

1949

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

Utah Supreme Court

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R. J. Hogan; Attorney for Appellants;

J. Rulon Morgan, Elias Hansen; Attorneys for Respondent and Defendant;

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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. HARMSTRON,
MARION EUGENE HARMSTON,
HELENE G. GILLIS AND CARL
FREDERICK HARMSTON,

Plaintiffs and Appellants,

VS.

J. H. CALDER, as the Administrator
of the Estate of Marion Eugene
Harmston, Deceased,

Defendant and Respondent.

BRIEF OF RESPONDENT

Appealed from the Fourth Judicial District Court,
in and for Utah County, Utah.

FILED JUDGE JOSEPH E. NELSON
Presiding.

11 1949

CLERK, SUPREME COURT, UTAH

J. RULON MORGAN,
ELIAS HANSEN,

R. J. HOGAN,
Attorney for Appellants

*Attorneys for Respondent
and Defendant.*

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Harmston, Deceased,

Defendant and Respondent.

CASE
No. 7362

BRIEF OF RESPONDENT

At the outset we direct the attention of the court to the fact that on the cover page and again on page 1 of the brief filed on behalf of Roger T. Harmston, et al, it is designated as "Brief of Respondents". This brief is filed on behalf of J. H. Calder, who disclaims all responsibility for what is said in the brief filed by Roger

T. Harmston, et al, and he shall characterize himself as the respondent, which in fact he is.

**MOTION TO AFFIRM THE JUDGMENT BECAUSE
THE STATEMENT OF ERRORS IS
FATALLY DEFECTIVE.**

Comes now the respondent, J. H. Calder, and moves the court to either dismiss the appeal or affirm the judgment and decree appealed from for the reason and upon the grounds that the brief filed by the appellants is not in conformity with Rule 8 of this court and the statement of errors contained in said brief of appellants is so general and uncertain in that such statement does not specify what particular errors are relied upon by appellants for a reversal of the judgment or decree appealed from. On the contrary the statement of errors in effect merely states that such decree or judgment is wrong and against law.

This motion is made upon the statement of errors contained on page 31 and repeated on page 32 of the brief filed on behalf of Roger T. Harmston, et al.

It has repeatedly been held by this court that it is without jurisdiction to review a cause appealed from a lower court in the absence of assignments of error. *Smith Table Co., vs. Madsen*, 30 Ut. 297; 84 Pac. 885. *Lyon vs. Mauss*, 31 Utah 283; 87 Pac. 1014. So also has it been repeatedly held by this court that an assignment of errors which does not advise the court with particularity the error relied upon for a reversal of a judgment or decree is fatally defective and the court will affirm

the judgment unless the error or errors relied upon are specified with particularity. *Bauwhuis, et al, vs. Johnson*, 68 Utah 544; 251 Pac. 359 where numerous cases from this jurisdiction are cited. A general discussion of the functions and requirements of assignments of errors will be found discussed at length in 4 *C.J.S.*, page 1770 where it is said that:

“An assignment of error must be sufficient to point out in what particular respect the action complained of was erroneous and the grounds or reasons for the contention unless the error is manifest and it must not be vague and general in this respect.”

To the same effect see 3 *Am. Jur.*, page 293, Sec. 703 where it is said:

“An assignment of errors must be specific. A general assignment without specification of the particular point relied on gives no information to the appellate court or to the adverse party and will not as a general rule be considered. The assignment should point out the place in the record where the incidents complained of may be found.”

Cases will be found cited from various state and federal courts in support of and which do support the text.

It will be observed that assignments 1, 3, 4, 5 and 6 on page 31 of the Harmston brief, some of which are repeated on page 32 of the brief, merely state that certain orders, findings of fact, conclusions of law and

judgment are not supported by the law. Just what is meant by such claimed errors it is impossible to ascertain from the assignments. Is it claimed that the findings of fact are contrary to law and if so which of the findings of fact, if any, are contrary to law? If a found fact is established by evidence it cannot be contrary to law. So also if conclusions of law find support in the facts found the same may not be said to be contrary to law.

In assignment numbered 2 it is said the uncontradicted evidence does not support the findings of fact, conclusions of law or the judgment entered herein on the 3rd day of January, 1949. We do not understand that uncontradicted evidence is required to support findings of fact, conclusions of law or judgment. Many, if not most, findings of fact are upheld when there is a conflict in the evidence.

In a broad sense it may doubtless be said that every judgment is contrary to law where prejudicial error was committed at the trial. Thus to say that a judgment is contrary to law totally fails to inform the court or counsel wherein the judgment is contrary to law. Nor does the statement of errors advise the court or counsel wherein or what findings and conclusions appellants claim is or are contrary to law.

As to assignment number 5 there is nothing to indicate wherein the court erred in denying appellants' motion for a new trial. If appellants cannot prevail because of some deemed error not properly assigned

it follows that they cannot prevail because the court denied a new trial. It is not error to deny a new trial in the absence of some prejudicial error having occurred at the trial.

