

1952

# Robert V. Tiller and Mildred Molinari v. Loren G. Norton et al : Brief of Appellants

Utah Supreme Court

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W. D. Beatie; Attorney for Plaintiffs and Appellants;

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# IN THE SUPREME COURT of the STATE OF UTAH

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ROBERT V. TILLER, also known as Robert V.  
Tillier, also known as ROBERT V. SWANN,  
and MILDRED MOLINARI,

*Plaintiffs and Appellants,*  
vs.

LOREN G. NORTON, LOREN G. NORTON,  
administrator of the Estate of CHARLES  
CARSON, also known as H. F. SWANN, also  
known as R. C. TILLER, also known as  
ROBERT C. TILLER, deceased, and THE  
EMPLOYERS LIABILITY ASSURANCE  
CORPORATION, LTD., a corporation, and  
E. LeROY SHIELDS, as executor of the Estate  
of Grace Catherine Carson, deceased, and E.  
LEROY SHIELDS,

*Defendants and Respondents,*  
and

LOREN G. NORTON, GLORIA NORTON, wife  
of Loren G. Norton, EDITH M. HAZELRIGG  
and CATHEDRAL OF THE MAGDALENE  
CATHOLIC CHURCH OF East South Temple,  
Salt Lake City, Utah, also known as ROMAN  
CATHOLIC BISHOP OF SALT LAKE CITY,  
a corporation sole,

*Cross-Defendants.*

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## APPELLANTS' BRIEF

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433 Judge Building  
Salt Lake City, Utah

W. D. BEATIE,  
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and Appellants.*

FILED

FEB 4 1952

Supreme Court, Utah

7770

# INDEX

	Page
THE FACTS .....	1
STATEMENT OF POINTS RELIED UPON .....	43
ARGUMENT .....	43
POINT. I—THE JUDGMENT IS CONTRARY TO THE EVIDENCE OF MRS. GRACE CARSON BEING A WIDOW AND HEIR OF CHARLES CARSON.....	44
POINT II—THAT AN ADMINISTRATOR IS A TRUSTEE IN THE BROADEST SENSE AND HELD TO THE SAME HIGH DEGREE OF STRICT ACCOUNTABILITY AS A TRUSTEE .....	49
POINT III—THAT THE DUTY OF A SPECIAL ADMINISTRATOR IS LIMITED .....	50
POINT IV—FAILURE TO PERFORM THE DUTY TO MAKE DISCLOSURES WHICH RESTS UPON ONE BECAUSE OF TRUST AS FRAUD FOR WHICH EQUITY IN AN INDEPENDENT ACTION WILL RELIEVE AGAINST JUDGMENT.....	52
POINT V—ORDER OR DECREE OF DISTRIBUTION OF DECEDENT'S ESTATE AS PROTECTION OF ADMINISTRATOR AGAINST CLAIM OF ONE NOT NAMED THEREIN WHO IS ENTITLED TO A SHARE OF AN ESTATE .....	78
CONCLUSION .....	85

## TEXTS CITED

21 Am. Jur. 515 .....	52
-----------------------	----

## STATUTES CITED

Section 102-4-15 U.C.A. 1943—Powers and Duties.....	50
---	----

## CASES CITED

Aldrich v. Barton, et al, (Cal) 71 Pac. 169.....	52
Anderson v. Lyons, 32 N. W. (2d) 849.....	65
Appeal of O'Neal, 11 Atl. 856.....	74
Barrette v. Whitney, 36 Utah 574, 106 Pac. 522.....	73
Caulk v. Lowe, (Okla) 178 Pac. 101.....	61
Child, et al. v. Dist. Court of 2nd Jud. Dist., et al., 80 Utah 243, 14 Pac. (2d) 1110 .....	74
Crow v. Madsen, et al, (Cal) 111 Pac. (2d) 7.....	64

# INDEX—(Continued)

	Page
Ferguson v. Wachs, et al, 96 Fed. (2d) 910.....	74
Hewett, et al v. Linstead, et al, (Cal) 122 Pac. 352.....	55
Hewitt v. Hewitt, 17 Fed. (2d) 710.....	67
In Re Bailey's Estate, 238 N.W. 845 .....	74
In Re Pilcher's Estate, 114 Utah 72, 197 Pac. (2d) 143.....	44
In Re Pingree's Estate, 82 Utah 437, 25 Pac. (2d) 937.....	51
In Re Ross Estate, (Cal) 73 Pac. 976.....	74
In Re Stevens Estate, 102 Utah 255, 130 Pac. (2d) 85.....	79
Jones v. Arnold, 221 S.W. (2d) 187.....	74
Jorgenson v. Jorgenson, (Cal) 193 Pac. (2d) 728.....	63
Larrabee v. Tracy, et al, 21 (Cal) (2d) 645, 134 Pac. (2d) 265.....	56
Morris v. Mull, 144 N.E. 436.....	83
Purinton V. Dyson, (Cal) 65 Pac. (2d) 277.....	59
Rice v. Rice, .... Utah ...., 212 Pac. (2d) 685.....	50-53
Sears v. Rule, (Cal) 114 Pac. (2d) 57.....	74
State v. Vincent, et al, (Ore) 52 Pac. (2d) 203.....	74
Welch v. Flory, et al (Mass.) 200 N.E. 900 .....	79
Weyant, et al v. Utah Savings & Trust, 54 Utah 181, 182 Pac. 189	71

# IN THE SUPREME COURT of the STATE OF UTAH

ROBERT V. TILLER, also known as Robert V.  
Tillier, also known as ROBERT V. SWANN,  
and MILDRED MOLINARI,

*Plaintiffs and Appellants,*

vs.

LOREN G. NORTON, LOREN G. NORTON,  
administrator of the Estate of CHARLES  
CARSON, also known as H. F. SWANN, also  
known as R. C. TILLER, also known as  
ROBERT C. TILLER, deceased, and THE  
EMPLOYERS LIABILITY ASSURANCE  
CORPORATION, LTD., a corporation, and  
E. LeROY SHIELDS, as executor of the Estate  
of Grace Catherine Carson, deceased, and E.  
LEROY SHIELDS,

*Defendants and Respondents,*  
and

LOREN G. NORTON, GLORIA NORTON, wife  
of Loren G. Norton, EDITH M. HAZELRIGG  
and CATHEDRAL OF THE MAGDALENE  
CATHOLIC CHURCH OF East South Temple,  
Salt Lake City, Utah, also known as ROMAN  
CATHOLIC BISHOP OF SALT LAKE CITY,  
a corporation sole,

*Cross-Defendants.*

No. 7770

## APPELLANTS' BRIEF

### THE FACTS

This is an appeal by the plaintiffs, Robert V. Tiller,  
also known as Robert V. Tillier, also known as Robert V.

Swann and Mildred Molinari, from a Decree in favor of the defendants and against the plaintiffs, no cause of action.

This action was commenced by the plaintiffs filing an action against Loren G. Norton, Loren G. Norton, administrator of the Estate of Charles Carson, also known as H. F. Swann, also known as R. C. Tiller, also known as Robert C. Tiller, deceased, and The Employers Liability Assurance Corporation, Ltd., the latter being the bondsman of Loren G. Norton the administrator. (R. 1). Plaintiffs then filed an amended complaint with leave of court (R. 23) to which complaint answers were filed by the respective defendants and a cross complaint was then filed with leave of court by the defendant, The Employers Liability Assurance Corporation, Ltd., against Loren G. Norton, Gloria Norton, wife of Loren G. Norton, Edith M. Hazelrigg and Cathedral of the Magdalene Catholic Church of East South Temple, Salt Lake City, Utah, also known as Roman Catholic Bishop Salt Lake City, a corporation sole. (R. 58). By reason of the filing of the cross complaint, plaintiffs then with leave of court filed a second amended complaint (R. 72), adding as party defendants E. LeRoy Shields, as executor of the Estate of Grace Catherine Carson, deceased and E. LeRoy Shields. Answers were then filed by the defendants to plaintiffs' second amended complaint (The Employers Liability Assurance Corporation R. 101) (E. LeRoy Shields, executor R. 115) (Loren G. Norton R. 141) and trial was had upon the same.

In this brief we shall refer to the parties as follows:

Robert V. Tiller and Mildred Molinari—plaintiffs  
 Loren G. Norton—administrator  
 The Employers' Liability Assurance Corporation  
 E. LeRoy Shields—executor.

The complaint alleges in substance that the plaintiffs are residents of Chicago, Illinois and that defendant, Loren G. Norton, is a resident of Salt Lake County and was the duly appointed qualified and acting administrator of the Estate of Charles Carson, etc. and that the defendant, The Employers Liability Assurance Corporation, Ltd., is a corporation of Great Britain, authorized to do business in the State of Utah, and that E. LeRoy Shields is the duly qualified, and acting executor of the Estate of Grace Catherine Carson, deceased.

That one Charles Carson died intestate in Salt Lake City, Utah, on the 8th day of October, 1948, a resident of Salt Lake City, Utah, and is referred to in the complaint at all later times either as H. F. Swann, Henry F. Swann, R. C. Tiller, also known as Robert C. Tiller.

That the plaintiffs are the children and issue of the marriage of one Maydie Sherman and R. C. Tiller and that for many years prior to 1922, the plaintiffs and Maydie Sherman Tiller, their mother, and R. C. Tiller, their father, resided at Vetat, South Dakota where R. C. Tiller was known as H. F. Swann, or Henry F. Swann. That in May of 1922, Maydie Tiller, the mother of plaintiffs was forced to leave R. C. Tiller, by reason of cruel treatment and left the family ranch at Vetat, South Dakota, and sought residence at Chicago, Illinois and that



shortly thereafter, R. C. Tiller did likewise take residence at Chicago, Illinois. That Maydie Tiller, the mother of plaintiffs, divorced R. C. Tiller at Chicago, Illinois, on the 11th day of July, 1924 and that R. C. Tiller remained absent from his family, the plaintiffs, from 1924 until the date of his death and that the plaintiffs between 1924 and July 7, 1950, were never informed of the location of their father or his address, but that he had gone under an assumed name of Charles Carson and so did business in Salt Lake City, Utah, until the date of his death on October 8, 1948; that Charles Carson was buried in Salt Lake City, Utah, on the 12th day of October, 1948, and left an estate appraised at \$28,620.99. That on the 11th day of October, 1948, one Dr. Howard T. Anderson, a preferred creditor of Charles Carson, deceased, did file a joint petition for letters of special administration and administration and designated that one Grace Catherine Sweney Carson was the widow of the decedent, (Ex. L-1) and that the Hon. Roald A. Hogenson did on the 11th day of October, grant letters of special administration to Tracy Collins Trust Company; that on the 13th day of October, Grace Catherine Carson filed a petition for probate of said estate (Ex. S-1) alleging that Charles Carson left surviving the following heirs at law: "Grace Catherine Carson, your petitioner herein and no other presently known heirs at law."

On October 14, 1948, Tracy Collins Trust Company, special administrator, filed a petition allegeing that Charles Carson was also known as H. F. Swann, also known as Henry F. Swann, and that the title should be



so amended and that decedent had two children by marriage, namely Robert V. Swann and Mrs. Mildred Swann Molanari, who were last heard of at Chicago, Illinois in the year 1944. Notice of hearing on letters of administration were then mailed on the petition of Dr. Anderson to Grace Catherine Sweney Carson at 2300 South State Street, Salt Lake County, Utah, Robert V. Swann, Chicago, Illinois and Mrs. Mildred Swann Molanari, Chicago, Illinois on the 16th day of October, 1948. (Ex. L-1). On the 21st day of October, 1948, Grace Carson filed an objection to the petition of Dr. Anderson for letters and alleged "That decedent had relatives in the State of Arizona the exact denomination is not familiar to the Protestant but that said Protestant is now making inquiry to determine who such relatives and heirs are." (Ex. L-1). On December 21, 1948, Dr. Anderson filed an amended petition for letters of administration, setting forth that his information, since the filing of his original petition, is that Grace Catherine Sweney Carson was not the widow of the decedent and that the heirs at law were Robert V. Swann and Mrs. Mildred Swann Molanari, of Chicago, Illinois. On the 6th day of May, 1949, Tracy Collins filed a petition further amending the title of the deceased by adding R. C. Tiller and Robert C. Tiller. On June 7, 1949, Grace Carson filed an amended petition for probate, alleging, "that he left him surviving the following heirs at law, Grace Catherine Carson, your petitioner herein and no other presently known heirs at law."

On the 1st day of April, 1949, Neil O'Donnell, filed a petition as a preferred creditor, asking the appointment

of Tracy Collins Trust Company and alleged that Robert V. Swann and Mildred Swann Molanari were the heirs at law. (Ex. 19). By order of court the petitions filed by Dr. Anderson, Grace Carson and Neil O'Donnell were consolidated for hearing and various hearings were had thereon at which the testimony of Mr. Beless, the assistant trust officer of the special administrator was adduced as to what progress was made by letters and inquiries as to the whereabouts of the plaintiffs and the total sum of \$25.00 was authorized for search of the plaintiffs, by the court. At one of these hearings Grace Catherine Carson testified as to her marriage in South Dakota, 25 or 30 years before to the decedent and that they had lived as husband and wife to the death of the decedent.

That on the 11th day of June, 1949, the Hon. Jos. G. Jeppson did make an oral decision appointing Loren G. Norton, the designee of Grace Carson, the administrator of the Charles Carson Estate. That a printed form Order appointing Loren G. Norton as administrator was signed by the Hon. Jos. G. Jeppson on the 20th day of June, 1949, and on the same day, letters of administration were filed by Loren G. Norton and a corporate surety bond in the sum of \$22,000.00 was filed by the defendant, The Employers Liability Assurance Corporation.

