

1952

Robert V. Tiller and Mildred Molinari v. Loren G. Norton et al : Brief of Defendants and Cross-Defendants (Respondents)

Utah Supreme Court

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In the Supreme Court of the State of Utah

ROBERT V. TILLER, also known as
ROBERT V. TILLIER, also known
as ROBERT B. SWANN, and MIL-
DRED MOLINARI,

Plaintiffs and Appellants,

vs.

LOREN G. NORTON, LOREN G.
NORTON, administrator of the Es-
tate 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 COR-
PORATION, LTD., a corporation,
and E. LE ROY SHIELDS, as Ex-
ecutor of the Estate of Grace Cath-
erine Carson, deceased and E. LE
ROY SHIELDS,

Defendants and Respondents,

and

LOREN G. NORTON, GLORIA
NORTON, wife of Loren G. Nor-
ton, EDITH M. HAZELRIGG and
CATHEDRAL OF THE MAGDA-
LENE 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.

Brief of
Defendants and
Cross-
Defendants
(Respondents)
Civil No. 7770

FILED

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Clerk, Supreme Court, Utah

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Brief of
Defendants and
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Defendants
(Respondents)
Civil No. 7770

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

This is an action by the purported son and daughter of the deceased to recover from the administrator and his bondsman for alleged fraud of the administrator in proceeding to distribute all of the estate to the widow pursuant to the decree of distribution of the Third District Court.

The allegation of fraud is generally the alleged failure of the administrator to make a full disclosure to the District Court of facts known by the administrator. The District Court found that the Probate Court had been informed and possessed of all the facts known by the administrator, all of which had been disclosed in contested proceedings extending over a

period of many months. The defendants contend and the Court found that there had been no concealment or breach of duty. The facts follow:

Charles Carson died October 8, 1948 (R. 3). On October 11, 1948, a petition was filed by Dr. Howard T. Anderson, represented by W. D. Beatie, praying for letters of administration of the estate of the said deceased (Ex. L-1; P-1). The funeral was held October 12, 1948 (R. 4).

On the next day Grace Catherine Carson, the widow, filed a petition for letters of administration, in which she stated "that he left him surviving the following heirs at law: Grace Catherine Carson, your petitioner herein, and no other presently known heirs at law." At the time of the filing of the petition for letters Dr. Anderson also filed a petition praying for the appointment of Tracy-Collins Trust Company to be special administrator of the estate of Charles Carson, and this appointment was obtained ex parte on October 11, 1948. (Ex. L-1; Order of October 11, 1948).

On October 14, 1948, the caption of the cause initiated by Anderson was amended ex parte by adding after the words "Charles Carson," the words "also known as H. F. Swann, also known as Henry F. Swann." Subsequently the caption was amended further to add the words, "also known as R. C. Tiller, also known as Robert C. Tiller."

All such petitions having been consolidated for hearing, there ensued in this proceeding a series of objections, cross-objections, answers and amended petitions and protests, in

which two pertinent questions were raised. These were: (1) whether Grace Catherine Carson was in fact a surviving widow of Charles Carson, and (2) whether there were children living in Chicago or elsewhere of Charles Carson, as claimed by the special administrator. These questions were pertinent because they were involved in determining the question of priority in the appointment of the administrator of the estate and also because they were involved in determining the heirship of the children. The details of the hearings on these various petitions and cross-petitions are set out in plaintiffs' brief and in plaintiffs' complaint and amended and second amended complaints. The ensuing hearings relative to these questions were pursued over a period of approximately nine months.

Hearings were held particularly on November 26, 1948, December 8, 1948, January 19, 1949, January 26, 1949, February 23, 1949, February 26, 1949, March 25, 1949, May 23, 1949, and June 11, 1949. (Finding of Fact No. 10; R. 147). During the hearings it became apparent that a number of efforts had been made to locate the purported two children of Charles Carson both before and after his death. Carson himself had made either one or two trips to Chicago and other parts of the Middle West to locate the children. He had employed Lawrence Barclay, of the firm of Barclay and Barclay of Salt Lake City, to assist in making the search. He had sent letters to former acquaintances in the Midwest and Chicago areas to endeavor to ascertain further information concerning the children.

