number).

And an administrator may in his own name, for the use and benefit of the estate, maintain an action on the bond of a former administrator of the same estate. (Revised Statutes of Utah 1933, 102-11-10, now Utah Code Annotated 1943 same number).

And every administrator is chargeable, in his account with the whole of the estate of the decedent, which has come into his possession *** (Revised Statutes of Utah 1933—102-11-20, now Utah Code Annotated 1943 — same number).

And an administrator is not only chargeable with the property that comes into his hands but also with those properties which by negligence he has failed to get into his hands.

Re. Dolenty's Estate
53 Mont. 33
161 Pac. 524

It was likewise his duty, after he was appointed, to recover for the estate any money that should have been paid to the estate by Mrs. Harmston during her administration or recovered from her bondsmen.

Re. Brook's Estate
83 Utah 506
30 Pac. 2nd 1065

And an administrator has the duty to conserve property and settle the estate with reference to the situation of assets at time of decedent's death.

Swanberg vs. National Surety Company
86 Mont. 340
283 Pac. 761

And an administrator is chargeable with the amount due the estate in an absence of showing why the debt has not been collected.

Re. Smith's Estate
Utah
162 Pac. 2nd 105.

And a court must exact of an administrator the ultimate in the performance of fiduciary duties and should be satisfied with nothing less and one who asserts false claims against an estate is guilty of constructive fraud.

Re. Tersip's Estate
194 Pac. 2nd 66
86 Cal. App. 2nd 43

(G) THAT THE FINDINGS OF THE COURT, (R. 469) TO THE EFFECT THAT CALDER HAD IN PARAGRAPH 25 OF THE FINDINGS OF FACT, NOT FAILED NOR NEGLECTED TO MARSHALL AND COLLECT OR PRESERVE THE PERSONAL PROPERTY ASSETS OF SAID ESTATE BUT TO THE CONTRARY HE HAD NOT BEEN ABLE AFTER HIS APPOINTMENT TO FIND SAID PROPERTY AND THAT THE SAME HAS NOT BEEN LISTED BY REASON OF ANY FAILURE OF CALDERS, IS CONTRARY TO AND NOT SUPPORTED BY LAW.

Because it appears from the record the items detailed in the paragraph are part of the inventoried assets of the estate, (R. 323) under the law heretofore cited, paragraph (F) of this argument, it was Calders' duty to collect them and he is chargeable with the items.

Re. Dolenty's Estate and
Brook's Estate
Supra

(H) THAT THE FINDINGS OF THE COURT, IN PARAGRAPH 26 OF THE FINDINGS, (R. 470) TO THE EFFECT THAT J. H. CALDER DID NOT

WASTE THREE HUNDRED SIXTY SIX DOLLARS NINEY NINE CENTS (\$366.99) OR ANY PART THEREOF BELONGING TO SAID ESTATE, IS CONTRARY TO AND IS NOT SUPPORTED BY THE LAW.

Beause it appears from the Record (R. 391) that the items of expense, except those for taxes, are of Calder's own making and his not being legal administrator of said estate, the items are not a proper charge against the estate.

Re. Cloward's Estate
Supra

(I) THE FINDINGS OF THE COURT, IN PARAGRAPH 29 OF THE FINDINGS, (R. 471) HOLDING THAT CALDER HAD NOT NEGLIGENTLY DELAYED CLOSING THE ESTATE BUT TO THE CONTRARY COULD NOT CLOSE UNTIL THE BALANCE OF THE PURCHASE PRICE WAS PAID, IS CONTRARY TO AND IS NOT SUPPORTED BY THE LAW.

Because when Calder took over, May 5, 1938, (R. 350) in accordance with the then last Order of the court, entered in the proceedings, all the debts, taxes and claims against the estate had been paid, with the exception of attorney's and administratrix's fees (R. 327) under the provisions of Revised Statutes of Utah 1933 — 102-12-6 — now Utah Code Annotated 1943 — 102-12-6, the administrator must render a Final Account and pray for settlement of administration, yet Calder delayed nine (9) years. The receipt of installment payments are no excuse for such delay for they could have been distributed as paid.