Tracy Collins in accordance with the Order of Judge Jeppson filed its first and final account as special administrator on July 7, 1949, requesting instructions of the court as to whether or not the assets of the estate should be turned over to Loren G. Norton until such time as Findings of Fact, Conclusions of Law and Decree

were entered on the matter of the appointment of the administrator in the cause. That on the 22nd day of July, 1949, Judge Joseph G. Jeppson did file Findings of Fact, Conclusions of Law and Decree, appointing Loren G. Norton as administrator of the Estate of Charles Carson and did make the following findings:

“2. That said petitioner and said decedent owned a store in Salt Lake City, Utah, the name of which was Carson and Carson; that both worked in the store, both transacted the business and the business was conducted as a partnership, and was so run for a period of thirteen years; that many people in Salt Lake City, Utah, knew the said Mr. and Mrs. Charles Carson for a period of over thirty years, and who knew them as man and wife, and that they lived together as man and wife; that all business that has been conducted between said parties, Charles Carson and Grace Catherine Carson, was conducted by both of said parties and in the business affairs of the parties, each was recognized as an owner therein and that they consulted together in relation to said business matters, and that during all of said time, they lived together, cohabited together as man and wife, and that the said Charles Carson, also known as H. F. Swann, also known as Henry F. Swann, also known as R. C. Tiller, also known as Robert C. Tiller, always obtained permission from Grace Catharine Carson in all business deals that were transacted within the knowledge of them, and the witnesses who knew them and all others, according to their understanding and best information.”

“4. That Mrs. Grace Catharine Carson, in a hearing before the above entitled Court, testified

under oath that she and Mr. Charles Carson, also known as H. F. Swann, also known as Henry F. Swann, also known as R. C. Tiller, also known as Robert C. Tiller had traveled and lived together as man and wife in other states, including the State of Wyoming, in which they lived for a period of over six months, and in the State of Utah, for a period of twenty-five to thirty years.”

“7. That he left surviving the following heirs at law, Grace Catherine Carson, your petitioner herein.”

Prior to filing of Findings of Fact, Conclusions of Law and Decree, appointing Loren G. Norton as of July 22, 1949, administrator, an Order of Publication of Notice to Creditors was filed on the 23rd day of June, 1949, by Loren G. Norton as administrator and publication of notice to creditors was completed on the 15th day of July, 1949. Publication to creditors being in the name of Charles Carson, also known as H. F. Swann, also known as Henry F. Swann, also known as Henry F. Tiller, also known as R. C. Tillier, also known as Robert Tiller, deceased.

Tracy Collins Trust Company thereupon turned over the assets of the estate to Loren G. Norton for administration and Tracy Collins Trust Company was discharged as special administrator on the 31st day of August 1949.

That E. LeRoy Shields, a notary public had Dr. Howard T. Anderson file a claim for \$25.00 on September 8, 1949, and said claim was approved and allowed by

Court September 9, 1949. Payment of said claim is alleged in the first and final account of Chas. Carson estate.

That Loren G. Norton, as administrator filed a petition for widow's allowance for Grace Carson for the sum of \$125.00 per month on June 29, 1949, and did obtain an Order granting widow's allowance on July 1, 1949, without any notice of said hearing, and did again on October 28, 1949, file a petition for increase of widow's allowance to Grace Carson to the sum of \$200.00 per month, which order was granted without notice on the 28th day of October, 1949. On December 7, 1949, Loren G. Norton filed a first and final account and petition for distribution in said estate alleging:

“that the only heir of said decedent that can be found is Grace Catherine Carson who died on the 4th day of November, 1949, leaving a will to her property and estate which has been filed for probate in the above entitled court.”

That on this first and final petition the only notice given was that of posting notices and the court did enter a decree of settlement of first and final account and for distribution and discharge as of the 21st day of December, 1949, which decree provided:

“That the said Charles Carson, also known as H. F. Swan, also known as Henry F. Swan, also known as R. C. Tiller, also known as Robert C. Tiller, deceased, died intestate leaving him surviving the following heirs at law who would be entitled to share in the residue of said estate as

hereinafter described, remaining for distribution; Grace Catherine Carson, his wife, of Salt Lake City, Utah."

That to date there has never been filed receipts in the estate of Charles Carson, deceased, nor a discharge of the administrator as such.

The plaintiffs allege eleven acts as the basis of this action, being broken up into three periods as follows:

That the defendant, Loren G. Norton, did falsely, fraudulently and deceitfully enter into and act with Grace Catherine Carson in her application and actions applying for his appointment in said estate as the administrator thereof in the following particulars:

(a) That at the time Grace Catharine Carson filed her petition for letters of administration and objection to the petition of Dr. Howard T. Anderson, that defendant Loren G. Norton well knew that plaintiffs herein were the children of the decedent Charles Carson and to his best information resided in Chicago, Illinois.

(b) That Grace Catharine Carson was not the widow of Charles Carson, deceased, nor was she his heir at law.

(c) The publishing of a purported notice to creditors, the first publication of which was on June 24, 1949, and the last date of publication on the 15th day of July, 1949, prior to his appointment as the duly appointed and qualified administrator of the estate of Charles Carson deceased.

That Loren G. Norton, as administrator of the Estate of Charles Carson, deceased, falsely, fraudulently

and deceitfully acted with Grace Catherine Carson from the time of his appointment until the death of the said Grace Catharine Carson in the handling of said estate in the following particulars:

(d) That no legal notice to heirs or creditors was ever published in this estate.

(e) That he did file two petitions herein referred to in paragraph 11, for widow's allowance and had the sum of \$500.00 paid out of the estate, well knowing that Grace Catharine Carson was not the widow of the decedent or entitled to a widow's allowance.

(f) That at no time after July 22, 1949, were notices sent to the plaintiffs herein advising them of any matter in the handling or distribution of the Estate of Charles Carson, deceased.

(g) That no diligent search was made to locate the plaintiffs herein at Chicago, Illinois, and that plaintiffs have for many years resided at Chicago, Illinois, and could easily have been located through proper channels of investigation.

(h) That he failed to inventory assets, which he owed to the estate, and thereby converted the same to his own use in the sum of \$300.00. That he failed to inventory an indebtedness of his brother, which was a loan on the part of the decedent to his brother, and that he failed to properly inventory assets of said estate which were in his possession, namely numerous rings and settings of rings and instances of safety deposit box and blue foot locker.

That Loren G. Norton, administrator, falsely, fraudulently and deceitfully failed to disclose to the Court in



the First and Final Account and Petition for Distribution of said estate the following:

(i) The fact that he knew prior to the death of the decedent that the plaintiffs were the children of the decedent and his lawful heirs.

(j) That Grace Catharine Carson was not the widow of the decedent and entitled to distribution of all assets of said estate as the only heir at law.

(k) The fact of what search had been made as the administrator of the estate to locate the plaintiffs herein nor to disclose to the Court the likelihood of plaintiffs herein being heirs at law of said decedent well knowing, that he, the said defendant, would beneficially gain by not making any such disclosures of other heirs, as he at said time well knew, at the time of the filing of said First and Final Account that Grace Catharine Carson had died on November 4, 1949, prior to the filing of the First Account and that he, the defendant, was the residuary beneficiary of the estate of Grace Catharine Carson and would materially gain by not having the plaintiffs herein participate in the distribution of the estate of Charles Carson deceased, and that failure to disclose to the Court the probability of such heirs for the purpose of depriving these plaintiffs of their just share of said estate and by such failure to so disclose the probability of plaintiffs, from having plaintiffs herein advised as to their interest in the estate, and to avoid any adversary contest in the probate of said estate.

At the trial of this cause it was determined that the plaintiffs were the children and heirs of Charles

Carson (R. 146) so there is no issue of that fact on this appeal.

Volume one of the transcript could have been eliminated as the first four witnesses, namely plaintiffs and the two Mr. Bakers from South Dakota testified as to identity of plaintiffs. Counsel for The Employers Liability insisted on the full record on appeal.

The following statement of witnesses will eliminate as much as possible of the fact that plaintiffs are heirs of Charles Carson, deceased.

Robert V. Tiller, one of the plaintiffs, relates the names used during his life, states the name of his father and mother and that he was born October 4, 1901. (R. 173 and 409). That he resided at 4707 Kenmore Avenue, Chicago, Illinois, six years immediately prior to coming to Salt Lake City in 1950 (R. 174), and then relates the other various addresses where he resided in Chicago, since approximately 1930. (R. 182). His earliest recollection of any residence was Gynadotte, West Virginia, when about two years old. (R. 184). That his father's name was Robert C. Tiller and mother's Maydie Sherman Tiller, and moved to Chicago and attended Longfellow School until 1912 or 1913. (R. 185). Then moved to Vetel, South Dakota residing there until 1926, and attended England School. (R. 187). That his mother died in Chicago in 1926. (R. 189). He left the farm at Vetel, South Dakota in 1927, traveling to Omaha, Nebraska, Denver, Colorado, working on farms and for Union News Company at Denver. (R. 190). Returned to Chicago in 1930 and resided there until 1950 except for trips. (R. 191).

Operated restaurant nine months in 1949 in Chicago. (R. 195).

That his father's name while residing in Chicago was H. F. Swann and mother's name Mary Swann. Plaintiff's name, Robert Swann and sister's name Mildred Swann and the same names were used during the family residence at Vetel, South Dakota. (R. 203). He last saw his father in 1923, when he left the farm at Vetel, South Dakota, but communicated by letter for a year. (R. 204). Made trip to California in 1948 by Trailway Bus. Made inquiry of father at Vetel in 1947 or 1948 by letter. (R. 216). Had never received any mail from Salt Lake City, Utah, of any kind, and the name he used since 1930 was Robert Tillier. (R. 219). Had been working three or four years for Yellow Cab in Chicago, prior to going to California in 1946. (R. 269).

On cross examination, plaintiff relates various employments (R. 345 to 375), and that he had a telephone listing in 1949 at Chicago. (R. 397 to 401). He used the name Tillier. (R. 401).

The other plaintiff, Mildred Molinari, resides at 1354 Washtenaw, Chicago, Illinois. Recalled living in Huntington, West Virginia and that father's name was R. C. Tiller, and mother's name Maydie Tiller. (R. 427). That her brother, Robert Tiller, and the family moved to 3302 Archer Street, Chicago. (R. 428). The family then moved as a group to Vetel, South Dakota and the father's name was then Henry F. Swann, mother's name was Maydie Swann, brother's name Robert Swann and attended England School, graduating in 1913. (R. 430). The

family resided as a group at Vetat, South Dakota until 1922, when mother and this plaintiff went to Huntington, West Virginia to see her grandmother for two months and then returned to Chicago. (R. 431). This plaintiff remained in Chicago, and mother returned to Vetat, South Dakota, during which time this plaintiff was employed about three weeks at Sears, Roebuck & Co., and was then married and there was one child, issue of the marriage, Anthony Molinari and that she was later divorced and married Pellegreni and divorced him. (R. 432).

This plaintiff was present at divorce proceedings in Chicago by which her mother obtained a divorce from her father who was then residing in Chicago. (R. 433). Exhibits B-1 to E-1, admitted, showing personal service of summons on defendant R. C. Tiller at Chicago, Illinois, complaint filed, the testimony at the hearing of the divorce decree and decree of divorce of Maydie Tiller from R. C. Tiller, July 7, 1924. (R. 434). This plaintiff was a registered voter in Chicago under the name of Pellegreni (R. 437). Phone in name of Mildred Molinari in Chicago for 10 years. (R. 438). In December 1926, at time of death of her mother, this plaintiff saw her father at her home in Chicago and saw and talked with her father in Chicago in 1927. She further identified father in Exhibits U and V. (R. 444). Relates various residences from earliest remembrance to date. (R. 445).

This plaintiff was cross examined as to residences and marriages and divorces and various aliases used to date of trial, at various cities in this country. She related

that she had an unlisted phone at the Washtenaw address in Chicago, always in the name of Molinari or Pellegrini. (R. 490). She is operating a cleaning business at the present time in Chicago. (R. 492). She has been a registered voter since 1937 in Chicago under the name of Mildred.Pellegrini. (R. 499).

George E. Baker a witness for the plaintiffs, who resides at Martin, South Dakota, and was the owner of ground in Vetel, South Dakota, since 1913, and left there in September, 1929, (R. 279), stated that he knew a person by the name of H. F. Swann who owned adjacent ground to him. That Swann came to Vetel, South Dakota in the fall of 1912 or in the spring of 1913. That Henry F. Swann, also known as H. F. Swann, visited him at his home almost every Sunday until such time as his family came to South Dakota. That the family of Henry F. Swann was Maydie, his wife, son Robert and daughter Mildred. He related that Swann tried at one time to ride a bull in a corral and he was thrown from the bull. (R. 286). Identified (Ex. T.) as being Henry Swann and his wife and the women's name is Maydie, and the same people he knew as neighbors at Vetel, South Dakota. After Mr. Swann left the family homestead at Vetel, South Dakota, he next heard from him in January, 1944; identified letter, (Ex. Y) as having been received by him from the post office at Martin, (R. 288); identified letter (Ex. Z) as having been received by him in April of 1947. Had conversation at his home, Martin, South Dakota, about a couple of months after Exhibit Z was received with H. F. Swann, who told the witness that he had been

to Chicago trying to locate Robert and Mildred. (R. 290). He stated he had no success and failed to find them and asked me if I knew any one he could contact who might perhaps know anything or where he could find them. The main conversation had was about locating Mildred and Robert Swann. (R. 294). He stated he had been quite prosperous since he had been in Salt Lake and said he had accumulated quite a little wealth and he had never done anything for the children and they were all he had and he wanted to find them if at all possible and do what he could for them now.