Lawrence Barclay, representing Carson, had likewise

written a number of letters to various public officials and agencies in an effort to find the purported children. The special administrator had also made a very serious attempt to locate them. Between sixty and seventy letters were sent to various individuals and agencies at the addresses indicated in Carson's effects. The entire nine months were devoted to the search, and the entire search was reported to the District Court at the various hearings on this matter.

In the instant case the Court found that "said search included the contacting by mail and by telephone of all known friends and relatives of the deceased in the states and cities of his residence prior to Salt Lake City, to-wit: West Virginia, Ohio, Illinois and South Dakota; that in this search, public officials were contacted requesting their assistance in this search, including sheriffs, chiefs of police and librarians. Search was also made through medical schools in an attempt to locate the purported grandson, being the son of Mildred Swann Molinari, and particularly inquiry was made of the chiefs of police of Chicago, Illinois, and Omaha, Nebraska, with correspondence approximating sixty or seventy pieces of mail forwarded and received in this search, in addition to the personal investigations and telephone conversations." (Finding of Fact No. 8; R. 146).

The attorneys for the special administrator were paid \$550.00 for their services in attempting to locate the purported children; \$100.00 was allowed to Lawrence Barclay for his services performed in connection with the search for the alleged children, and the sum of \$150.96 was further awarded to the special administrator for expenses incurred

in searching for Carson's alleged children. (Finding of Fact No. 13; R. 149).

In addition to the evidence before the Court concerning the alleged children the Probate Court in the hearing heretofore mentioned heard a great deal of testimony and evidence of various kinds as to whether Grace Catherine Carson was in fact the wife of Charles Carson. There was a deposition taken at the LDS Hospital, where Mrs. Carson was seriously ill, as appears from the deposition itself. Testimony was obtained from a number of other witnesses.

At the conclusion of all of this testimony, and as a determination of the questions presented by the petitions, cross-petitions and pleadings, the Probate Court on July 22, 1949, made written Findings and conclusions in which it determined that Carson etc. "Left him surviving the following named heirs at law: Grace Catherine Carson, your petitioner herein." (R. 148).

The special administrator thereupon filed his petition for final account and turned the assets over to the administrator. (See Exhibit L-1, Petition dated July 7, 1949). The administrator immediately entered upon his duties and caused notice to creditors to be published. (Ex. L-1; Order of July 29, 1949, and Proof of Publication dated July 19, 1949. Questions arose concerning the sufficiency of the Findings, Conclusions and Decree, and the written Findings, Conclusions and Decree were actually signed July 22, 1949. (Ex. L-1).

The administrator thereupon paid various claims and dis-

tributed the estate pursuant to a court order. The knowledge that Mrs. Carson had of Charles Carson's children is summarized in Findings of Fact Nos. 15 and 16. (R. 150-151). Witnesses knew that Mr. Carson had made trips to the State of Illinois to determine the whereabouts of the children. At the time of Carson's death, Loren G. Norton called one Harry Costello of Toledo, Ohio, to determine whether Costello had any knowledge of the existence or whereabouts of the children, and Costello reported that he had no such information.

During the hearings, and prior to the entry of the decree by the Court, "defendants Norton and Shields and Grace Catherine Carson did not fail to disclose any information they had as to the whereabouts of said children, and that said defendants made a full and complete disclosure of all facts, information and knowledge in their possession to the Court; that in some instances the source of information had by Grace Catherine Carson and defendant Norton was different than the source of information reported to the Court by special administrator, but that in no instance did said persons fail to disclose any information in their possession." (Finding of Fact No. 15 Ibid.)

Following the signing of the Findings, Conclusions and Decree by Judge Jeppson in connection with the appointment of the administrator, both Loren G. Norton and his counsel, "and all other interested parties, relied upon such findings and conclusions and decree, and accepted and relied upon the fact and law that Judge Joseph G. Jeppson passed upon the question of heirship relative to the estate of Charles Carson,

deceased, and that at said time and thereafter Loren G. Norton and E. LeRoy Shields believed that a full, complete and thorough search had been made in said estate to determine and discover the whereabouts and existence, if any, of Mildred Swann Molinari and Robert V. Tiller, plaintiffs herein, who had been represented as being the children of Charles Carson, deceased, and that the said Loren G. Norton, and E. LeRoy Shields in good faith believed that further search or inquiry would not disclose any facts which had not been revealed in the search by the special administrator and others, as fully disclosed to the Court.” (Finding No. 16; R. 151).