If assignments of error are to serve any useful purposes, as the courts uniformly hold they do, then and in such case the statement of errors in appellants' brief totally fail to serve such purpose.

It will also be observed that the record filed in this case is somewhat lengthy and notwithstanding such fact the statement of errors does not refer to where in the record the claimed errors may be found.

It is submitted that the judgment should be affirmed because there are no sufficient assignment or statement of errors made on behalf of the appellants.

ADDITIONAL STATEMENT OF CASE

If the above motion is granted, as we contend it should be, then and in such case that of course will end this controversy. In the event the court should conclude otherwise we direct the attention of the court to some additional facts which we deem material to consider in reviewing the record in this case.

In order to enable the court to find the place in the record where there may be found the parts thereof which we refer to it will be observed that the numbering of the pages begins with what is designated as the bill of exceptions. The pages of that part of the record are numbered consecutively, and then the probate files

in the estate of Marion Eugene Harmston, beginning with page 205 are numbered consecutively. We shall refer to such pages in the course of this brief.

After the death of Isabelle Thurston Harmston, the administratrix of the estate of Marion Eugene Harmston, J. H. Calder was in April, 1938 appointed administrator de bonis non of the estate of Marion Eugene Harmston. (R. 349) He furnished the bond fixed by the court and on April 30th, 1938 letters of administration were issued to J. H. Calder. (R. 350) The petition for letters of administration was filed by the Farmers and Merchants Bank, a corporation, which held a note signed by Isabelle T. Harmston and Isabelle T. Harmston, administratrix of the estate of Marion Eugene Harmston. The note was secured by a mortgage on Lots 29, 30, 31 and 32, Block 9, Plat "A" Roosevelt Townsite, Duchesne County, Utah. The mortgage was executed by Isabelle Harmston individually and as administratrix of the estate of Marion Eugene Harmston. The findings of fact and conclusions of law and decree of foreclosure are set out in the record, pages 97 to 116. The property covered by the mortgage was sold to satisfy the amount owing on the note and mortgage. (R. 302)

At the time the note and mortgage were executed the real property covered by the mortgage on July 31, 1937 (R. 89) was a part of the estate of Marion Eugene Harmston. (R. 323) The inventory and appraisalment filed by Isabelle Harmston and decree of partial distribution was entered on August 30, 1937 by which decree

of distribution the property was decreed to Isabelle Thurston Harmston. (R. 340)

The money that was loaned to Isabelle Harmston individually and as administratrix of the estate was used to construct a service station on the property mortgaged and which property stood in the name of Marion Eugene Harmston at the time the money was so loaned. (Tr. 51-52)

The rents and profits derived from the property were collected by Roger T. Harmston. (R. 74)

During the time that Isabelle T. Harmston was administratrix of the estate of Marion Eugene Harmston the property was sold for taxes and bought in by Mrs. Harmston for the sum of \$510.52. (R. 39) The property was again sold for taxes in 1936 and an auditor's tax deed issued in May, 1941 to Charles W. Jenkins for \$459.87. On October 18, 1941 Charles W. Jenkins and wife conveyed the property to Roger Harmston, one of the plaintiffs herein, for the sum of \$535.77. (R. 40)

It will thus be seen that when J. H. Calder was appointed administrator of the estate of Marion Eugene Harmston there were taxes owing and the property had been sold because of the failure to pay the same.

When Calder learned that taxes were owing upon Lots 5 to 12 of the property belonging to the estate he was without any funds belonging to the estate to pay the same (R. 23), and so informed Roger Harmston, one of the heirs and a plaintiff herein who promised

to pay such delinquent taxes and thus redeem it for the heirs. (R. 49)

After Isabelle Harmston was appointed administratrix of her deceased husband's, Marion Eugene Harmston Estate and on June 19, 1922 (R. 312) she, on June 14, 1926, filed an inventory and appraisement of the estate. (R. 273) She listed Lots 29, 30, 31 and 32, which were later distributed to her, also Lots 8, 9 and 10, Block 32, and Lots from 5 to 12, \$200.00 cash; three cows and one calf and a half interest in 300 shares and 10 shares of stock in the Texas Standard Oil Company of the value of \$150.00 as constituting the assets of the estate. (R. 323)

- After Calder was appointed administrator of the estate of Marion Eugene Harmston he caused an inventory and reappraisement of the estate to be made and filed. He listed Lots 29, 30, 31 and 32 but the same were not appraised. He listed Lots 5 to 12 and the same were appraised at \$1500.00. Lots 8, 9 and 10 were listed and appraised at \$900.00.