He stated that when Charles Carson was at Vetala, South Dakota in 1947, he told him the purpose of his visit was to look for his children and after receiving the card that he was unable to find them in Chicago, he never heard further from him. The last he ever heard was a letter from Salt Lake stating that he was dead. (R. 313). The letters which he received either in 1949 or 1950 were to the effect that Henry Swann had died and they were trying to locate heirs. (R. 314). On cross examination Mr. Baker was shown Exhibit Y, one of the letters received from H. F. Swann with ink marks drawn through H. F. Swann and the words (to be forgotten) were on the letter when it was received by the witness, which indicated to the witness that H. F. Swann did not want his identity made known. (R. 323). This witness testified that Charles Carson told him that he was going by the name of Charles Carson. (R. 324). The witness relates that before 1944 he had heard that Swann was married under the name of Tiller and that this man had



come from Chicago and the two children on first acquaintance were known as Robert and Mildred. (R. 329).

George D. Baker, a witness for the plaintiffs testified that he resides at Martin, South Dakota. (R. 334). That he attended the England School, south of Vetel, South Dakota in 1913 and that during grade school at the England School, he knew Mildred Swann and Robert Swann and identified the plaintiffs as being those people. (R. 335). The last he ever saw the plaintiff, Mr. Swann was in 1927, (R. 337), but that plaintiff used the name of Tiller in 1924. (R. 338). That Robert Swann graduated in 1916, and he had no communication with Robert Swann after he left Vetel in 1927. (R. 339). He never saw Mildred's father after 1922. (R. 340).

L. J. Barclay, a witness in behalf of plaintiff testified that he is a practicing attorney and identified Exhibits U and V as to Charles Carson and the women who purported to be his wife. (R. 506). The witness represented Charles Carson in excess of ten years prior to 1948 and on several occasions in discussing the handling of real property and the interest of the lady that he was living with as his wife, such that she would have to sign, Carson then told him that it was none of her business or something to that effect and then would go elsewhere, and each time that Carson came to the witness about real estate transactions he had explained to him that she had to sign and then he would go elsewhere. (R. 507). During the last three or four years of the life of Mr. Carson, the witness had conversations with reference to two children of Mr. Carson. (R. 508). In the latter part



of 1947 he came to witness' office talking about a son and daughter and a grandson by the name of Tony and that he had been back to Chicago and had gone over all the street known as DeKalb looking for his daughter and that his son's name was R. V. Swann; that his daughter had married several times, and that her first name was Mildred Swann and that he thought her name was Sabatora and the last name Moulanita; that the grandson Tony was studying in a medical school. (R. 509). Arrangements were made for witness to search for the children and correspondence was had with a relative in West Virginia and the Chief of Police of West Huntington, West Virginia. (R. 510).

On cross examination he testified that the search made by the witness for the children was in the latter part of 1947 and possibly into January of 1948.

Edith Hazelrigg, called as a witness for plaintiffs testified that she resides in Salt Lake City and that her name, prior to marriage was Edith Gertrude Nicholls. (R. 520). That the mother of the witness was Mrs. Grace Catherine Sweney Carson and her father was Archie Nicholls. (R. 521). Ex. L-1 being file #30762 of the District Court in the probate of the Estate of Charles Carson, deceased, was admitted in evidence. (R. 524). The witness lived with her mother until about 1929 and said that she presumed her mother's name was Mrs. Nicholls. From 1930 until 1932 the witness lived with her mother at 227 South 2nd East Street, Salt Lake City, in a boarding house at which time she still presumed her mother's name was Nicholls. (R. 529). The witness knew of no

other name her mother was called by up to 1932 other than Sweney or Nicholls, and that since 1932 she had only seen her mother once. During 1929, while residing at the Woodruff Apartments with her mother, they had no roomers with them there but there was a gentleman that had eaten with them occassionally, but his name was not known to the witness. (R. 533).

David Barclay testified that he is a member of the Utah Bar, (R. 538) and identified Mr. Charles Carson in Exhibit U, and that he represented Charles Carson while he operated a store on South West Temple Street. (R. 539). That Barclay & Barclay had been employed by Mr. Carson to make a search to locate his son and daughter. Mr. Carson informed the witness that he had been in Chicago in the fall of 1947 trying to locate his son and daughter and was very certain they were in Chicago and was emphatic that the name Swann should be spelled with two n's. (R. 541). During a real estate transaction handled by the witness for Carson in approximately 1943, when it was explained to him that title would be in his name and that he and his wife would enter into the contract and when the contract was paid up he and she would have to give a Warranty Deed to the property, Mr. Carson at that time stated "it is none of her business it is my money." Carson brought the people to the office and the husband of the purchaser insisted that Mrs. Carson be on the contract as one of the sellers. Mr. Carson stated it was none of her business and at that time I said to him, well is she your wife or isn't she and he colored up and refused to answer. (R. 544).

On cross examination the witness testified that at the request of Mr. Carson he had written to the University of Chicago to determine if Tony Molonari was a medical student, (R. 548) and likewise to Northwestern University and received information of other medical schools in and about Chicago and Milwaukee; likewise the Association of Medical Colleges were written to, which covers all accredited schools, (R. 549) and inquired at Rush Medical College. (R. 550). A letter was also written to the Chicago Public Library asking them to assist in locating R. V. Swann and Mrs. Mildred Molonari, asking them to check the City Directory, but witness was not clear whether an answer was received or not. (R. 551).

Loren G. Norton, a defendant, called in behalf of plaintiff testified that he resides in Salt Lake City, is a real estate salesman for about a year and a half, and prior to that was in the dry cleaning business and is a married man and his wife's name is Gloria. (R. 553). The witness identified Charles Carson in Exhibit U and first met Charles Carson and Mrs. Carson around May of 1947 when he was purchasing Hollywood Cleaners. (R. 554). About four months after the witness purchased Hollywood Cleaners from Neils Hansen, Mr. Carson informed the witness that he held a mortgage on the business. (R. 556). In November of 1947, the amount of the Chattel Mortgage was greater than the payments agreed to be paid by the witness to Pete Hansen, the seller of the Hollywood Cleaners and at that time a conditional sales contract between Charles Carson and the witness was

made. (R. 557). The witness identified Exhibit M-1, the conditional sales contract between himself and Charles Carson. (R. 558). The witness then identified Ex. N-1 which is a chattel mortgage and promissory note of the witness to Mr. Carson and testified that by March of 1948 the conditional sales contract was paid down to \$700.00, at which time he needed some money and asked Mr. Carson for a loan of an additional \$1300.00 and he gave it to the witness and he paid \$700.00 to clear the note and a note was then issued for \$2,000.00 to Mr. Carson. Ex. O-1 was identified, showing the balance of the conditional sales contract item at \$700.00 paid in full and the \$1300.00 check of Mr. Carson to the witness. (R. 560). Witness testified that he had no other checks other than Ex. P-1 which were paid to Mr. Carson prior to his death. (R. 561). The witness testified that his relations with Charles Carson were chiefly business relations, but that Mr. Carson did not at any time during his lifetime seek advice from the witness in any business way. (R. 562). Witness then described the physical appearance of Charles Carson on or about October 1st, as being about 75 years of age, and physically active. (R. 564). Between March 20th and the 1st part of July, 1948, the witness was in California and had no dealings with Mr. Carson other than through his brother with a power of attorney and had no visits with Mr. and Mrs. Carson. Between July 1, 1948, to October 8, 1948, the witness saw Mr. Carson about every day he was at Hollywood Cleaners. (R. 565). Witness testified that about ten days before October 8, 1948, Mr. Carson was taken to the

County Hospital and that he visited him there and that he had a stroke and was capable of moving his arms or legs once in a while. The witness denied that during the ten day period while Charles Carson was at Jean's Rest Home, 2300 South State Street, where he died, that he at any time attempted to have Mr. Carson sign a general power of attorney. (R. 569). While Mr. Carson was at Jean's Rest Home, he was refused once the right to see Mr. Carson and after the refusal he made a further visit to Mr. Carson. (R. 570). On these later occasions the witness' attorney Mr. Jed Shields accompanied him. (R. 571). The witness denied removing any of the Charles Carson's personal property from Jean's Rest Home and further stated that he moved Mrs. Carson out of her hotel and took everything out to Jean's Rest Home. (R. 572). Witness was notified of the death of Charles Carson probably five minutes after it happened by the Rest Home. That information supplied to Neil O'Donnell, the undertaker for Charles Carson was given by Mrs. Carson to the witness and then communicated to Neil O'Donnell. (R. 573). On October 9th, the witness took Mrs. Carson from Jean's Rest Home and from then on made provisions for her residence. (R. 574). That Mrs. Carson was moved to two or three different places and then was hospitalized by Dr. Pace.

Witness was asked the question:

“Q. Did you ever have a conversation with Charles Carson in the latter part of 1947 as to whether or not he had been inquiring in the east for his children? (R. 575).



A. Yes.

Q. What did he say: relate when and where and what was said Mr. Norton.

A. It was in the Hollywood Cleaners. All I remember about it is that he said he had been back looking for his children.

Q. That is all that was said?

A. Yes.

Q. Didn't you in your deposition, taken on November 4, 1950, page 32, beginning at line 13, weren't you asked the question by Mr. LeRoy Shields: At the time before his death did he ever state to you that he had any children at that time or whether he had any or not after he came back from the east. (R. 576). Your answer was he didn't find anybody, didn't you so answer to that question?

A. Yes.

Q. Did he tell you he had been hunting for them, but he couldn't find them?

A. That is right." (R. 577).

The witness was advised of request for his appointment as administrator of the Charles Carson Estate on October 13, 1948. (R. 580). The witness was asked the following questions and gave the following answers:

"Q. At any of the hearings in the Charles Carson Estate which took place in Judge Jeppson's Court did you ever hear or were you advised by counsel that I, at that time was representing Dr. Anderson and represented that there were two children that were heirs to the estate?

A. Yes." (R. 581).

Witness further was asked the following questions and made the following answers:

“Q. Were you present in Court at the time Judge Jeppson announced his decision that you were to be administrator of the Charles Carson Estate.

A. I believe I was.

Q. At that time you represented you were likewise a debtor of the estate did you not?

A. I did.

Q. And stated you were a debtor in the sum of how much money?

A. \$1100.00.

Q. The \$\$1100.00 balance which you claim was due to Mr. Carson was the net balance which was due at that time on the note, that is June of 1949?

A. Yes.

Q. In the interim between October 8, 1948, and the date of the announcement of Judge Jeppson had you made any payments on the account of the Chattel Mortgage to Charles Carson?

A. Yes, I gave Mrs. Carson two payments.

Q. I hand you what had been marked Exhibit O-1, and ask you what they are?

A. The two receipts.

Q. Of the amount which you represented to Judge Jeppson \$1100.00 you had used the two receipts totaling \$300.00 and you had deducted that amount to arrive at \$1100.00 didn't you?

A. I believe so. (R. 582).

Q. Do you at this time claim that the payment by those two receipts to Mrs. Carson on the



Chattel Mortgage of Charles Carson was paid to Charles Carson or his estate?

- A. Yes. I believe on one of those receipts it says—let me take a look, it says ‘I received from Loren G. Norton, doing business as Hollywood Cleaners, \$150.00 for October payment to Mr. Charles Carson, signed by Grace Carson,’ that was to him.
- Q. What was the date of that?
- A. October 15, 1948.
- Q. What was the date of the other receipt for \$150.00?
- A. November 15, 1948.
- Q. That was after the death of Charles Carson?
- A. Both of them was. (R. 583).
- Q. Mr. Norton, what if anything did you do with relation to discovering if there were any other heirs, other than Grace Carson, who purported to be a widow in the estate of Charles Carson? (R. 585).
- A. As I stated before, I was at most of the hearings and heard what went on in court, and, as I understand it, Mr. Beless had looked for, and Tracy Collins Trust Company had looked for them without any success, and when Mr. Carson—before I was appointed administrator I still tried to get in touch with friends of his and see if they knew anything of the children and they was the only people we knew at the time and they was some people Mrs. Carson told me about and I made a personal phone call to Toledo, Ohio and notified them he had died and asked if they knew anything of the children.
- Q. Is this phone call the only endeavor you made outside of the State of Utah to find any other heirs?

A. It is.

Q. Was it before or after your appointment as administrator that you called Harry Costello in Toledo, Ohio?

A. Before, I believe, well I wasn't appointed until June, 1949 was I as administrator?

Q. Your oral order was June 20th.

A. It was long time before that I got hold of Harry Costello. (R. 587).

The Court. Do I understand during this period of your administration of the estate you didn't make any further inquiry?

A. No Sir, the Judge—(R. 588).

Q. Did you ever hear Mrs. Carson say whether or not she knew Mr. Carson had children?

A. No. I don't believe I did. (R. 589).

Q. Did Mrs. Carson ever state to you after Mr. Carson's death on October 8th, whether she knew Mr. Carson had children by a previous marriage or not?

A. I don't recall.

Q. You read in some of those petitions that there were no heirs known other than Mrs. Carson?

A. Yes. (R. 590).

Q. When did you take possession of the personal effects of Mr. Carson?

A. When did I take possession?

Q. Yes.

A. After Mr. Carson was in the rest home, I moved his wife and all his belongings, I believe everything went to Jean's Rest Home.

Q. Do you recall what with reference to the number of bags, trunks or things that was moved particularly then? (R. 594).

A. As I remember it there was one trunk, a small suit case, some blankets and some bags of

clothing, I don't recall just what all of them was.

Q. This trunk you recall, is that the blue foot locker that has been discussed?

A. Yes, it is.

Q. After delivery of this blue foot locker to Jean's Rest Home, did you take it into your possession between then and shortly after the death of Mr. Carson?

A. Mrs. Carson did. Mrs. Carson asked me to take the blue foot locker to my home. (R. 596).

Q. Demand was made upon you by Tracy Collins Trust Company for delivery of all the personal property of Mr. Carson to the bank was it not?

A. No, there was demand for the foot locker I believe and Mr. Beless came to the house and picked it up. (R. 597).

Q. You never discussed, prior to your appointment what was in the blue foot locker?

A. No. She said it was important papers in it and that was all. That is why she sent me to pick up the box and take it to my house.