The whole aim of probate procedure is the speedy settlement and adjudication of rights of property, to the end that those entitled to share therein, may have the full benefits of their rights, at the earliest moment, consonant with due process. (Vol 1, Bancrofts Probate Practice, page 569, section 297).

Diligence must be used and careful attention given to all details in settling decedent's estate and the court should hold the administrator to the strictest compliance with the law.

Re. Rinio's Estate
93 Mont. 428
19 Pac. 2nd 322

(K) THAT THE FINDINGS OF FACT, IN SUB-PARAGRAPH (b) AND (f) OF PARAGRAPH 31 OF THE FINDINGS OF FACT (R. 471), HOLDING THAT J. H. CALDER HAD ACCOUNTED FOR ALL THE PROPERTY BELONGING TO SAID ESTATE WHICH HAS COME INTO HIS POSSESSION AND THAT THERE IS NO OTHER PROPERTY TO BE MARSHALLED, IS CONTRARY TO THE LAW AND IS NOT SUPPORTED BY THE LAW;

For the reason that Mrs. Harmston, Calder's predecessor as representative of decedent's estate, in her inventory charged herself with three (3) pieces of real property and three (3) articles of personal property (R. 322). In her accounting filed (R. 327) she credited herself and accounted for the disposition of one (1) piece of real property, this left two (2) pieces of real and three (3) pieces of personal property in the estate, these were the assets of the estate at the time Calder took over. Calder in his inventory (R.373), charged himself with

two pieces of real property and one piece of personal property, in the course of his administration of the estate he credits himself with one (1) piece of real property, by way of sale, (R. 352) but he makes no effort to account for the original three (3) pieces of personal property other than to say that they did not come into his possession and that the other piece of real property was sold for delinquent taxes, when in fact under the law he was obligated to take into his possession the assets of the estate (Revised Statutes of Utah 1933 and Utah Code Annotated 1943—102-11-3) and constructively the possession of the real property of the estate passed to his possession (Mansfield vs. Neff Supra.) and it was his duty to ascertain and defend the property of the estate (Re. Picot's Estate Supra.) even to the extent of maintain an action (Revised Statutes of Utah 1933 and Utah Code Annotated 1943—102-11-6 and 102-11-7) against the bond of Mrs. Harmston for the loss thereof (Revised Statutes of Utah 1933 and Utah Code Annotated 1943—102-11-10 Re. Brook's Estate Supra). A personal representative of a decedent must exercise good faith, care and diligence in the management and administration of the affairs of the estate he represents in such a way as to protect it from loss by his own mismanagement or act of waste. Included within this duty is the obligation to protect the estate against every demand made against it which is not legally enforceable (21 American Juris Prudence, Section 224, Page 497) and an administrator is bound to settle the estate with reference to the situation of the assets at the time of the death of the decedent. (Swanberg vs. National Surety Co. Supra).

Under Revised Statutes of Utah 1933 and Utah Code Annotated 1943 — 102-11-20, every administrator is chargeable in his account with the whole of the estate of the decedent, which may come into his possession at the value of the appraisement contained in the inventory and that would include not only the assets which actually came into his hands but also those by reason of his negligence he had failed to get into his hand (Re. Dolenty's Estate and Re. Brook's Estate, Supra).