The stock in the Texas Standard Oil Company was also listed but no value placed thereon. The appraisement is dated Sept. 9, 1939 and was filed in court on Sept. 26, 1939. The total value of the estate was placed at \$2400.00 (R. 373)

Mr. Calder secured an order authorizing him to sell Lots 8, 9 and 10 under date of March 6, 1939. (R. 359) On September 25, 1939 the court approved the sale of Lots 8, 9 and 10 to Harry W. Larson for the sum of

\$1000.00, of which \$150.00 was cash and the remainder was to be paid at \$12.50 per month with interest on the unpaid portion at 6% per annum until the whole amount was paid. (R. 375) Larson defaulted in his payments and Calder conveyed the property to Charles W. Jenkins, subject to the rights of Larson, the original purchaser. (R. 11) Larson paid a total of \$297.50 before he defaulted. Jenkins agreed to pay and did pay \$1075.00 principal and \$142.50 interest. (R. 12) The estate thus realized \$1539.00 from the sale of the property which was the amount reported in the account of Calder. (R. 391)

On April 19, 1940 Roger T. Harmston, one of the heirs, filed a petition to revoke the letters of administration to J. H. Calder in which petition it is, among other matters, in substance alleged:

“That J. H. Calder was appointed administrator of the estate on July 28, 1938 and letters of administration issued to him. That said J. H. Calder is not entitled to said administration without the consent of the heirs.”
 “That the said heirs of said deceased have heretofore given their consent to said administration but that this petitioner alleges that during the past year or two it has been unnecessary, expensive and inconvenient to administer said estate with the administrator and his attorney both residing at Provo, Utah.” The petition was signed and verified by Roger T. Harmston and was also signed by Merril H. Larsen, attorney for the petitioner. (R. 377)

To the petition the attorney for Calder filed a demurrer. (R. 382)

On June 3, 1940 Judge Young ordered the revocation of letters of administration to Calder and that letters issue to a person claiming under prior rights. The court further ordered the payment of all proper charges and directed the administrator to file a report. (R. 384) On September 4, 1940 a similar order was made and Roger T. Harmston was ordered appointed administrator, his bond was fixed at \$500.00 if a surety bond and \$800.00 if a personal bond. (R. 385) The orders above mentioned appear in the minute entries. So far as appears no formal written order was ever made. Also so far as appears Roger T. Harmston never took an oath of office and no letters of administration were ever issued to him. He did file a bond which was never approved. (R. 386)

So far as the probate files show no further proceedings were had until August 30, 1947 when Calder filed a final account and petition for distribution. (R. 387-391) Also (R. 444 to 448).

After the hearing was had and the account approved Calder paid to counsel for the plaintiffs the sum of \$1018.51 as ordered by the court (R. 480) and Calder was discharged and his sureties released from all liability. (R. 481)

CROSS ASSIGNMENTS OF ERROR

Comes now the respondent and makes the following cross assignments of error:

1. The trial court erred in admitting the files in cause numbered 1931 civil. (R. 28 and 29)
2. The trial court erred in admitting in evidence the files in cause numbered 1932 civil. (R. 28 and 29)
3. The trial court erred in admitting in evidence over respondent's objection the files in the probate proceedings in the matter of the Estate of Isabelle T. Harmston, the same being probate file 374. (R. 28 and 29)
4. The trial court erred in rejecting evidence that Calder prepared a report and account and mailed it to Merrill Larsen, attorney for Roger T. Harmston. (R. 76)

A R G U M E N T

As to the cross assignments of error it may be that respondent has not been prejudiced. We are at a loss, however, to see the materiality of the mortgage foreclosure proceedings had in case number 1931, the same being the action to recover on a note and foreclose a mortgage for \$2500.00 executed by Isabelle T. Harmston as an individual. The fact that Isabelle T. Harmston gave a note and a mortgage or the proceedings had to foreclose the same could not have any bearing on the question of whether or not J. H. Calder properly administered the estate of Marion Eugene Harmston. So also and for the same reason the proceedings had in the

matter of the estate of Isabelle T. Harmston are in no way material to any controversy involved in this proceeding. It will be noted that there are about 200 pages of the Bill of Exceptions devoted to a copy of such proceedings. Unless the attention of the court is directed to such matter it might well be confusing to the court as it has to the writers of this brief. Nor are the files in cause numbered 1932 civil enlightening, except possibly to show that the property foreclosed was owned by Marion Eugene Harmston at the time the \$4500.00 note and mortgage were executed, a fact which is not disputed, and is established beyond controversy by the probate files in the Marion Eugene Harmston estate.

**THE TRIAL COURT WAS NOT IN ERROR IN
HOLDING THAT THE ONLY PROPERTY THAT
CAME INTO POSSESSION OF J. H. CALDER
WAS THE PROPERTY WHICH HE SOLD.**