Q. She told you there were important papers in it?

A. That is right.

Q. Mr. Norton, I believe it is correct is it not that Grace Carson died on November 4, 1949?

A. That is right.

Q. When did you find out, first, that you were the residuary legatee of her estate?

A. It was two or three days after she was in or shortly after she died.

Q. By whom were you advised?

A. By Mr. Shields. (R. 605).

Q. Did you, at any time after your appointment discuss with your counsel the advisability of

forwarding any notices of any type to the plaintiffs advising them of the probate of the Estate of Charles Carson, deceased?

A. I believe, there was notices sent out by the court while I was administrator, that is all I know.

Q. To these plaintiffs?

A. That is right.

Q. Have you seen such a notice?

A. I have not. (R. 609).

Q. Mr. Norton, shortly after Charles Carson died you stated on cross-examination that you made a phone call to Harry Costello, is that correct?

A. Yes.

Q. For what purpose Mr. Norton?

A. Notifying him of the death and to see if he knew anything of the children.

Q. What did Mr. Costello tell you concerning that?

A. That he didn't know anything about them. (R. 613).

On redirect examination Mr. Norton, you were asked the following questions and gave the following answers:

Q. What endeavor did you make while you were administrator of the estate to locate them. The answer was 'and at the time of Mr. Carson's death I called a friend of his in Toledo, Ohio. Q. What was the name of that person?

A. I don't remember. Costello I believe. I told him of the death and asked him if he knew of any children.

Q. What was his reply to you.

A. He didn't.

Q. Was that H. C. Costello of 220 Maumee Avenue, Toledo, Ohio 9?

A. I believe so.

Q. Did he inform you that he didn't know of any children?

A. He told me there was children. He didn't know anything of them. He said Mr. Carson hadn't heard from them for a good many years.' Did you so answer to those questions?

A. I did and I didn't deny just now that he said there was children he said he didn't know anything of them." (R. 620).

Exhibit T-1 which is the deposition of Gustave Kopp was received. (R. 606).

Neil O'Donnell, the undertaker called in behalf of plaintiffs testified as follows:

"The Court. Mr. O'Donnell, there was one notation, he was married 24 years ago.

A. Your honor, I cannot remember that definitely, I don't know whether it came from Mr. Norton or Mrs. Carson, I am sure it was either party, but I am not sure which one. (R. 637).

Q. Who gave you that information?

A. Either Mrs. Carson or Mr. Norton and he was advised by his widow, that could be a fact of my own notations from Chicago. That was either Mr. Norton or Mrs. Carson and that he was married 24 years ago was either Mrs. Carson or Mr. Norton." (R. 638).

Jean Sinclair, called as a witness for the plaintiffs testified that she resides at 2300 South State Street and operates Jean's Rest Home where Charles Carson was admitted September 27, 1948 and that Grace Catherine



Carson was admitted on October 2, 1948 as a patient. The witness identified Mr. Loren G. Norton in the court room as being the person who made visits to Mr. Carson and the following testimony was adduced.

“Q. Do you recall any particular visitations to Mr. Carson by Mr. Norton or attempts to visit Mr. Carson?

A. He came down with another man for Mr. Carson to sign a power of attorney.

Q. You say a power of attorney, did you see this purported power of attorney?

A. I saw the paper.

Q. Did you read the same?

A. Yes sir.

Q. What conversation did you have with Mr. Norton or the man who accompanied him with reference to the same?

A. I told Mr. Norton, in my opinion the patient was not competent to sign a power of attorney and without his doctor's permission that it couldn't be done in my home. (R. 647).

Q. Was there any particular situation in which the personal effects of Mr. Carson were brought to your rest home? Will you relate to the Court the circumstances in which they were received and what disposition was made of them?

A. Mrs. Carson—Mrs. Grace Carson, was sent to the home through the auspices of the County Hospital, the same as Mr. Carson and when she came she brought a foot locker and a couple of paper suit cases—paper bag suit case with her and a box of cooking utensils—that would probably be a double boiler or something like that and she brought them

with her and Mr. Norton was the man that brought them.

Q. What was done with the personal belongings—what disposition did you make of them?

A. They were placed in a double garage in the rear.

Q. Were they subsequently ever disposed of? Do you know what disposition was made of those particular items? (R. 648).

A. Within 24 hours the foot locker disappeared. It was locked—I didn't have a key and didn't know the contents.

Q. At or about this particular time of the bringing of the foot locker to your rest home did you have conversation with Mrs. Carson with reference to the same?

A. Yes, Mrs. Carson wanted the foot locker with her and said there were important papers in it, such as contracts and different papers that Mr. Carson had.

Q. You remember that within 24 hours the blue foot locker disappeared? Did you report that fact to Mrs. Carson?

A. Yes I did.

Q. Did you ever have any conversation with Mrs. Carson while she was a patient at your home with relation to any trip that she and Mr. Carson had made to Chicago?

A. Yes, she said first, prior to his stroke, that he had been in Chicago to see if he could locate two children. He had a boy and a girl, and that was only one of several he had made to locate the family. (R. 649).

Q. Did you ever have any conversation with Mrs. Carson with relation to any indebtedness that was owed to Mr. Carson?

A. Yes.



Q. Will you kindly relate where the conversation took place and who was there and what was said please?

A. Mrs. Carson had come down stairs to fix— Mrs. Carson came out in the kitchen and asked for a cup of coffee. We gave it to her. She was sitting there and she said the reason she didn't want Mr. Norton to have this box—it was very important that he didn't have this foot locker affair, was because that in it were papers showing he owed Mr. Carson \$4,000.00 and also other people that owed money on accounts." (R. 650).

Mrs. Ellen Rawlins, as witness for the plaintiffs, testified that she is part owner of Jean's Rest Home and that Charles Carson was a patient at the home. Relative to a power of attorney she testified:

"Q. Will you kindly relate the conversation heard, relate what was said by one party and the other?

A. They asked to have the Power of Attorney signed.

The Court: Who?

Q. When you say they that didn't indicate who made the statement.

A. Mr. Shields, and Jean said she wouldn't allow it as long as the patient wasn't rational enough to know what he was doing. They wanted to take his hand and make a cross. They would have had to lift his hand because he couldn't use his hands."

James W. Beless, Jr., testified that he was assistant trust officer of Tracy Collins Trust Company and that

he represented the special administrator and appeared numerous times in Judge Jeppson's court on the question of appointment of general administrator of the Estate of Charles Carson and related what letters and inquiries had been made to determine the whereabouts of the plaintiffs. He related that he inquired of a private investigator in Chicago as to his fee to carry on the investigation and it would be \$30.00 to \$40.00 per day, which matter was represented to the Court. The Court had authorized the special administrator to expend up to \$25.00 in making a search for plaintiffs and stated that he had serious doubts whether a special administrator had any power to make such a search without a Court order. Evidence of the true names of the plaintiffs were obtained from papers within the blue foot locker and that subsequently the assets were turned over to Loren G. Norton under order of court on July 22, 1949.

On cross-examination he stated that the investigation to locate heirs was started around the first of 1949. (R. 678).

Agnes C. Teeter called as a witness for the plaintiffs testified she resided at Salt Lake City, Utah and knew Charles Carson since about 1941. The following questions and answers were given:

“Q. We will take just the conversations you had at the place of business. Will you relate who was present and what was said on those occasions?

A. Just the three of us.

Q. With regard to conversations about children

(R. 686). Just tell what Andy said, what Grace said and what you said if you can recall.

A. He said he had a son and daughter and he hadn't heard from them for years and they were either in Chicago or in South Dakota; that they had formerly lived in South Dakota and that he was going to try and find them, and that was his wish, because he knew his health was bad and he had a slight stroke and he wanted to find these two children. (R. 687).

Q. And will you relate where the conversation took place and who was present and what was said.

A. I went up to see her. I come down on the street car and then I generally take a taxi home. I lived west on 6th North and Andy said 'I will go over to the bus depot with you to get your cab.' I had been down there several hours talking to them.

We went over and sat in the bus depot, this evening, and he said 'I am going to go back to Chicago to find my children.' He said 'would you let Grace live in your home and take care of her until I come back.'

I said 'well, as she is a sick women you shouldn't leave her.' He said 'I have to find my children.' He says 'I have arranged an insurance policy for her burial.'" (R. 688).

She further testified her conversation with Grace was "she felt bad, she said she felt so bad. She called Andy 'Dad.' She felt so bad Andy had to die and die before he found his children, and that he had his heart

set on finding his children and that is what she felt bad about."

William L. Sanders called for plaintiffs testified he knew Charles Carson for 14 or 15 years. That he had a business a couple of doors from Carson and were good friends and played cards several nights a week, as late as midnight, or as late as 3:00 in the morning; that there were two or three different ladies coming to see him that he was going with, one by the name of Grace and one by the name of Minnie, and that he had discussed with Carson about his children.

The following questions and answers were given:

"Q. During your relations with Charles Carson did you ever have any discussion as to whether or not he had any children?

A. Yes.

Q. Will you kindly relate where the conversations took place, who was present and what was said either by yourself and Mr. Carson or any other persons present; just whatever you recall as being the conversation?

A. He often mentioned his two children; that he had and his wife; he hadn't see them in years. He didn't know where they were, but he often mentioned them to me wishing he could find them and shortly before he died, the last couple of years before he died he made two trips I know of back east with intention of trying to get in touch with them."  
(R. 696).

On cross-examination the witness stated that he had played cards with the decedent for fourteen years

and was in business side by side with Charles Carson in 1936 and played cards both at the store on West Temple and then later on South Temple and that after Carson moved to South Temple he saw Grace Carson in back of the store. (R. 698).

Minnie Steffen called as a witness for plaintiffs testified that she knew Charles Carson during his lifetime and identified Exhibits U and V as being exhibits given to her by Charles Carson. She first became acquainted with Charles Carson while she was working at a W.P.A. project and after her working hours terminated at 3:00 in the afternoon she went to his place on West Temple and worked there for him. That during all of the time she worked for him he was on West Temple. That nearly every night she worked at the store, cleaning up and then would cook supper and on many occasions he would take her to a show. (R. 703). That it was three or four months after she first started to work for Charles Carson on West Temple before Grace Carson started coming to the store. (R. 704). That during these occasions, Charles Carson proposed to her several times and that she did not want to marry him. Further that at the store on West Temple he had discussed the fact that he had children.

On cross examination the witness testified that after Carson moved his business to west on South Temple that she saw him at the store on numerous occasions and that Grace Carson was there at all times after he moved, but that she never had any meals with them, but an occasional glass of beer.



Neils Hansen called as a witness for the plaintiffs testified that he had purchased property from Charles Carson and the decedent had visited him in his home numerous times and had related to the witness and his wife, at their place of business on 2nd West that he had tried to locate his children and was going to make further trips to Chicago to locate them, stating that he had some children, a son and a daughter. This witness related that Grace Carson knew of the children by the following conversations:

“Q. During your acquaintance with Grace have you ever had any conversation with Grace in relation to Andy Carson’s family?

A. Well, we used to mention it a lot of times—she called Mr. Carson “Dad”—He was very anxious to locate his children because he was getting along in years and he wanted to make some arrangements to see if they were taken care of, because he felt that sometime or other he hadn’t done just right by them, was the way I gathered it, and he was very anxious to locate them and see that they were taken care of with what he had.” (R. 716).

Douglas Thomsen, called on behalf of plaintiffs testified that he had made a complete search of the Third District Court records from 1890 to the time of testifying and that there appeared no divorce action between an Archie Nicholls and Grace Catherine Sweney Nicholls, or the reverse thereof.

Martha Larson called as witness for the plaintiffs testified to the attachment of proof of mailing notices on



October 16, 1948 in Exhibit L-1 and proof of notice in Exhibit 19 on the 16th day of April 1949 in the petition filed by Neil O'Donnell and then testified to the custom as to return or non-return of letters which were sent to purported heirs in other states; that there is no record kept of letters returned and that they are merely thrown in the waste basket and whether or not envelopes mailed in the three instances on the petitions of Dr. Anderson and Neil O'Donnell were ever returned or not she had no recollection.

E. LeRoy Shields testified that he was the attorney for the Charles Carson estate; that he never had any conversations with Grace Carson with reference as to whether or not Charles Carson had any children; that the only thing he knew about the plaintiffs was the proceedings in court and the petitions brought in and arguments made thereon with reference to the appointment of an administrator. That the witness drew the various objections and petitions incident to the probate of the Charles Carson Estate, and that the allegations which were made were the answers which Mrs. Carson had given to him; that he made no inquiry of any Arizona heirs but that was on the part of Mrs. Carson.

Subsequently Mr. Shields testified as follows:

- “Q. I am interested only in the question of two children as heirs.
- A. She never told me at that time. I don't know that she ever told me anything about any children. I was acquainted with that fact when

you filed the petitions in court that there was a claim of that.

Q. But you never discussed it with her as final—

A. Only asked her about it, if she knew anything about them.

Q. What did you ask her?

A. I asked her if she knew anything about any children of Charles Carson. (R. 736).

Q. What did she say?

A. She said no.

Q. Where was that conversation had?

A. I couldn't tell you that, whether it was in my office or somewhere else. After the matter of the children came up I talked to her and asked her what she knew about them if anything. She said she knew nothing." (R. 739).

The deposition of Grace Carson was introduced as Exhibit Y-1. This deposition was taken on the 26th day of November, 1948 at L. D. S. Hospital. The following questions and answers were adduced. (Page 3, Ex. Y-1).

“Q. Were you ever married to anyone prior to assuming the name of Carson?

A. Yes.

Q. What was your name at that time?

A. It was Carson.

Q. Where did you first meet Mr. Carson?

A. Right here in Salt Lake City.

Q. What year?

A. I don't know, it has been so long.

Page 4.