Neither Norton nor Shields, his counsel, at any time objected to the procedure or investigation made and directed by the Court to attempt to discover the whereabouts of any children of Carson, and they did not withhold any information concerning these children. (Finding of Fact No. 17; R. 151).

The reason of the difficulty in locating either of the two plaintiffs is readily apparent from their own testimony. Mildred Molinari could not remember the number of names she had used since 1923 (R. 469). Her best judgment at the commencement of the cross-examination on the question was about five (Ibid). She used the name “Mildred Allen” in Detroit, Michigan, to an arresting officer or court official (R. 469, 470). In 1932 in Chicago she used the name “Mildred Pelligrini” (Ibid). The name “Pelligrini” at that time was given to a judge or clerk. She remembered that the name of the person to whom she gave that name was Judge O’Connell.

Nineteen days later, on October 26, 1932, in Chicago, she represented herself as "Ann Manners." She gave that name to a Judge Graver (R. 471). On January 24, 1934, she gave her name as "Mildred Pelli" in California to a judge. On December 14, 1935, in St. Paul, Minnesota, she gave the name "Marian Russo." This name was also given to a public officer (R. 472). On October 27, 1937, in Chicago, she gave her name as "Joan Wood" to a Judge McCormick (R. 472). On February 10, 1932, before Judge McCormick in Chicago, she gave her name as "Marcella Gordon" (R. 473). On March 12, 1938, in Milwaukee, Wisconsin, she gave her name as "Mildred Pelligrini," and again the name was given to a public officer (R. 473). On March 15, 1941, in Chicago, she gave her name as "Mildred Pelligrini" to a Sergeant Griffith. She also gave the name "Mildred Pelligrini" to a Judge Schiller in making a public record of her name (R. 474). On August 9, 1948, in Chicago, she gave her name as "Mildred Pelligrini," and on January 17, 1950, she gave her name as "Mildred Pelligrini" to a Judge Donahue Harris (R. 474).

Mrs. Pelligrini or Molinari, or whatever her name was, or is, was asked:

"Q. During this period of time of 1948, that would be August 9, 1948, to the present time, have you ever had occasion to represent yourself to any public officer there at your address at Washtenaw Avenue as to identify yourself by name??"

A. I don't remember." (R. 476).

* * * * *

"Q. Have you ever represented yourself to any public official, clerk or otherwise as Mildred Molinari?

A. I dont think so." (R. 476).

* * * * *

"Q. You couldn't name one instance for us where you have publicly made a record of your name as Mildred Molinari?

A. I don't remember whether I did or not.

Q. You can think of none at the present time?

A. No.

Q. Do you have any real property in your name?

A. No.

Q. Do you own any real property?

A. Yes.

Q. And it is a fact, is it, that whatever property you claim to own is in the name of your son?

A. That is right." (R. 477).

Mrs. Molinari or Pelligrini then stated that she had title to real property in the name of Anthony Molinari and Thomas Pelligrini. Mrs. Molinari could not recall any information concerning her contacts with the relatives of her former husband whatsoever (R. 482). She admitted that she had not been in touch with any of her own relatives (R. 485). For a period

of several years none of her relatives even knew of her address (R. 486, 487). She herself had never made any effort to find out what had happened to her father's property at Vetala, South Dakota (R. 487). She did not recall ever having had a social security number (R. 492). Despite the fact that she testified she was doing business for herself and had a telephone "Ogden Courts Cleaners," she had never identified herself by filing any affidavit of assumed name or similar affidavit in or around Chicago (R. 492). She had never had a telephone listed in the name of that business in Chicago (R. 492, 493). As far as she knew at the time of the trial she had never had a telephone listed in her name in any telephone directory (R. 493, 494). At the time of her deposition she stated definitely that she had not had a telephone listing in the telephone book in her own name (R. 494). She has never owned an automobile (R. 496). She could not ever remember having a driver's license (R. 495, 496). Later she stated that in 1933 or 1934, when she was in California, she had a driver's license under the name of "Pelligrini" (R. 497). She did obtain a driver's license on July 19, 1950, but she could not remember whether Cox and Company, "Missing Heir" investigators, who allegedly turned up the purported heirs, had anything to do with that (R. 498). In Chicago she voted since 1937 under the name of "Pelligrini" (R. 499).