Beginning on page 32 of appellants' brief it is argued that property other than Lots 8, 9 and 10 came into the possession of Calder. It is true that Calder listed in his inventory other property, namely: Lots 5 to 12, which were appraised at \$1500.00 but the evidence conclusively shows that he never had actual possession of such property. That property stood in the name of Isabelle Harmston, the widow of the deceased, by reason of her having received an auditor's tax deed. She paid \$510.52 to Duchesne County for the property. (R. 39) Calder was wholly without funds to pay the taxes which had been paid by Mrs. Harmston, the mother of all of the heirs who are here complaining. If Calder had

brought suit against the mother of the heirs to recover the property and charged the expenses against the estate of Marion Eugene Harmston we wonder what the court and those interested in the estate would have said about such useless expenditure of the assets of the estate, especially so in light of the fact that it could make no difference to the persons interested in the estate after the death of Isabelle Harmston as to whether their father or mother held the title to the property. The evidence further shows that Calder never collected any of the rents or profits from such property (R. 8) On the contrary Roger T. Harmston had possession of that property and collected the rents therefrom after the Utah Savings and Trust Company ceased to act as administrator of the Isabelle Harmston estate. (R. 29 and 37) The estate of Isabelle T. Harmston claimed that property and in the inventory and appraisement of Isabelle T. Harmston's estate, the Utah Savings and Trust Company reported the same as a part of that estate. (R. 491) That company collected the rents and profits therefrom up to the time it was relieved as administrator. It should further be noted that under date of April 15, 1940 Roger T. Harmston prepared a petition to have the Utah Savings and Trust Company removed as administrator of the Isabelle Harmston estate and have himself appointed. (R. 226 to 228) Roger T. Harmston was appointed administrator of the estate of Isabelle T. Harmston to succeed the Utah Savings and Trust Company by an order made on December 4, 1940. (R. 248-251) He furnished a bond which is dated Feb.

29, 1941 from which time he collected the rents on Lots 5 to 12. Thus the only evidence which tends to show that Calder ever had possession of Lots 5 to 12 is that said lots are listed in the inventory. The evidence as above indicated is that Calder never collected one cent of the rents or profits but the same were collected by the administrators of the estate of Isabelle T. Harmston and that such administrators claimed the property for said estate. It is axiomatic that the law does not require the doing of a useless thing. It may be inquired what useful purpose would be served by Calder bringing an action to recover title to Lots 5 to 12. Where could he get the money to prosecute such an action unless he advanced it himself? If he had succeeded in recovering the property it would be distributed to the same persons who will receive it if it comes through the estate of the mother, Isabelle T. Harmston.

Possession of property means, as we understand it, more than to list property in an inventory. The evidence shows that the title to Lots 5 to 12 stands in the name of Roger T. Harmston who purchased it for the use of the heirs.

As to the stock in the Texas Standard Oil Company the evidence shows that Calder had never received any such certificate and from correspondence he learned that the company was defunct. (R. 10) He made inquiry about the \$200.00 reported by Mrs. Harmston as being in the bank but there was no such money nor could be found any cows or calves belonging to the estate. (R. 9)

There is no evidence to refute the testimony of Calder. If there was any stock of value belonging to the estate of Harmston it is more than likely that some of the children would know about its existence. Calder having attempted to locate such stock and having learned that the company had ceased to exist there was nothing more he could do.

Complaint is made because Calder sold the property to Larson and subsequently sold to Jenkins. At the time the sale was made to Jenkins in 1942 it was not necessary for an administrator to secure the consent of the court to sell real estate. Chapter 113, page 154, Laws of Utah 1939, now U.C.A. 1943, 102-10-5. It will be noted from the contract of sale "Protestants' Exhibit 1" that the sale was made subject to confirmation by the court having jurisdiction of the estate of Marion Eugene Harmston, deceased, and also subject to the rights of Harry W. Larson. It will further be noted that Calder received \$1539.00 in principal and interest for the property, (R. 9) while the property was appraised at only \$900.00. The last payment made by Jenkins was on February 2, 1946 as shown by the report filed on August 30, 1947. (R. 391) Pursuant to an order to show cause another report was made on August 30, 1948. (R. 444)

Counsel for the plaintiffs has been paid the money derived from the sale of the property and given his receipt therefor (R. 480). It is stated on page 29 of appellant's brief that it might not be amiss to here state that there is now an action pending to recover back the

property (Lots 8, 9 and 10). Apparently appellants believe that they can have their cake and eat it too. If the plaintiffs believe they still have a right to the property it is indeed difficult to see why they are complaining because we turned over to their representative the proceeds from the sale of the property, less certain items of expense. If as appellants contend they are still the owners of the property which Calder sold and their representative has the money derived from the sale of said property then and in such case it is difficult for us to understand why appellants are here complaining because Calder sold the property to Jenkins with a provision in such contract to the effect that Jenkins should take the property subject to the rights of Larson.

It is further said on page 34 of appellants' brief that Calder failed to secure the confirmation of the sale of the property to Jenkins and that it does not appear that Calder had the ability to dispossess Larson. We can understand how there might be some controversy between Larson and Jenkins as to their respective rights to the property sold, but they are, as it so appears, satisfied with what was done and the representatives of the plaintiffs having received the money derived from the sale are in no way injured by any defect in the title of Jenkins. Indeed they are benefited by the manner in which Calder disposed of the property. If Calder had become involved in litigation with Larson in an effort to dispossess Larson such a proceeding would obviously cost the estate a substantial sum which would be taken out of the assets of the estate.