Q. What is your best judgment Mrs. Carson, 20 years ago?

A. It would be I guess, 30 years ago.

Q. Were you ever married to Charles Carson who was also known as H. F. Swann, also known as Henry F. Swann?

A. Yes, I was married to him but I never knew anything about Swann.

Q. When and where were you married to this Charles Carson?

A. It was in Dakota, but I can't think of the name.

Q. What year?

A. It must be 25 or 30 years ago anyway.

Q. You have some recollection of the city, do you know—Dakota and in what Dakota?

A. South Dakota, but it was a little bit of junky town, terrible.

Page 5.

Q. What time of the year was it?

A. It was the 23rd of I think February.

Q. And you think 20 to 25 years ago?

A. Yes. It was all of that.

Q. Would it be more than 25?

A. I think it would be.

Q. Would it be as many as 30 years?

A. It would be closer to 30.

Q. 30 years in Dakota?

A. Yes.

Page 6.

Q. Do you claim you are a common-law wife of Mr. Carson or a legal wife?

A. I claim I am a legal wife.

Q. To best of your recollection is it between 25 or 30 years ago?

Page 7.

A. Yes.

Q. In South Dakota?

A. Yes.

Q. You had no children by Mr. Carson?

A. No.

Q. You had no children by any other man?

A. Yes, I had a child with Mr....., the first husband but she is dead.

Q. Were you ever divorced from your first husband?

A. Yes.

Q. When and where?

A. I don't know, I don't know really and truly.

Q. Did you ever have divorce papers?

A. Yes I did have a divorce. He always had them.

Q. Who had them?

A. My husband.

Q. Which husband?

A. The first one.

Q. Did you obtain a divorce or he?

A. I got a divorce or asked for a divorce.

Q. Did you go to someone in Salt Lake City for the divorce?

A. Yes, it was—I can't think of the name.

Page 10.

Q. How long before your marriage to Mr. Carson did you divorce your first husband?

A. My lands it was about ten years.

Page 12.

Q. You have only had two husbands you claim, is that correct?

A. Yes, that is right.

Q. You were divorced from him before you married Mr. Carson?

A. Yes.

STATEMENT OF POINTS TO BE RELIED  
UPON

POINT I.

THAT THE JUDGEMENT IS CONTRARY TO THE EVIDENCE OF MRS. GRACE CARSON BEING A WIDOW AND HEIR OF CHARLES CARSON.

POINT II.

THAT AN ADMINISTRATOR IS A TRUSTEE IN THE BROADEST SENSE AND HELD TO THE SAME HIGH DEGREE OF STRICT ACCOUNTABILITY AS A TRUSTEE.

POINT III.

THAT THE DUTY OF A SPECIAL ADMINISTRATOR IS LIMITED.

POINT IV.

FAILURE TO PERFORM THE DUTY TO MAKE DISCLOSURES WHICH RESTS UPON ONE BECAUSE OF TRUST AS FRAUD FOR WHICH EQUITY IS AN INDEPENDENT ACTION WILL RELIEVE AGAINST JUDGMENT.

POINT V.

ORDER OR DECREE OF DISTRIBUTION OF DECEDENT'S ESTATE AS PROTECTION OF ADMINISTRATOR AGAINST CLAIM OF ONE NOT NAMED THEREIN WHO IS ENTITLED TO A SHARE OF AN ESTATE.

ARGUMENT

POINT I.

THAT THE JUDGEMENT IS CONTRARY TO THE EVI-

DENCE OF MRS. GRACE CARSON BEING A WIDOW AND  
HEIR OF CHARLES CARSON.

We cite the case of *In Re Pilcher's Estate*, 114 Utah 72, 197 Pac. (2d) 143, and quote from the opinion of Justice Pratt at page 147:

“We hold that where, as here, the first wife attacks the validity of a marriage by her husband to a second wife, then the burden of proof rests with the first wife, after proving her marriage, to rebut the presumption of divorce arising from the proof of the second marriage. In view of the many years that elapsed during which contestant and deceased lived apart and with others in family relationship, this case is particularly strong evidence of the merit of the rule.”

We contend that the following evidence clearly discloses that Grace Catharine Sweney Carson could not have been legally married to Charles Carson for the following reasons:

Exhibit (W) is a certificate of marriage of R. C. Tiller of Cincinnati, Ohio to Maydie Sherman of Cincinnati, Ohio dated the 13th day of September, 1899 at Covington, Kentucky. Exhibit (X), the 13th Census Report of the United States, 1910, shows Henry F. Swann head of the family, Maydie Swann, his wife, Robert Swann, son and Mildred Swann, daughter, residing at 3302 Archer Street, Chicago, Illinois. Exhibit (B-1) is a certified copy of personal service of summons on R. C. Tiller on the 23rd day of May, 1924, at Chicago, Illinois. Exhibit (C-1), is a certified copy of divorce complaint; Exhibit (D-1), certified copy of transcript of evidence; Exhibit



(E-1), certified copy of Decree of Divorce of Maydie Tiller from R. C. Tiller on the 7th day of July, 1924 at Cook County, Illinois.

These exhibits disclose that R. C. Tiller was married to Maydie Sherman from 1899 until July 7, 1924. Mildred Molinari, one of the plaintiffs, saw her father on several occasions at the death of her mother in Chicago in December of 1926 and she likewise talked with her father on the street in Chicago in 1927.

Exhibit Y, being a letter of the decedent to George E. Baker at Martin, South Dakota, identifies himself as being H. F. Swann, of Vetala, South Dakota. This exhibit states:

“I wonder where my boy is—‘Robby’ you remember him—I have not heard from him in years, but how I wish I knew where he is now for after what has taken place in Chicago I have not heard or seen him since. Mildred is married and my wife died and I wandered out to California and finally landed here about 15 years ago, went into business and have been here very since.”

This exhibit is dated January 16, 1944, so that 15 years prior would be January 1929 by the decedent’s own statement as to when he arrived in Salt Lake.

As to Exhibit (Z) being a letter from the decedent dated April 6, 1947, to Mr. George E. Baker at Martin, South Dakota, he recites within the letter:

“All in all, since I left S. D. most 18 or 20 years has been spent in Utah and I have no regrets for having come here.”

Further on in the letter the decedent states :

“I have some property and money, about 20 grand. This of course belongs to the children if I can find them.”

This exhibit likewise indicates from the decedent's own statements that he had left South Dakota about 20 years before which would be 1927.

Edith Hazelrigg, who is the daughter of Grace Catharine Sweney Carson, admits living with her mother in Salt Lake City until 1932 and that her mother was then known by the name of Nicholls or Sweney.

William L. Sanders identifies that his place of business was next to the decedent in 1936 on West South Temple and that at that time, two women by the name of Minnie and Grace were seen at the place of business of the decedent.

Minnie Steffen who cleaned up the place of business of the decedent on West Temple Street, which would have to be in the year 1936 or prior thereto, testified that she had been working for the decedent almost every day after she completed her W.P.A. sewing work, cleaned up the store, numerous times cooking his meals and that the decedent took her out to shows and on numerous occasions proposed marriage to her which she refused.

There will be no question that Charles Carson deceased, lived with Grace Catharine Sweney Carson as man and wife from approximately 1936, until the date of his death, but that does not prove marriage by which

Grace Carson could be a widow and heir. Exhibit (Y-1) is the deposition of Grace Carson, taken November 26, 1948, at the L. D. S. Hospital, which date is subsequent to the death of the decedent.

The witness was asked questions and gave the following answers:

“Q. When did you first meet Mr. Carson? (Page 3 Ex. Y-1)

A. Right here in Salt Lake City.

Q. And what year?

A. I don't know. It has been so long.

Q. What is your best judgment Mrs. Carson? Twenty years ago?

Page 4.

A. It would be, I guess thirty years ago.

Q. Thirty years ago? Were you ever married to Charles Carson, who was also known as H. F. Swann, also known as Henry F. Swann?

A. Yes, I was married to him, but I never knew anything about Swann.

Q. When and where were you married to this Charles Carson?

A. It was in Dakota but I can't think of the name.

Q. What year?

A. It must be 25 or 30 years ago anyway.

Q. Was it after the time you met Mr. Carson in Salt Lake City, Utah?

A. Yes.

Q. And how did you happen to go to the Dakotas to be married?

A. I didn't go there to be married. I went to see a woman, and, of course, I told him I was going, and he said he was going in a week or so.

Q. What time of the year was it?

Page 5.

A. It was the 23rd of, I think February.

Q. And you think 20 to 25 years ago?

A. Yes, it was all of that.

Q. Would it be as many as 30 years?

A. It would be closer to 30.

Q. 30 years—in Dakota?

A. Yes.

Q. Do you claim you are a common-law wife of Mr. Carson or a legal wife?

A. I claim I am a legal wife.

Q. To the best of your recollection it was between 25 or 30 years?

A. Yes.

Q. In South Dakota?

A. Yes.

Q. You had no children by any other man?

A. Yes, I had a child with Mr. ...., the first husband, but she is dead.

Q. You have only had two husbands you claim, is that correct?

A. That is right.

Q. You were divorced from him before you married Mr. Carson?

A. Yes."

We must assume that the evidence of Grace Carson is proof of her purported marriage, thus at the bare minimum 25 years from November 1928, would be November, 1923, at which time Mr. Carson was still a married man, being married to Maydie Tiller, who divorced him the following year at Chicago, Illinois on July 7, 1924. By reason of the claim of Grace Carson that it was a legal marriage and not a common law marriage, the

question of her marriage must be determined by a legal marriage to Charles Carson.

Grace Carson as late as 1932 was residing with her daughter, Edith Hazelrigg, and as late as 1936 at the West Temple Store of the decedent, Minnie Steffen was proposed to by the decedent and Minnie Steffen was likewise working for approximately four months prior to the first appearance at the decedent's place of business of Grace, who is identified as being Grace Carson, who lived with the decedent after he removed his store from West Temple to South Temple Street, and lived with him as husband and wife until October 8, 1948, the date of his death.

Charles Carson while discussing a real estate transaction with David Barclay in 1943 was asked by Mr. Barclay, if she, referring to Grace Carson was not his wife, he colored up and refused to answer. On other occasions concerning real estate transactions with both David Barclay and L. J. Barclay, he stated that it was his money and that it was none of Grace Carson's business and upon those instances went elsewhere for his work to be done.

## POINT II.

THAT AN ADMINISTRATOR IS A TRUSTEE IN THE BROADEST SENSE AND HELD TO THE SAME HIGH DEGREE OF STRICT ACCOUNTABILITY AS A TRUSTEE.

It is the fundamental principle that an executor or administrator occupies a duty of high trust and is held to a strict accountability under that trust.

We quote from the case of *Rice v. Rice*, ..... Utah ....., 212 Pac. (2d) 685, from the opinion of District Judge Van Cott at page 689:

“Initially we desire to make it plain that an executor or administrator occupies a position of the highest trust and confidence not only to the creditors and beneficiaries of an estate, but to the court as well, and so he is required to act in entire good faith. \* \* \*

“Accordingly an executor is a trustee in the broadest sense and is held to the same high and strict accountability of a trustee.”

Clearly, there can be no argument that Loren G. Norton as administrator of the estate of Charles Carson, deceased, would be held to a high and strict accountability as a trustee for heirs of this estate.

### POINT III.

THAT THE DUTY OF A SPECIAL ADMINISTRATOR IS LIMITED.

“Sec. 102-4-15, U.C.A. 1943. Id. POWERS AND DUTIES.

“The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts and effects of the decedent, and all incomes, rents, issues, profits, claims and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste and injury, the real estate, and for such and all necessary purposes may commence and maintain or defend actions and other legal proceedings as an administrator, and exercise



such other powers as are conferred upon him by his appointment; but in no case is he liable to an action by any creditor on a claim against the decedent."

That the appointment of Tracy Collins Trust Company as special administrator of the Charles Carson Estate was limited as follows:

"IT IS FURTHER ORDERED, that the powers of the special administrator shall be limited to collection of goods, chattels, debts and estate of the decedent and all incomes, rents, insurance, profits and claims and demands of the estate and to take charge and manage and for such and all necessary purposes may commence and maintain or defend actions or other legal proceedings as an administrator, but in no case is said special administrator liable to any action by any creditor or a claim of decedent." (Ex. L-1)

*In Re Pingree's Estate*, 82 Utah 437, 25 Pac. (2nd) 937, Justice Elias Hansen at page 939 said:

"The duty of Mrs. Pingree as special administratrix was to preserve the property until a general administrator was appointed. Upon such appointment, it became her duty in the absence of an order of court to the contrary to render an account and deliver the property of the estate which had come into her possession to the general administrator."

The duty of the special administrator was thus limited and the only Order of Court for expenses in locating heirs was the sum of \$25.00 which was so nominal

that no extensive search in anywise could have been had. Further, that it was proper and not the duty of a special administrator to make search for heirs as that comes under the duties of a general administrator when so qualified.

#### POINT IV.

FAILURE TO PERFORM THE DUTY TO MAKE DISCLOSURES WHICH RESTS UPON ONE BECAUSE OF TRUST AS FRAUD FOR WHICH EQUITY IS AN INDEPENDENT ACTION WILL RELIEVE AGAINST JUDGMENT.

It is a fundamental principal that "an administrator or executor is under a duty to exercise the utmost good faith in all his transactions regarding the estate. While administrators and executors acting in good faith are treated with indulgence, and not held answerable on slight grounds, they will not be allowed to promote their own personal interest to the injury of the heirs at law, and any fraud upon the part of an executor or administrator, which tends to defeat the ends of the trust reposed in him, will justify the court in declaring his acts void, whenever this can be done without prejudice to the rights of innocent third persons." 21 Am. Jur, 515.

We do not cite authorities for these principles at this point. The principles will be found reiterated time and time again in the authorities hereinafter cited.