(L) THAT THE FINDINGS OF THE COURT, IN SUB-PARAGRAPHS (c) and (d) OF PARAGRAPH 31 OF THE FINDINGS OF FACT, (R. 471) HOLDING THAT THE AMOUNTS CLAIMED FOR DISBURSEMENTS IN SAID ACCOUNTING, INCLUDING COSTS OF CLOSING AND POSTING NOTICES, ATTORNEY'S FEES AND ADMINISTRATOR'S FEES ARE NOT ILLEGAL AND ARE PROPER CHARGES AGAINST THE ESTATE, ARE ALL CONTRARY TO AND ARE NOT SUPPORTED BY THE LAW;

For the reason that Calder, being nothing more than an administrator de son tort to this estate, as heretofore argued in this brief, and without interest in the property of the estate on distribution and who could receive nothing from it except fees and commissions as administrator or attorney, has no right to subject the property of the estate to debts and expenses and could not recover from the estate for filing inventory and publishing Notices to Creditors or for amounts paid to file petitions or for sums paid to appraisers or administrator's commissions or attorney's fees (Re. Cloward's Estate Supra).

(M) THAT THE FINDINGS OF THE COURT, IN PARAGRAPH 33 OF THE FINDINGS OF FACT (R. 472), HOLDING THAT J. H. CALDER IS A FIT AND PROPER PERSON TO ACT AS ADMINISTRATOR OF SAID ESTATE, IS CONTRARY TO AND IS NOT SUPPORTED BY THE LAW; as will more specifically appear in the argument and law cited in paragraph (f) of this argument.

(N) THAT BECAUSE OF THE ERRORS OF LAW, WITH RESPECT TO THE FINDINGS OF FACT AS HEREINBEFORE SET FORTH, THE CONCLUSIONS OF LAW AND THE DECREE OF COURT AND THE WHOLE THEREOF MADE AND ENTERED, PURSUANT TO SAID FINDINGS OF FACT, ARE CONTRARY TO AND ARE NOT SUPPORTED BY THE LAW AND PARTICULARLY THOSE PROVISIONS OF THE DECREE OF COURT SET FORTH IN PARAGRAPHS TWO (2) AND THREE (3) THEREOF (R. 475) "RELIEVING AND EXONERATING J. H. CALDER AND HIS BONDSMEN FROM ALL LIABILITY GROWING OUT OF THE ADMINISTRATION OF SAID ESTATE APPROVING ALL ACTS PERFORMED BY CALDER IN HIS ADMINISTRATION OF THE ESTATE";

As being contrary to Utah Code Annotated 1943 — 102-12-19, limiting the discharge of an administrator only from future liability.

POINT III

THE ORDER OF DISCHARGE MADE ON THE 6TH DAY OF JANUARY, 1949, IS CONTRARY TO THE LAW (R. 481).

For the reason an administrator is only entitled to a discharge when he has performed all the acts lawfully required of him (Utah Code Annotated 1943 — 102-12-19).

And the duties of an administrator are not full performed until he has not only accounted for but also distributed all of the assets which have come into his possession.

Re. Brook's Estate

83 Utah 506

30 Pac. 2nd 1065

I assume this court will take judicial notice of records of the court and the fact that Judge Joseph E. Nelson was defeated for election in the general election of 1948 and his term of office as a judge of the District Court of the Fourth Judicial District, expired January 3, 1949, (Article IV Section 9, Constitution of the State of Utah) and he was not reappointed by the Governor of this state until the 18th day of March, 1949, and that the Order of the court purporting to discharge J. H. Calder, as administrator, (R. 481) was signed by Joseph E. Nelson, as judge of the Fourth Judicial District Court, on the 6th day of January, 1948, three (3) days after his terms of office had expired.

POINT IV

THAT THE COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL AND THEIR MOTION TO VACATE THE COURT ORDER OF DISCHARGE, MADE ON THE 6TH DAY OF JANUARY, 1949.

Because of the law heretofore cited the court erred denying appellants' Motion for a New Trial (R. 478)

and its Motion to Vacate the Order of Discharge, made on the 6th day of January, 1949 (R. 487).

We respectfully submit that the Orders, Findings of Fact, Conclusions of Law and Decree of the Court in the above matter are contrary to and are not supported by either the fact or the law; we therefore maintain that the Orders, Findings, Conclusions and Decree of Court be modified to conform to the evidence and the law as herein presented.

Respectfully submitted,

R. J. HOGAN,

Attorney for Appellants.