The generally accepted view is that the conveyance of property authorized to be sold may be made to the assignee of the purchaser or to such person as the purchaser may indicate. *Ewing vs. Higby*, 7 Ohio 198; 28 Am. D. 248; *McKee vs. Simpson*, 36 F. 248; *Hallick vs. Grey*, 9 Cal. 18; 70 Am. D. 643; *Hobson vs. Ewan*, 62 Ill. 146; *White vs. Jones*, 88 N.C. 166; *West vs. Burgie*, 75 Ark. 516; 88 S.W. 557; *Pruit vs. Holly*, 73 Ala. 269.

While the evidence in this case does not show that Jenkins had any arrangements with Larson it is a reasonable inference that he had some understanding with Larson as otherwise Jenkins would not have undertaken to purchase the property.

Moreover the representatives of the appellants having accepted and retained the money derived from the sale of the property they are now estopped from questioning the validity of the sale. *Warner vs. Hill*, 153 Fa. 510; 112 S.E. 478; *Allen vs. Bekmier* (Tex.) Civ. App. 216 S.W. 647; *Gilbert vs. Hopkins*, 204 Fed. 196, 122 C.C.A. 482; *Myers vs. Boyd*, 144 Ind. 496; 43 N.E. 567; *Powers vs. Scharling*, 76 Kans. 855; 92 Pac. 1099; *Estrade vs. Kaack*, 126 La. 26; 52 S. 181; *Willie vs. Brooks*, 45 Miss. 542; *Meddes vs. Kenney*, 176 Mo. 200; 75 S.W. 633; *Mote vs. Kleen*, 83 Neb. 585; 119 N.W. 1125; *Matten vs. Brown*, 141 N.Y.S. 318; *Browne vs. Coleman*, 62 Ore. 454, 125 P. 278.

So also do the authorities hold that before a sale may be vacated it is necessary to offer or tender back the money paid before the sale may be set aside.

34 C.J.S., page 611, Sec. 630 and 24 C.J., page 680 and cases cited in footnotes.

So also a sale made by an executor or administrator is barred by the statutes of limitation after three years. *U.C.A. 1943, 104-2-17*.

The attention of the court is also directed to *U.C.A. 1943, 102-10-6* which gives any person interested in an estate the right to bring an action for the neglect or misconduct of a personal representative in making a sale of property if the person complaining has sustained damage by reason thereof. No claim is here made that the heirs have sustained any damage by reason of the sale to Jenkins even if it be held, contrary to our contention, that such sale was improvidently made. The evidence shows that the property was depreciating in value at the time the sale was made (R. 22).

J. H. CALDER WAS PROPERLY APPOINTED ADMINISTRATOR OF THE ESTATE OF MARION EUGENE HARMSTON.

It is contended at some length in appellants' brief that Calder was not properly appointed administrator of the estate. No such claim was made by any of the appellants until on October 15, 1947 when Roger T. Harmston filed his amended petition seeking the revocation of the letters of administration issued to Calder on May 28, 1938 (R. 402 to 408).

Roger T. Harmston did file a petition to have Calder's letters revoked in 1938, because, as therein al-

leged: "The said heirs of said deceased have heretofore given their consent to such administration but that this petitioner alleges that during the past year or two it has been unnecessarily expensive and inconvenient to administer said estate with the administrator and his attorney both residing at Provo, Utah" (R. 377-378). We doubt very much that the grounds alleged in such petition are sufficient to withstand the demurrer filed thereto, but no useful purpose would be served by arguing such demurrer at this late date. The court ordered the letters of Calder revoked and directed that letters of administration issue to Roger T. Harmston (R. 385). No formal order appears to have been made. On October 15, 1942 a surety bond was filed but so far as shown by the record no oath of office was filed and no letters of administration issued to Roger T. Harmston. Calder prepared an account and at the hearing he attempted to show that a copy of the account was sent to the attorney for Roger T. Harmston but the court rejected the evidence of the sending of such account (R. 75 and 76).

Some of the heirs of Marion Eugene Harmston also assisted in securing a purchaser for Lots 8, 9 and 10 (R. 47).

It will thus be seen that the heirs at law of Harmston recognized the fact that Calder was serving as administrator by and with their approval and consent. It is also made to appear from the evidence that the appellants have waived their right to act as adminis-

trators of the estate of their father; that they are now estopped by their conduct from questioning the right of Calder to serve as administrator of said estate and that they have ratified his appointment.

Moreover, as we have heretofore pointed out, Isabelle T. Harmston signed the note and mortgage as the administratrix of the estate of Marion Eugene Harmston and the money which she received was used to improve property which was a part of that estate when such improvements were made. It is of course elementary that every careful lawyer who is called upon to foreclose a mortgage will make all parties defendants who have or appear to have a claim subsequent or subject to the mortgage which is about to be foreclosed.