In the case of *Aldrich v. Barton, et al* (Cal.) 71 Pac. 169, in this action after there had been a distribution of the estate to a trustee under the terms of the will, the trustee filed an account charging off certain items as

sales of capital investment instead of being income to which the widow was entitled to a quarter share. The account was filed while the widow was in the Hawaiian Islands and had no notice of the account or its contents or the hearing thereof, except such notice as the court ordered, viz: posting for ten days, and more than six months had expired and likewise the time for appeal. The court said at page 170:

“The trustees took advantage of the absence of the cestui que trust to present a false and fraudulent petition to the court, and have it acted upon without her knowledge. This was fraud upon the court, as well as upon the absent interested party, and this is held to be a fraud “extrinsic to the case,” which prevented the plaintiff from being properly represented at the hearing, or from being represented at all. *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282. In the *Sohler Case* the fraudulent decree was the result of a conspiracy between the trustee and another, but the principle of that case applies with equal force here, for a fraud is equally abhorrent to equity, and is to be measured by the same rules, whether it be the result of conspiracy or arises from the corrupt motives of the trustee alone. The demurrer should have been overruled. We advise that the judgment be reversed.”

In the case of *Rice v. Rice*, ..... Utah ....., 212 Pac. (2) 685, the facts in this case we feel need not be discussed, because they are undoubtedly clear in the courts mind.

District Judge Van Cott at page 689 said:

“It is clear from the letters that appellant was guilty of extrinsic fraud, and that the trial court was justified in so finding. But quite apart from the extrinsic fraud, the trial court was justified in vacating the order and decree on the ground that the executor had not made to the court a full and fair disclosure of the rights of respondent. \* \* \*

“Here the executor in his capacity of residuary legatee was unjustly enriched by the construction placed by the court upon the will upon his ex parte showing, to the impoverishment of the legatee entitled to her legacy. It was a fraud of the most serious nature. It involved not only a breach of fiduciary duty to the respondent but a breach of duty to the court.” \* \* \*

“From the above citations it is quite apparent that this Court has the power and authority to deal with cases of the class presented; that an executor is a trustee owing an obligation to his legatees and devisees and to the Court; and that a petition to the Probate Court which misconstrues the amount of a legacy or the construction of a will is extrinsic fraud, and a fortiori where the guilty executor stands to profit by his wrongful act.”

Further, at page 690, the Court said:

“Also having in mind that appellant by the terms of the will was to have the land he was occupying, can it be said that any executrix desiring to carry out the terms of a will under such condition would not at least petition the Probate Court for an interpretation of the will? But respondent did not do this. She proceeded to select the land

on the west side of the highway and give that to appellant and she denied to him by the caprice of her own judgment the barn property on the east. This all was done by what she in effect concluded was the infallibility of her own mind and judgment to say nothing of the gain in land and water she was to profit by as one of the residuary legatees. That she was fallible is shown by the evidence and the finding in part of the Trial Court in this matter. We believe that in view of the above facts, together with the duty she owed to appellant, she has not acted in good faith, and as her interpretation of the will is not correct in that it understates the amount he is entitled to, she has been guilty of extrinsic fraud sufficient to justify the intervention of a Court of Equity."

In the case of *Hewett et al v. Linstead, et al* (Cal.) 122 Pac. 352.

In this case one George Golden was predeceased by his wife and the plaintiffs in this action are the heirs at law of Mrs. Golden. That a portion of the estate of George Golden consisted of property which, during the lifetime of his wife, was community property; that none of the plaintiffs had any actual knowledge of the death of George Golden until after the final decree of distribution in his estate which was distributed to his heirs. Plaintiff first learned of the facts after the final decree of distribution had been entered but while an appeal was pending by a third person.

Presiding Justice Peters said at page 355:

"Although there is some confusion in the cases, we agree with plaintiffs that the better rule

is that where a legatee knows of the existence of other heirs, and, for the purpose of defrauding such heirs, and benefiting himself, fails to notify the court of the existence of such heirs, and knowingly files false petitions with the court representing there are no such heirs, he is guilty of extrinsic fraud warranting the imposition of a trust on the fraudulent distributee's interest. In *Mulcahey v. Dow*, supra, it was impliedly held, and in *Monk v. Morgan*, supra, it was expressly held, that even in such a case the fraud is intrinsic and is not extrinsic. The better-reasoned cases, however, are in accord with the rule as above stated. See *Caldwell v. Taylor*, 218 Cal. 471, at page 476, et seq. where the cases are collected and discussed, 23 P. 2d 758, 88 A.L.R. 1194; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; see also, cases collected in annotations in 113 A.L.R. 1235; 88 A.L.R. 1201. \* \* \*

“These cases establish that, where the executor or heir knowingly suppresses evidence of the existence of other heirs with intent to defraud them, the fraud is extrinsic warranting the equity court in granting relief, but where the executor or heir acts in good faith the decree is final and conclusive and equity is without power to impose a trust.”

In the case of *Larrabee v. Tracy, et al*, (Cal.) 134 Pac. (2d) 265.

In this action Mrs. Larrabee was the child of Kate Chase who was a legatee under the will of Mark H. Rice. The executor who was also the residuary legatee advised Mrs. Larrabee of the will and that the one-sixth interest in the estate would revert to her. On the third account



the executor asked for a construction of the will alleging Kate Chase predeceased the testator and that the will disinherited all persons other than those specifically named therein including the decedent of Kate Chase and that this devise would lapse and become part of the residue. Notice of hearing was by posting only. This petition was granted and decreed that Mrs. Larrabee was not entitled to any of the estate. Mrs. Larrabee learned from her aunt later that the aunt's devise had been paid and so commenced this action.

The Court said at page 268:

"The evidence shows that appellant led respondent to believe that she was entitled to the share of the estate her mother would have received had she survived the testator, and that distribution would be made accordingly as soon as a fair price could be obtained for the real property in the estate. In correspondence covering a period of over five years appellant never at any time indicated that there was any question concerning respondent's right to be substituted in her mother's place. Appellant seeks to justify this conduct by claiming that he 'erroneously believed' that the bequest and devise to Kate Chase 'reverted' to respondent upon the death of Kate Chase and that it was not until about the time the petition for distribution was filed that he 'was advised and determined' that he was in error. This, of course, does not excuse appellant's failure to notify Mrs. Larrabee that he had changed his position and intended to ask the court to distribute to himself the legacy Mrs. Larrabee had been led to believe she would re-

ceive. Without informing Mrs. Larrabee of his intentions, appellant presented his adverse claim to the probate court stating as a fact that her share had lapsed. Appellant prosecuted his petition knowing full well that respondent would not be in court to challenge his claim to her share of the estate. Wellman's conduct effectively prevented Mrs. Larrabee from obtaining a fair adversary hearing and, in our opinion, affords ample justification for the granting of equitable relief. As executor of the estate and its residuary legatee appellant had a clear duty to refrain from taking an unfair advantage of the impression he had created. An executor has numerous fiduciary obligations to the beneficiaries of the estate. In 1 Scott on Trust (1939) it is stated (#6, P. 48) 'An executor is often called a trustee; and in the broad sense of the term so he is. \* \* \* The relation between an executor or administrator and the legatees and distributees, like that between a trustee and the beneficiaries of the trust, is a fiduciary relation.' "

The Court further said at page 269:

"While it may be that appellant would not have been guilty of a breach of duty had he given respondent actual notice that he intended to dispute her right to the legacy, allowing sufficient time for her to obtain an attorney to represent her in the probate hearing, it would be unconscionable for a court of equity to hold that, under the circumstances of this case, he had fulfilled his obligations by compliance with the statutory requirements of posting notice at the courthouse."

In the case of *Purinton v. Dyson* (Cal.) 65 Pac. 2d 777.

This is an action involving a pretermitted heir. The decedent Adeline Potter died testate leaving as her only heirs Thomas Purinton a son, and respondent who is a daughter of a deceased son. By her Will Mrs. Potter bequeathed \$100.00 to her son and \$50.00 to Dyson and the residue of the estate to a Schaffer who was also executor. Schaffer presented the will for probate by a petition stating that the only heir at law was deceased's son. Schaffer was appointed and qualified and on petition for distribution under oath stated that the persons entitled to distribution were those named in the will. Distribution of the estate was had and the following year Schaffer died leaving the bulk of his estate to Dyson. The Court in Bank at page 779 said:

“However, it is difficult to see how fraud could be practiced more directly upon one entitled to present his rights to a court than by keeping him in ignorance of the proceedings. It is true that in most cases of extrinsic fraud the defendant has said something directly to the person whose rights were involved amounting to representations that it was not necessary for such person to take any part in the proceedings. In other cases, acts have been held to amount to such representations. But the rule allowing the maintenance of an action in equity for extrinsic fraud should not be limited so strictly as to require as a basis evidence of representations made directly to the one defrauded.

"In this case notice of the hearings of Schaffer's petitions was required to be served upon the heirs of the testator either personally or by mail. Section 328, Probate Code. Schaffer as the proponent of the will in the first instance and as the duly qualified and appointed executor thereof after it was admitted to probate was charged with the utmost good faith to the heirs of the deceased and to the court. It was his duty to see that notice of the proceedings was given to those whom he knew to be heirs of Mrs. Potter. The same situation was considered in the case of Zarembo v. Woods (Cal. app.) 61 P. (2d) 976, 980. There the executor of a will also presented a petition stating that the deceased left no heirs. It was claimed, as it is here, that his representation amounted to intrinsic but not extrinsic fraud. But the court held that the allegation constituted extrinsic fraud, saying: "There is a clear line of demarcation, however, between a statement made in the petition for the probate of the will which would limit the giving of notices to heirs, and testimony in court to the effect that there were no such heirs, after the heirs had been notified of the proceeding for the probate of the will, as provided by the different sections of the Probate Code."

"Whatever may have been the motive of Schaffer, whether it was induced by the agreement which the court found he made with Mrs. Potter's son, or by some other reason, his acts in suppressing all information concerning respondent and representing Thomas Purinton to be the only son of the deceased, amounts to fraud practiced directly against the respondent. They furnish abundant foundation for a judgment holding him to have been a trustee for the property

which should have been distributed to the respondent but which he wrongfully received.”

In the case of *Caulk v. Lowe* (Okla.), 178 Pac. 101.

In this case Judge K. Clingan died intestate and one Fannie M. Caulk filed a petition that she was the only heir of the decedent and had her husband appointed administrator and later filed an account and final settlement which account was approved and the administrator discharged. On the day following the discharge Fannie M. Caulk filed a petition for designation of heirship and on the same day the Court entered Findings that Fannie M. Caulk was the sole and only heir at law of the deceased. Three years later Mary C. Lowe, claiming to be the legitimate daughter of the decedent filed her petition to have vacated the final order discharging the administrator and the order determining heirship. The Court entered judgment on behalf of Mary Lowe and an appeal is taken therefrom.

The Court said at page 106:

“The weight of evidence disclosed that fraud was practiced by the defendant by withholding from the county court information had by Fannie M. Caulk and Otto Caulk at the time the application was made for the appointment of Otto Caulk as administrator, and at all the subsequent proceedings in the case, that Mary C. Lowe was the daughter of the decedent and an heir of his estate, which resulted in having the said Fannie M. Caulk wrongfully adjudged the sole heir of Judge K. Clingan, deceased. That the orders and



judgment involved in the instant case which were sought to be set aside is a probate matter does not admit of question, and therefore the district court had jurisdiction of the appeal from the county court sitting in probate.

“It therefore clearly appears that the county court and district court had jurisdiction, and that the contention of proposition one is without merit.

“The great weight of the evidence shows that Judge K. Clingan and Angeline Sisk were legally married in accord with the laws of Tennessee, and the said Mary C. Lowe was the result of such union; therefore there can be no question that the said Mary C. Lowe is an heir of the estate of Judge K. Clingan, deceased, and the undisputed record of the county court, together with the evidence in the case, conclusively showing that the fraud alleged to have been perpetrated by Fannie M. Caulk and Otto Caulk upon the county court sitting in probate was perpetrated, and that no notice whatever was given Mary C. Lowe of any of the proceedings had in the court which resulted in declaring Fannie M. Caulk the sole heir of the said estate, the county court never acquired jurisdiction of Mary C. Lowe, and that, therefore the orders and judgment as to her were void; which findings of the court of facts, and the judgment rendered, are not contrary to the weight of the evidence in the case, and therefore the second proposition is without weight.

“The court in its findings found that Mary C. Lowe, the petitioner, was the legitimate child of Judge K. Clingan; and, having so found, it was entirely immaterial whether or not Mary C. Lowe was ever recognized by the decedent as a member of his family, as a legitimate child is



an heir regardless of whether or not it was ever recognized as a member of its father's family, or whether or not the father ever lived with the family in which such child resided, and it was unnecessary for the court to find whether or not Mary C. Lowe was ever received in the family of the decedent.

"The court found that in withholding the information that she should have given the probate court in her petition for administration and the other proceedings in the case in the said probate court that Fannie M. Caulk practiced a fraud upon the court. It is entirely unimportant in this case as to whether or not her husband, Otto Caulk, participated in this fraud, and therefore it was not necessary for the court to make any findings as to the action of Otto Caulk.

"The court found that Judge K. Clingan and the mother of Mary C. Lowe, Angeline Sisk, were legally married.

"The court found that this action was not barred by limitation.

"Hence the court found upon every question of fact upon which the defendant requested findings of facts. It is true that the court did not find the facts as defendant desired, but this is not an error."

In the case of *Jorgensen v. Jorgensen* (Cal.), 193 Pac. 2d, page 728.

This is a case of where husband and wife had entered into a separation agreement and the wife subsequently obtained a divorce based upon the statement of assets agreed upon by the parties. The wife then brought this action to set aside the decree of divorce

based upon misrepresentation of the separate and community property as disclosed by the statements on which the divorce was obtained.

The Court said at page 732:

“The latter policy applied when a party’s adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him facts essential to the protection of his rights, even though such facts concerned issues involved in the case in which the judgment was entered. “The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true, whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule.” 3 Freeman Judgments, 5th Ed., p. 2576; see *Laun v. Kipp*, 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655.”

In the case of *Crow v. Madsen, et al.* (Cal.), 111 Pac. (2d), page 7.