Certainly it is not difficult to understand why any of the searches made for a person under the name "Mildred Molinari" were not successful; in fact, it appears that it would almost have been an impossibility for one to find her in a city the size of Chicago under the conditions and circumstances

in which she lived. If she had purposely cut herself off from all of her friends and relatives, and particularly from her father and his interests, it is difficult to imagine how she could have done a more complete job.

During all of the probate proceedings in the Charles Carson estate the only name that anyone suggested as to the purported son of Charles Carson was R. V. Tiller and Robert V. or R. V. Swann. The plaintiff in this action was interrogated concerning his activities and the names which he had used since approximately 1926 or 1927. During all of that period of time he was unable to point out one instance where any other name was used than Robert or Robert V. or R. V. Tillier. Exhibit A, a series of drivers' licenses and renewals for the years 1947, 48, 59 and 50, authorizing the owner of the license to operate a public conveyance in the City of Chicago, all referred to Robert Tillier. Exhibit B, which was a series of City of Chicago Vehicle Licenses for the years 1947, 48 and 49 all referred to Robert V. Tillier at 4707 Kenmore Avenue, Chicago.

Exhibit C, which is a series of chauffeur's licenses for the State of Illinois, for the years 1946, 1945, 1948, 1945, 1942 refer to Robert Tillier at 4707 Kenmore Avenue, Chicago, and 4539 North Racine Avenue, Chicago.

Exhibit D, which likewise is a series of drivers' or chauffeur's licenses for the State of Illinois for the years 1939, 1940 and 1941, refer to Robert Tillier at 607 Oakdale Avenue, 648 Oakdale Avenue and 1647 South California Avenue, all in Chicago.

This plaintiff was registered as a voter under the name of Robert Tillier (Ex. E).

Exhibit F indicates that he was employed by Thompson's Restaurants as Robert Tillier.

Exhibit G indicates that his telephone notices came to Robert V. Tillier.

Exhibit H shows that his rent was paid under the name of Robert V. Tillier.

Exhibit I indicates that his light bills were paid under the name Robert Tillier.

Exhibit J indicates that his gas bills were paid as Robert V. Tillier.

Exhibit K shows that his income tax returns were paid under the name Robert Tillier.

Exhibit L indicates that in the year 1946, while in California, he went under the name Robert Victor Tillier.

The fact in this regard is that the plaintiff admitted that he had used the name Tillier at all times for all purposes since 1926 or 1927. At no place where plaintiff used a name did he use the name "Tiller" or the name "Swann."

He too had lost contact with all of his relatives and any friends of the family which existed in Vetat, South Dakota, or Chicago or any other place prior to approximately 1925 or 1926. He was a transient most of his life, going from state to state; couldn't remember most of the time where he was during a given period. He claims he changed his name about 1923-6.

"Why did you change your name from Swann to Tillier?"

"I wanted to go back to the family name."

"Why not Tiller then?"

"I liked the sound of Tillier. Only reason." He had never made any effort to locate his father except that one letter was sent to the county recorder at Martin, South Dakota, in or about the year 1947 or 1938 to determine if his father still owned some property (R.265-267). He testified that he knew of the whereabouts of his sister during the greater part of this period of time, but it is very apparent from his testimony that he had most certainly failed to keep any connections of his former associations. Again, if an effort had been knowingly made to cut himself off from all former relatives, friends and acquaintances, a more complete job could hardly have been imagined or planned than was done by the plaintiff in this action.