We are mindful that under our law an administrator must as a general rule secure an order of court before he can mortgage the property of the estate. It is a well settled law that an administrator may and frequently does enter into contracts or assumes obligations for and on behalf of the estate and later have such acts approved by the court. So far as we are advised the courts uniformly approve such acts if they are for the benefit of the estate. In this case there can be no serious question but that the improvements of the property belonging to the estate was calculated to be beneficial to the estate. It was by such means that the estate could derive an income from its otherwise unimproved property. It is true that prior to the foreclosure of the mortgage the mortgaged property was distributed to

Isabelle T. Harmston but it does not necessarily follow from such fact that the money loaned for the improvement of the property of the estate was not a benefit to the estate. If Mrs. Harmston had lived or if the mortgage on the property given to secure the money loaned to improve the property had been paid who can say that the probate court may not have required the estate to pay some or all of the money borrowed upon the final distribution of the estate. The fact that Mrs. Harmston signed the note and mortgage as administratrix of the estate of her deceased husband was notice to the Farmers and Merchants Bank that in the mind of Mrs. Harmston the estate was under some obligation to pay the note. The Bank in its foreclosure proceeding was in no position to claim that the estate of Marion Eugene Harmston had no interest in the property covered by the mortgage and no obligation to pay a part or all of the note signed by Mrs. Harmston, as administratrix of her husband's estate.

The only safe way of setting that matter at rest was to have an administrator of the estate appointed and made a party to the foreclosure proceedings. Apparently none of the heirs at law were willing to serve as administrator and therefore the Bank was compelled to act in the matter before it could safely proceed to foreclose its mortgage to the end that any interest that the estate might have in the mortgaged property be foreclosed and the record owner of the property be precluded from making the claim that the estate of Marion Eugene Harmston had an interest in the estate by

reason of the property standing in the name of the deceased at the time the mortgage and note were executed and the same were executed by the administratrix of the estate.

In their brief appellants seem to rely on the case of *In re: Cloward's Estate*, 95 Utah 453, 82 Pac. (2d) 336, 119 A.L.R. 123. The facts of that case are easily distinguishable from the facts in this case. In the Cloward case some of the heirs were minors. The petition of G. T. Bean was filed in less than three months after the death of Amanda Cloward Searle. There was no semblance of a claim in favor of G. T. Bean against the estate of Amanda Cloward Searle or against the estate of Thomas H. Cloward. There is nothing in that case which indicates that any of the heirs at law of either Cloward or Mrs. Searle ever consented to or ratified the appointment of Bean as administrator. The Cloward case is not authority for the doctrine that one who claims to have an interest in an estate may not properly be appointed administrator if it later turns out that his claim is unenforcible. On page 344 of 82 Pac. (2d) in the prevailing opinion it is said:

“If the appellant claims to be a creditor only a prima facie showing is required, but if the proof of this fails the petition should be dismissed.”

The fact that the note and mortgage were signed by Isabelle T. Harmston, as administratrix of the estate of Marion Eugene Harmston, established a prima facie case of liability of the estate and the court properly

appointed Mr. Calder as administrator where, as here, no one appeared to oppose the appointment. Under the doctrine of unjust enrichment or quasi contracts the estate might well be held liable for the improvements placed upon the property with the money loaned by the bank.

**THE FINDINGS OF FACT AND CONCLUSIONS OF
LAW SUPPORT THE ORDER MADE
ON DECEMBER 21, 1948.**

Beginning on page 40 of appellants' brief under the heading "Point II" it is contended that various of the Findings of Fact and Conclusions of Law of the Trial Court are erroneous. We have already discussed most of the questions discussed under that heading, including subdivisions B, C, D, E, F, G, H, I, K and L thereof.

In support of its claim that the mortgage to the Bank is invalid in so far as the estate of Mr. Harmston is concerned the cases of *Skebata vs. Bear River State Bank of Utah*, 205 Pac. (2d) 251 and *Parks vs. Illinois Life Insurance Company*, 176 Okla. 63, 54 Pac. (2d) 392 are cited. In the Skebata case the mortgage was to secure money not for the benefit of the estate but for the use and benefit of a third person. No such question is here presented because the money in this case was loaned and used for the improvement of property which belonged to the estate at the time the money was loaned.

In the Oklahoma case the court did hold that a mortgage of property of an estate must be authorized

by the proper tribunal. We do not contend that an administrator of an estate may mortgage property for the benefit of a third person nor do we contend that an administrator may mortgage property for any purpose other than for the benefit of the estate. What we do contend is that in light of the fact that Mrs. Harmston signed the note and mortgage as administratrix of her husband's estate at the time the property stood in his name it was proper to have the administrator of the estate made a party to a foreclosure proceeding for the purpose of foreclosing a mortgage purporting to bind the estate and that one holding such a mortgage has such an interest in the estate as will authorize the mortgagee to designate someone to act as administrator so that any interest that the estate may claim in the mortgaged property may be foreclosed, especially where the money is loaned and used for the improvement of property belonging to the estate. That is all that is here claimed by the respondent. We, of course, do not know what arrangements, if any, Mrs. Harmston had with her children when she had Lots 29 to 32 distributed to her. So far as we know she may have continued to hold it in trust for the other persons interested in the estate. The fact remains that Mrs. Harmston signed the note and mortgage as administratrix of the estate of her deceased husband.