In this case Martin C. Madsen was a son of Hanne Madsen and was made executor of her last will which gave to Helen Crow \$3100.00. Madsen upon becoming executor reported to the court that there was no property in his hands and claimed certain real estate of his mother by reason of assignment and deed leaving nothing to probate in her estate. The plaintiff brought this action claiming fraud on the part of the executor and was granted a judgment.

The Court said on page 15:

“When he accepted the position of executor of the Hanne Madsen estate he became not only an officer and agent of the court but a trustee for the beneficiaries under the will of Hanne Madsen of which plaintiff was one. He then owed the duty to the court and to plaintiff to disclose every material fact within his knowledge bearing on the property of the estate or of any interest therein. He failed to perform his duty, which, under the decisions we have cited was extrinsic fraud. If the allegations of the amended complaint are true, which we must assume at this stage of the proceedings, he went further than the passive act of concealment and took the positive position of representing to the court that Hanne Madsen had no property nor estate at the time of her death. Whether or not this representation was intrinsic or extrinsic fraud, it is not necessary to decide, as the extrinsic fraud of breach of duty by concealment is sufficient.

“We have, therefore, reached the conclusion that the fraud alleged in the amended complaint is extrinsic and sufficient to sustain the action.”

In the case of *Anderson v. Lyons*, 32 N.W. 2d 849.

In this case one Claes Willander died testate in Idaho and bequeathed \$1000.00 to his brother Ander J. Anderson who predeceased him and the residue of the estate to his nieces and nephews. The plaintiff was Ander's adopted son and was a resident of Minnesota. The will was probated in the state of Idaho in which the plaintiff did not share in the estate and plaintiff alleged that it was defendant's duty to bring to the

Court's attention that plaintiff was entitled to Ander's legacy and to a share as a nephew but that the defendant knowingly and intentionally failed to name the plaintiff in the petition for probate of the will and to bring to the Court's attention that plaintiff was entitled to share in the distribution of the estate and that these facts were concealed from the Court and by such concealment plaintiff was intentionally defrauded of his share of approximately \$5000.00.

The Court at page 851 said:

“Knowingly and intentionally concealing from and failing to disclose to the probate court in probate proceedings the existence of a person interested in the estate so that such person is by decree deprived of his interest in the estate constitutes extrinsic fraud against which such person is entitled to equitable relief. Annotation, 113 A.L.R. 1235. The Annotation collects numerous cases involving the question.

“In *Schmitz v. Martin*, 149 Minn. 386, 183 N.W. 978, we applied the rule, but without stating whether the fraud there was extrinsic or intrinsic. There, a daughter of decedent with knowledge of the fact that plaintiff was decedent's son's widow stated in the petition for the probate of his will, devising his farm to decedent's widow for life with remainder over to his son and daughter, that decedent's son left no issue and that decedent's widow and daughter were (149 Minn. at page 388, 183 N.W. at page 979) “all of the heirs and devisees” of decedent, and made no mention of plaintiff, thereby knowingly and intentionally concealing from the probate court plaintiff's exist-

ence as decedent's son's widow and heir and the final decree of distribution followed the petition reciting the allegations as to decedent's only heirs being his widow and daughter. There the son's widow, who was defrauded as an heir, was a nonresident of this state, where the probate proceedings were had, the same as plaintiff here was a non-resident of Idaho, where the probate proceedings here were had. We held that the evidence established fraud entitling plaintiff to equitable relief setting aside the probate decree and establishing her right to the share of decedent's estate wrongfully diverted from her by a probate decree; that, while a probate decree is final and conclusive as to all matters thereby adjudicated (149 Minn. at page 387, N.W. at page 979) "it may be assailed and set aside in a direct proceeding for that purpose, on the ground of fraud"; and that an action for equitable relief, such as there, to establish and enforce rights constitutes a direct attack upon the final decree."

In the case of *Hewitt v. Hewitt*, 17 Fed. Rep. 2d, 710.

In this case the appellant was adopted by Hewitt in 1872 in Kansas and about two years after the adoption the appellant was taken from his custody by Court order because of cruel and inhuman treatment. After the separation the appellant did not communicate with Hewitt and purposely avoided giving him any notice of his whereabouts for fear that he would disinherit him by will. In 1921 the appellant had attorneys employed for him in Los Angeles to check and see if Hewitt was still living in that city. The residence listed for Hewitt was



phoned and a statement was made that he was down town. These facts were then communicated to Hewitt through his counsel. On January 9, 1922, Hewitt died at Los Angeles leaving his only heirs his widow, a daughter by a previous marriage and the appellant. Seven months after the death of Hewitt the Los Angeles attorneys again were requested to check to determine if Hewitt was still living and upon phoning the Hewitt home was informed that he was out of town for a few weeks. The widow of the deceased at the time of the latter phone call was in the east and during her absence the property was being cared for by a friend. Appellant first learned of the death of Hewitt in June of 1925 but in the meantime Letters Testamentary had been taken out, the administration of the estate had been closed, and the estate distributed to the widow and daughter as sole heirs at law. In the petition for letters of administration filed by the widow and in the petition for distribution of the estate no reference was made to the fact that appellant was an heir or that he ever existed.

During Hewitt's lifetime he executed three wills, each of which devised the sum of \$10.00 to his adopted son. The widow had seen these wills after her marriage and was familiar with their contents. She questioned Hewitt in reference to the adopted son and was informed by him that he had such a son but that he had been given back to his parents and he had heard that the son was dead. The knowledge thus gained by the widow was not communicated to the attorney in the settlement of the estate nor to the court in which the estate was admin-



istered. Hewitt's daughter had no notice that the appellant had ever been adopted by her father or that such a person existed.

The Court at page 718 said :

“Here, by reason of the trust and confidential relation existing between the parties, a positive duty rested on the administratrix to fully advise the court as to all facts and all information in her possession concerning the heirs of the decedent and their whereabouts. This duty she wholly failed to discharge, and the reason for her failure cannot be accepted. She knew that her husband had an adopted son, and the only knowledge or information she had as to his death was the bare statement of her husband that he had been so reported to him, but where, when, or by whom she was not advised. Furthermore, she knew that her husband had made provision for the adopted son by will as late as June 1920, thus indicating that he himself did not give full credence to the report of his death. She made no inquiry for the adopted son, at his last known place of address or elsewhere, and maintained silence solely because of the hearsay statement made to her by her husband some years before. Had she communicated all of these facts to the court, it is not at all likely that a decree of distribution would have been entered without directing further investigation or inquiry—at least we have a right to so presume. Nor will we speculate as to what might have happened, had she pursued the proper course.

“But it is said that, if her mere silence constituted fraud, it was intrinsic fraud, against which a court of equity is powerless to grant

relief, and *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed 93, is cited. \* \* \*

“On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.”

But in the same connection it was further said:

“But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side — these, and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.”

“This case, we think, falls within the exception, and not within the general rule. Here the appellant was prevented from presenting a claim for his portion of the estate by the fraudulent conduct of the administratrix, and there has been

no adversary trial or decision of any issue as between the parties to the present suit. The appellees frankly concede that, if the appellant had been prevented from making claim to the estate because of some fraudulent statement or misrepresentation on the part of the administratrix, a court of equity would readily grant relief, but it is contended that mere silence on her part presents an entirely different question. But there can be no sound distinction between the giving of false information and the failure to give correct information, where the giving of the latter is a matter of legal duty.

In the case of *Weyant et al. v. Utah Savings & Trust Co.*, 54 Utah 181, 182 Pac. 189.

In this case Harvey Weyant abandoned his wife and children in Springfield, Mass., in 1890 and eloped with a Rosella McIntyre to parts unknown but he died in Salt Lake City, Utah in July, 1910 under the name of Harvey W. Fuller where he had been in business and lived with Rosella Fuller as man and wife. Rosella Fuller probated his estate as his lawful wife and only surviving heir when she knew that decedent had a wife and children as lawful heirs and that she had no right or claim to any property. She thereafter conducted all proceedings and had distributed to her the full estate but it was found that she failed to inventory certain property which she appropriated to her own use.

The Court at page 199 said:

“In this case, however, the administratrix, so far as respondents are concerned, acted direct-

ly contrary to and in the very teeth of the duty imposed upon her by law and by the bond that is sued on. It was the duty of the administratrix, under the law, to publish proper notice, so as to apprise the heirs, and all others interested in the estate, of its true condition; and when she failed to do that, but published notice in a false and fictitious name, known to her to be so, she utterly failed to "faithfully execute the duties of the trust according to law," as provided in the bond. Nor did she, as the bond provided, administer the estate "for the use of the heirs" of the deceased, as she was bound to do. Nor did the wrongs committed by her occur after the decree of distribution, nor when acting in a capacity other than that of administratrix. It is sometimes somewhat difficult to determine whether the wrongful acts complained of occurred at a time when the administrator is acting as such, or whether they occurred after he had ceased to so act and acted in a different capacity. Sometimes the administrator may act in a dual capacity, one as administrator and the other as trustee, etc. There may thus be circumstances, as is well stated in some of the cases, where an administrator may have defrauded an heir while acting as trustee, and after he had ceased to act as administrator.

"In the probate proceeding here in question, however, the administratrix not only failed to publish proper notice, so far as respondents are concerned, but she utterly failed to make and return a true and complete inventory of the property belonging to the estate. Again she converted to her own use about \$12,000 worth of property of the estate without making an inventory thereof, and without disclosing its existence. That act alone constituted an insufferable fraud and mani-

festly constituted a breach of the bond. 18 Cyc. p. 1267. Moreover, all of her acts which resulted in despoiling respondents of their inheritance occurred during the administration of the estate, and not after the decree of distribution had been entered, and when the administratrix was acting in a private capacity, or in a capacity of trustee merely. True, she was awarded possession and control of the property which was inventoried, and which was left for distribution, by the decree of distribution; but that decree was directly based upon extrinsic fraud practiced by her, which fraud likewise constituted a breach of the bond in question here.

In the case of *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522.

Justice Frick at page 527 said:

“While the court may assume that, as a matter of law, and for the purpose of jurisdiction, both the known and the unknown heirs are before the court, yet, whether the heirs are living in different states or otherwise, it cannot be presumed that a prudent and careful judge would ordinarily proceed to distribute without notice to the heirs or to some accredited person representing them.

“There are various provisions in the statute by which full power and discretion is vested in the probate court with respect to the time and manner of giving notice during the course of administration, and the court may thus, in every case, suit the notice to the circumstances and conditions confronting it. But the mere fact that



such notices may be provided for does not necessarily make them jurisdictional.”

In the case of *Child et al. v. District Court of Second Judicial Dist. et al.*, 80 Utah 243, 14 Pac. (2d) 1110.

District Judge Worthen said at page 1111:

“His right to notice of all proceedings is important; sales of property, mortgages, and family allowance, all affect his rights, and if he is in fact an heir, he should be afforded an opportunity to be heard in respect thereto. Until his heirship is established, his right to petition for distribution does not exist, and he may be required to stand by until the recognized heirs may desire distribution, in order to establish his claim. The proof available to establish his heirship when he files his petition may be unavailable when the time for distribution arrives.”

The holding in the above cases has been reiterated in the appellate courts of many other jurisdictions. See for example:

In re Ross' Estate (Cal.), 73 Pac. 976;  
 Jones v. Arnold, 221 S.W. (2d) 187;  
 Ferguson v. Wachs, et al., 96 Fed. (2d) 910;  
 In re Bailey's Estate, 238 N.W. 845;  
 Appeal of O'Neal, 11 Atl. 856;  
 State v. Vincent, et al. (Ore.), 52 Pac. (2d) 203;  
 Sears v. Rule (Cal.), 114 Pac. (2d) 57.

Plaintiffs and Appellants contend that Mrs. Grace Carson knew of the fact of their existence by reason of



discussions concerning the decedent's children with the witnesses Jean Sinclair, Minnie Steffen and Agnes C. Teeter, the latter with whom Grace Carson discussed the children of the decedent as late as the evening of the Rosary held for the decedent, and yet filed petition for Letters of Administration stating that there were no known heirs other than herself. She further discussed the fact that there were no children with the defendant E. LeRoy Shields as the attorney for the Estate of Charles Carson in which Objections, Cross-Petitions and Amended Petitions were filed in her behalf. Likewise Grace Carson knew at all times herein mentioned that she had never been legally married to the decedent between the years 1919 and 1923 which would be 25 to 30 years before the date of taking her deposition and is her statement for the date of a legal marriage in South Dakota.

The defendant Loren G. Norton discussed with the decedent within the last few months of his life the fact that the decedent had two children whom he had been searching for in Chicago and could not find. On the death of the decedent Norton called H. C. Castello at Toledo, Ohio who told him there were children but that he didn't know anything of them and that Mr. Carson hadn't heard from them for a good many years. Further, Norton inquired in and about the neighborhood of the decedent's residence and was advised by various petitions at the hearings of which he was present in Court and heard discussed that there were two children that were heirs living in Chicago when last heard of in 1944,

and various receipts were introduced (Exhibit T-1), showing that the decedent was paying on a land assessment deal at Chicago, Illinois as late as 1947 in his own name as Henry F. Swann, in the name of his son Robert V. Swann, in the name of his daughter Mildred Swann and in the name of Mrs. H. F. Swann, his deceased wife. And further that the notices of these assessments were sent to Henry F. Swann, 176½ West South Temple Street, New Villa Hotel, Salt Lake City, Utah, care of Carson and Carson. Even though defendant Norton knew these facts he never disclosed to the Court at any time the fact that he had knowledge that there were two purported heirs.

Defendant Norton had published notice to creditors in the Estate of Charles Carson by July 15, 1949 and yet he was not formally appointed Administrator of said Estate until July 22, 1949 by reason of Findings, Conclusions and Decree of Judge Joseph G. Jeppson. Can it thus be said that there was Notice to Creditors published by a duly appointed, qualified and acting Administrator.

The defendant Loren G. Norton never at any time during the administration of the Charles Carson Estate had any notice forwarded to the plaintiffs of any kind. Further the two orders obtained for widow's allowance were without any notice at all, and the hearing for Petition for Distribution was had only by posting of notices.

The defendant Loren G. Norton further well knew at the time of filing the Petition for Distribution in the

Charles Carson Estate that he and his wife Gloria Norton were the residuary beneficiaries under the Will of Grace Carson and that they would materially benefit by not mentioning to the Court on final distribution that the plaintiffs were heirs of the decedent Charles Carson and that their particular inheritance under the Will of Grace Carson would be many times more if the plaintiffs did not inherit and even assuming that Grace Carson was a widow and entitled to one-third of the Estate of Charles Carson, Deceased. Further it is peculiar that two independent witnesses would testify to the fact that Loren G. Norton did attempt to have a Power of Attorney signed by the decedent Charles Carson a few days before his death and while in a physical condition after strokes that his hand would have to be held to even mark an "X" on the Power of Attorney. Is it not likewise peculiar that the Blue Foot Locker containing all the evidence of the value of the Estate of Charles Carson should have been removed by this defendant from the premises of Jean's Rest Home and that even Mrs. Grace Carson stated that she did not desire to have the defendant Norton have possession of the box as it contained all the contracts and papers evidencing indebtedness of other parties including this defendant in the sum of \$4000.00. Likewise defendant Norton required a formal demand on the part of the Special Administrator to relinquish the evidence of the assets of the Estate (Exhibit R-1). Defendant Norton likewise made arrangements for all residences of Grace Carson after the death of Charles Carson and to the date of her death Novem-

ber 4, 1949. This defendant paid to Grace Carson two \$150.00 payments between October 8, 1948 and June 20, 1949 which sum of \$300.00 was not payment to the Estate of Charles Carson and was not evidenced in the Inventory of the Charles Carson Estate. Furthermore there have never been any receipts filed in the Charles Carson Estate nor has the Administrator or his Bondsmen been discharged and yet the assets of the Charles Carson Estate were turned over to the defendant E. LeRoy Shields, as Executor of the Estate of Grace Carson, Deceased.

We contend that the foregoing facts show a fraudulent method between the defendant Loren G. Norton and Mrs. Grace Carson to the date of her death by which the District Court on distribution of the Estate of Charles Carson would never be advised by the Administrator of his knowledge of two heirs who were entitled to inherit.

## POINT V.

ORDER OR DECREE OF DISTRIBUTION OF DECEDENT'S ESTATE AS PROTECTION OF ADMINISTRATOR AGAINST CLAIM OF ONE NOT NAMED THEREIN WHO IS ENTITLED TO A SHARE OF AN ESTATE.

The defendants and respondents in this action take the position that there was a determination of heirship on the question of the appointment of the administrator and by the decree of distribution which is final and therefore res judicata.

The position of plaintiff and appellant is that the

hearing on petition for letters of administration could not be a determination of heirship as there was no person representing plaintiffs or in privity with them and that the order of Judge Jeppson appointing administrator merely designates the preference of Mrs. Carson for filing.

In the case of *In Re Stevens Estate*, 102 U. 255, 130 Pac. (2d) 85, the Court said on page 85:

“As was pointed out in the case of *In re Listman's Estate*, 57 Utah 471, 197 P. 596, 600: “It may well be conceded that when an executor (or administrator) in the discharge of his trust has exercised that degree of care which a prudent person ordinarily exercises in the conduct and management of his own affairs, the law, in case of loss, will hold him immune from personal liability. He is not an insurer, and if he exercises ordinary care and diligence in the performance of his duties he may not be held for mistake or error in judgment.”

In the case of *Welch v. Flory et al.* (Mass.), 200 N.E. 900.

In this case it involves a decree of distribution of Agnes Welch who died intestate in 1929, the respondent, the husband of a niece of the intestate was appointed administrator and in his petition stated that decedent left no husband and as her only heirs at law Welch the petitioner herein, described as her brother, and other persons described as nephews and nieces and the residence of petitioner was stated to be Boston, Mass. On the petition for final distribution persons entitled there-



to were named only as nieces and nephews and made no mention of the petitioner and distribution of the estate was had upon that petition. At the time of his appointment as administrator his wife informed him that James Welch, the petitioner was about 72 years of age and living at 115 Holton Street in the Brighton District where he had lived for 15 years. During the time he voted and paid taxes in Boston. For the purpose of notifying him of his sister's death the respondent made inquiry of two or three of the next of kin living in Lynn and was informed by some of them that a man named Comeau living in Lynn would probably know about the petitioner, James Welch. He asked them to see Comeau and make inquiry as to the whereabouts of petitioner and afterwards the wife of the respondent informed him that one of the next of kin had telephoned her saying that they had seen Comeau and that he had told them he did not know where the petitioner was. The respondent later went to the City Hall at Malden but could find no record of James Welch and he also wrote two of the next of kin in Nova Scotia but was unable to get any information from them regarding Welch. The respondent did not make any examination of the city records in Boston. Comeau, as a matter of fact, had called upon petitioner at various times and did know where he lived but the respondent never personally saw Comeau or communicated with him directly. The respondent testified that he believed that petitioner had died without issue although he was not so informed by anyone who had actual knowledge of his death. The trial judge found



that the petitioner was entitled to one-fourth of the balance of the estate.

The Court said at page 816:

“The general rule is that those acting in trust capacity must exercise not only good faith but also sound judgment in the performance of their duties. They must use that degree of intelligence and diligence which a man of average ability and ordinary prudence under such responsibility would exercise in like circumstances. That rule finds its most frequent illustration in the investment of trust funds and the management of trust estates. *Kimball v. Whitney*, 233 Mass. 321, 123 N.E. 665. *Springfield Safe Deposit & Trust Co. v. First Unitarian Society (Mass.)*, 200 N.E. 541. The rule is not confined in its operation to those cases, but as shown by *Cleveland v. Draper*, 194 Mass. 118, 80 N.E. 227, extends to an administrator in respect to his conduct in making distribution of an intestate estate in conformity to a decree of court.

“There is no express finding in the case at bar that the respondent was negligent. There is the finding that the respondent acted honestly and in good faith. That, however, is not enough. Not infrequently, trustees whose conduct has met that standard have been compelled to make good losses to the trust fund solely because of failure to exercise sound judgment in investments. There is no finding in terms that the respondent conformed to the general rule of conduct just stated. It is found, however, that by exercising more diligence he might have located the petitioner, or ascertained that he was living. The facts found and already narrated show that the respondent

was mildly active, if not actually slothful, in his attempt to locate the petitioner. He was described in the respondent's petition for administration as a brother of the intestate, resident in Boston. Of course that description did not establish the fact. *Hopkins v. Treasurer & Receiver General*, 276 Mass. 502, 177 N.E. 654. If that statement had come to the attention of the judge it can hardly be thought that the decree of distribution would have been entered on October 17, 1930. See *Withington v. Fidelity & Casualty Co.*, 237 Mass. 73, 78, 129 N.E. 418. The respondent did not personally see or communicate with, or even write to Comeau in Lynn, who in fact knew about the petitioner, but instead of making genuine investigation, the respondent accepted an unreliable hearsay report that Comeau did not know the residence of the petitioner. The respondent did not examine the city records of Boston. He did not seek information from that source by letters of inquiry. He did not, so far as appears, write a letter to the petitioner addressed to Boston or even examine Boston directories. He did not advertise for him in Boston newspapers. He did not solicit knowledge of him from the police department of Boston, or ask its assistance to find him. The diligence of the respondent falls far short of that disclosed by the administrator in *Cleaveland v. Draper*, 194 Mass. 118, 80 N.E. 227. The respondent did not bring the situation to the attention of the judge. The respondent occupied a position of trust with respect to the petitioner. That position required the putting forth of every reasonable effort to discover him. Instead of making that industrious and persevering search, he took the responsibility of representing to the court in substance and

effect, by presenting his petition for distribution, that the petitioner was not in existence at the time of the death of the intestate and hence not entitled to share in her estate."

In the case of *Morris v. Mull*, 144 N.E. 436.

This is a case where the son of the decedent was appointed executor of his mother's will which by the terms required that a legacy to the sister of the executor should be claimed within a two year period. The executor gave the statutory notices required and on petition for distribution stated: "I do not know the address of Myra Mull and have not heard from her for more than four years past." Distribution was made to the Executor as the residuary legatee of the bequest which would have gone to the sister.

The Court said:

"So in the present instance, by naming her son as executor of the will, the testatrix undoubtedly meant that her executor would use the knowledge that he had of the whereabouts of his sister, growing out of the settlement of the father's estate, and endeavor in good faith to locate and notify the plaintiff in error of the terms of her mother's will.

"It is not conceivable that this mother intended that her daughter to whom she gave this legacy, should be deprived thereof because she had no opportunity to know of the fact of her mother's death and the running of the two-year period named in the will, and it is not to be supposed that the mother intended that the son, her executor, should receive this legacy as a reward

of not having exercised all due diligence to follow up the information and means of information that he had relative to the whereabouts of his sister.

“It is not to be lost sight of that this executor, by remaining silent, and simply complying with the letter of the will and the statute, prevented his sister from learning of the death of her mother and claiming the legacy under the terms of the will.

“Has he shown due diligence in the premises in the light of the authorities and the record and undisputed facts in this case? It cannot be denied that the conduct of Frank S. Mull, executor, manifested a purpose on his part to do nothing and say nothing which might in any way aid the plaintiff in error in discovering her rights under the will of her mother.

“It is true he claims to have written letters, which were returned to him; yet unfortunately they are not produced in evidence. And it is equally true that within two years he had settled his father’s estate and had personal correspondence with her, as well as correspondence through her attorney, concerning settlement of that estate. His own attorney Frank Schnee, under date of April 3, 1917, sent a check, attached to a receipt therefor, for her \$500 legacy in the estate of the father of the plaintiff and defendant in error. And under date of June 18, 1918, the same attorney acting for defendant in error, sent a formal notice of the claims of Frank S. Mull, executor of the estate of Michael Mull, against such estate.

“This state of facts, as evidenced by this correspondence, the affidavits, etc., is not consistent with the representations made to the probate court in the final account filed January, 1920:

“ ‘I do not know the address of Myrul Mull and have not heard from her for more than four years past.

Frank S. Mull.’

“Such representations to the probate court cannot be reconciled in good conscience with the duty which a trustee owes his trust. In view of the personal profit which accrued to this defendant in error by reason of his failure to use a greater degree of diligence in the discharge of his trust, we are of the opinion that his conduct amounted to a fraud upon his sister, the plaintiff in error, and that it is not conscionable to permit such conduct to take refuge behind the fact that the letter of the will or the statute does not in terms direct greater activity upon his part.”

Plaintiffs and appellants contend that the fraud which has been shown both upon the plaintiffs and the court heretofore is sufficient that the Decree of Distribution in the Estate of Charles Carson cannot be any protection for Loren G. Norton, his bondsmen or E. LeRoy Shields, executor of the estate of Grace Carson, deceased.

## CONCLUSION

Plaintiffs and appellants contend that in this case on the first point that the judgment is contrary to the evidence and that Grace Carson could not have been a widow, claiming to have been married between 1923 and 1919 in South Dakota, at which time the decedent Charles Carson was residing first at Vetat, South Dakota until

about 1922 and then in Chicago, Illinois until 1927. Grace Carson was bound by her proof of marriage as being a legal marriage and the evidence disclosed rebuts any presumption that there was a legal marriage by which she could have been a widow and heir. Upon that particular theory Grace Carson's entire case would fall as it clearly would come directly within the holding of the case of *Weyant v. Utah Savings & Trust Company*.

As to the third point involved, plaintiffs and appellants contend first, that there is no argument as shown by the evidence that both Grace Carson and Loren G. Norton the administrator, knew of the existence of two children by conversations prior to the death of the decedent; secondly, the failure of Grace Carson by her denials in her petitions and objections filed in the various causes which were consolidated, to admit at any place that there were any known children and the collaboration of Grace Carson with Loren G. Norton in which he did not show good faith with the court by remaining silent both before and after his appointment as administrator. Thirdly, that neither the defendant Loren G. Norton nor Grace Carson never did give any notice of any kind during any of the probate proceedings to the plaintiffs; that Loren G. Norton failed to publish a legal notice to creditors and failed to give any notice upon obtaining two Orders for widow's allowance and failed to give any notice, except posting of notices on final distribution of the estate to E. LeRoy Shields as executor of the Estate of Grace Carson, deceased. Further, the failure of Loren G. Norton to inventory \$300.00 of assets or inform the



court at the time of setting of his bond, which monies had been paid to Grace Carson between the death of Charles Carson and his appointment on July 22, 1949, is an extrinsic fraud, and lastly the fact that Loren G. Norton well knew that he and his wife, Gloria Norton, were the residuary beneficiaries of the Estate of Grace Carson, deceased, at the date of the filing of the First and Final Account of the Charles Carson Estate, and that they would materially gain by not making any disclosures of any known heirs. That Loren G. Norton, administrator, had the advice of counsel and acted directly contrary to and in the very teeth of the duty imposed upon him by law and by the bond that provided for "faithfully executing the duties of the trust according to law." Further, that Loren G. Norton never did request the instruction of the court at any stage of the proceedings as to what investigation to make or type of notice to give when he had knowledge of two purported heirs, which shows the arbitrary manner in which the guise of the procedure of the court was flaunted with and particularly to say nothing of the gain that would be made by the Nortons in not making such disclosures to the court.

We respectfully contend that Grace Carson, Loren G. Norton, administrator and E. LeRoy Shields as executor of the Estate of Grace Carson, deceased, have

not acted in good faith either to the appellants and the plaintiffs or the court in the handling of this matter and have been guilty of extrinsic fraud sufficient to justify the intervention of a court of equity.

Respectfully submitted,

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and Appellants.*