It is, of course, elementary that a mortgagor is a necessary party defendant to a suit to foreclose a mortgage. In view of the law being so well settled that mortgagors are necessary parties to a foreclosure pro-

ceeding we shall be content by quoting the following from the case of *Ankeny v. Lieuallen, et al.*, 127 Pac. (2d) 735, 736:

“In mortgage foreclosure cases, all mortgagors, if living, or, if dead, their personal representatives, are ‘proper and necessary parties defendant’, and, if not made defendants, their individual interest in the mortgaged property would not be affected by the foreclosure.”

Not until there was a judicial determination of the interests or liability, if any, of the estate of Mr. Harmston in or on the note and mortgage could that matter be said to be set at rest. The only way that could be done was to have an administrator appointed and made a party to the foreclosure suit. That result has been accomplished. The mortgage has been foreclosed and the estate relieved from all liability on account of the note and mortgage. As we understand the appellants make no claim that the estate of Mr. Harmston has any interest in the mortgaged property and the Bank makes no claim that the estate is liable for any deficiency.

In appellants’ brief they further contend that the Bank having failed to file a claim against the estate within the time allowed in the Notice to Creditors it, therefore, is not a creditor. There is no necessity of filing a claim secured by a mortgage unless the mortgagee seeks a deficiency judgment. *U.C.A. 1943, 102-9-11*. It should be noted that under the provisions of *U.C.A. 1943, 102-4-3*, letters of administration must be granted

to any interested applicant when the persons having a better right fail to appear and claim letters of administration within three months after the death of decedent. Obviously one claiming a lien on the property belonging to an estate is interested therein even though such person makes no claim beyond the enforcement of a lien against the property belonging to or in which the estate claims or may claim an interest in the property covered by the lien.

On page 45 of appellants' brief it is said that the property sold to Larson was not appraised within one year of the sale. Counsel is in error in making that statement. The property sold was appraised on September 9th, 1939 and the sale was approved on September 25, 1939 (R. 373-376).

On pages 45 and 46 of appellants' brief they again discuss the failure of Calder to pay the taxes which became due before he was appointed as administrator and which property was purchased by Isabelle T. Harmston, who claimed to be the owner of such property. We have already directed the attention of the court to the fact that the heirs of Mr. and Mrs. Harmston were the same, that Roger T. Harmston collected the rents and profits derived from Lots 5 to 12; that Calder had no funds to pay the taxes; that Roger T. Harmston agreed to pay the taxes and that Roger T. Harmston now holds the legal title to the property for the use and benefit of the heirs. Pray how then may it be said that there is any loss because Roger T. Harmston paid the taxes or

why Calder should be surcharged with anything for failing to do that which he was unable to do because of a lack of funds and which Roger T. Harmston agreed to pay out of the funds which he collected and when, as here, no damage has resulted to the estate because Roger T. Harmston holds the legal title for the use and benefit of the estate. As we have heretofore observed why should Calder have brought an action and squandered what little assets the estate may have had when to do so would have accomplished nothing of ultimate benefit to the estate and when Calder was entirely without funds of the estate to engage in such useless litigation?

In their brief appellants in one breath complain that Calder was negligent because he failed to pay the taxes on the property of the estate notwithstanding he had no funds belonging to the estate and in the next breath they contend that the property of the estate should not have been sold because there was no necessity to sell the same. If Mrs. Harmston's estate and Roger T. Harmston are to be repaid the money which they advanced to pay the taxes which they are entitled to have repaid we wonder where the money can be found to pay the same without selling some of the property belonging to the estate.

It will be observed that in the petition for the sale of the property which was sold it is, among other things, alleged that it is the desire of all of the heirs of said decedent and all persons interested herein that said property be sold as aforesaid and at private sale (Tr.

353). Such allegation finds support in the evidence (R. 23 and 47). There is no evidence to the contrary. That being so the heirs are estopped from attacking the validity of the sale. *34 C.J.S., Sec. 606, page 637* and cases cited in footnotes.

All that is said on page 46 of appellants' brief applies equally to the purchase made by Roger T. Harmston.

Complaint is made on pages 48 and 49 of appellants' brief because Calder permitted a default to be entered against him in the foreclosure of Lots 29 to 32 and because Mr. Morgan was the attorney for Calder, as administrator of Mr. Harmston's estate. It is impossible to conceive how the estate of Mr. Harmston was in any way prejudiced by such facts. Appellants in one breath contend that the estate of Marion Eugene Harmston had no interest in the property because before the mortgage was foreclosed the same was distributed to Mrs. Harmston and in the next breath contend that Calder should not have permitted his default to be entered and also that Morgan being the attorney for the plaintiff in the mortgage foreclosure could not represent Calder as administrator. We are mindful of the rule that an attorney may not represent adverse interests but we are at a loss to see how such rule is applicable here where the appellants contend that the estate of Mr. Harmston had no interest in the mortgaged property. It may be inquired how may one be charged with representing adverse interests where, as here, it

is contended by appellants that there were no adverse interests to be represented. The facts shown by the evidence are that Calder, as administrator, was made a party defendant because it appeared from the mortgage that Mr. Harmston may claim some interest in the property because the mortgage and note were signed by the administratrix of his estate.

Numerous provisions of the Probate Code of Utah are cited on pages 49 and 50 of appellants' brief. Of course the duties there imposed upon the administrator should be complied with and his failure to do so will render him liable for damages sustained on account of his failure to do so. The difficulty with appellants' position is that there is a total absence of evidence to show that anything that Calder did or failed to do resulted in any injury to the estate of Marion Eugene Harmston or to those interested in his estate. On the contrary if Calder had done, what appellants claim he should have done, in all probability all of the estate of Mr. Harmston would have been squandered in attorney's fees and court costs.

It has been the repeated and uniform holding of this court that harmless error will not justify the reversal of a judgment. Such is the effect of *U.C.A. 1943, 102-11-20* referred to by appellants. Calder has accounted for the whole of the estate which has come into his possession at the value of the appraisement contained in the inventory, together with the money which he secured in excess of the appraisement as required in

U.C.A. 1943, 102-11-21. And such proceeds have been delivered to and retained by the representative of the appellants. Calder was not accountable for uncollectible debts or property, where as here, it appears that the \$200.00 reported by Mrs. Harmston was no longer in the bank, the stock was valueless and doubtless the cows and calf had died of old age before Calder became administrator. Moreover Mrs. Harmston doubtless expended much more than the value of the property which was evidently disposed of by her before her death in paying taxes on the property of the estate in the sum of \$510.52 (R. 39).

Complaint is also made because Calder delayed in making distribution. The facts touching that phase of the case are: He was appointed on May 5, 1938 (R. 350). On April 22, 1940 Roger T. Harmston filed a petition seeking the revocation of the letters of administration to Calder (R. 377). On June 3, 1940 and again on September 4, 1940 a minute order was made appointing Roger T. Harmston administrator and relieving Calder. So far as appears no formal order was ever made in conformity with the minute order. On September 22nd Roger T. Harmston filed a bond but so far as appears never took the oath of office or had letters of administration issued to him (R. 386). The last payment on the property which was sold was paid on February 21, 1946.

As soon as Calder was to have ceased acting as administrator and Harmston was to take over Calder

caused to be prepared and sent to the attorney for Harmston a report (R. 62 and 63). When respondent sought to introduce the report of Calder so made by J. Rulon Morgan, who prepared the same, the trial court, as we contend, erroneously rejected the same (R. 76).

It is pertinent to inquire what Calder could do that he did not do under the circumstances. By a minute order of the court he was required to cease acting as administrator and Harmston was to take over. Harmston having failed to qualify he could not lawfully take over. Calder attempted to get Harmston to examine his report before filing the same but apparently Harmston refused or neglected to do anything about the accounts. It is quite apparent that Calder did not wish to serve as administrator if he could be relieved from serving. If Harmston had qualified there can be no doubt but that Calder would have been delighted to be relieved from further serving.

The matter stood in that condition until August 30, 1947 when Calder filed his final account and petition for distribution (R. 387-391).

JUDGE NELSON WAS A JUDGE WHEN HE SIGNED THE ORDER DISCHARGING CALDER.

Under appellants' Point III on page 56 of their brief it is stated that Judge Joseph E. Nelson was not

a District Judge when he entered the order discharging Calder as administrator. Counsel is in error in making such statement. *Section 6 of Article 8 of the Constitution of Utah* provides that District Judges are elected for four years and shall hold office until the first Monday in January after their election and until their successors have qualified. If counsel had taken the trouble to look up the public records he would have ascertained that Judge Tuckett, who succeeded Judge Nelson, did not take his oath of office until after the 6th day of January, 1949.

THE COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL.

On page 57 of appellants' brief it is stated that the trial court erred in denying appellants' motion for a new trial. Nothing new is argued under that heading. When the court examines this record it will find that Calder has filed vouchers showing the amounts, dates and purposes for which he expended the moneys coming into his possession as administrator, including the money which he paid to the representative of the appellants. Such money is retained by the appellants and thereby they are estopped from attacking the judgment appealed from as we have heretofore pointed out in our motion to dismiss the appeal.

Moreover even though it should be found that Calder has failed to strictly comply with some of the provi-

sions of our Probate Code there is a complete failure of any evidence that appellants have sustained any injury because of such failure.

It is submitted that the judgment should be affirmed with costs.

Respectfully submitted,

J. RULON MORGAN

ELIAS HANSEN

Attorneys for Respondent.