Condensing the claims of plaintiffs against Norton, as the same appear in Paragraph 12 of the Second Amended

Complaint, the plaintiffs' right to recover is based upon the following claimed acts of fraud:

1. That Norton knew at the time he consented to be the nominee of the widow Grace Catherine Carson, (a) that plaintiffs were the heirs of Carson and were living in Chicago, Illinois; (b) that Grace Catherine Carson was not the widow of the deceased and (c) the publishing of notice to creditors on June 24th through July 15, 1949, subsequent to the order signed by the Court but prior to the entry of Findings and Conclusions for such order.

2. In doing of the following acts as administrator: (a) in not publishing a legal notice to heirs or creditors in the estate; (b) in filing two petitions for a widow's allowance; (c) in failing after July 22, 1949, to mail notices to the plaintiffs; (d) in failing to make a diligent search for plaintiffs; (e) in failing to inventory certain assets.

3. In failing to reveal to the Court, (a) that he knew plaintiffs were the children of deceased; (b) that Grace Catherine Carson was not the widow; (c) the facts as to what search he had made to locate the plaintiffs.

During the course of the trial, however, it became apparent to the Court and counsel, in view of the authorities on this matter and of the circumstances involved, that any irregularities in the time of the various orders and actions taken by the administrator would not be grounds for setting the decree aside for extrinsic fraud. The real claim in this action boiled down to the proposition that the administrator

had not affirmatively given the location and identity of these two children to the Court. This appeared clearly from a discussion of certain rulings of the Court (R. 434, 435).

"THE COURT: Let us inquire into this. There seems to be a lot of argument. I thought we had settled our positions before.

Mr. Beatie, the basis of your claim here is that the decree of distribution, and all proceedings, was based on the fraud of the administrator in affirmatively hiding the location and identity of these children.

Mr. Beatie: From the Court. Yes.

The Court: If you fail in that—

Mr. Beatie: I fail completely.

The Court: Then your decree is *res adjudicata* and there might have been an injustice but no remedy.

Mr. Beatie: That is right."

At the close of plaintiffs' evidence, and after the defendants had made their motions to dismiss upon the ground that no such proof had been adduced by plaintiffs, the Court stated:

"Now as I understand it, the administrator is under a very great duty to disclose to the court, at the time distribution is made, all known facts relative to heirship, and in those cases where the administrator himself actually receives, either directly or indirectly, benefits of the estate and the heir does not show up, after his failure to use reasonable diligence to locate them, does constitute what can be considered fraud upon that particular heir.

"What do you claim in this case, Mr. Norton knew or did affirmatively that constituted the fraud?

"Do you claim that the evidence shows that he had any knowledge of the whereabouts of these children that he did not disclose?

MR. BEATIE: To that question, no."

It was clearly made to appear by the record, therefore, that plaintiffs were forced to abandon any claim based on irregularities in the probate decision. In fact, plaintiffs had conceded that the Court had jurisdiction in the probate proceedings (R. 145). It also appears that plaintiffs had abandoned their claim that the administrator had failed to disclose to the Court any knowledge he had concerning the plaintiffs or the rights or position of the widow Grace Catherine Carson. While fraud was the entire basis of the right of plaintiffs to recover in this action, both in the pleadings and by the admission of plaintiffs' counsel during the course of the presentation of plaintiffs' evidence, and at the conclusion of the evidence in direct response to the question, that the administrator had not failed to disclose any knowledge he had to the Court. The entire basis for fraud was thus abandoned by the plaintiffs.

There remained only the question, then, as to whether the administrator, under the complaints and issues, was guilty of fraud in not making a further search or in not applying to the Court for further instruction after Judge Jeppson had made and entered his finding that the only known heir was Grace Catherine Carson, and having further found that Grace Cath-

thine Carson was the widow of the deceased. In this connection, it must be recalled that there had been a very hotly contested series of court proceedings extending over a period in excess of nine months concerning directly the question as to whether there were children, as to their existence, their probable location and also as to the validity of the position of Grace Catherine Carson as the widow of the deceased.

In connection with this point Judge Lewis stated (R. 151):

"Of course, in looking in retrospect that is what should have been done." (Making of an application to the court for direction as to whether there should be a further search.) There is no question about that. These children are here at this stage of the proceedings. Of course, as the case goes forward they may have some evidence to the contrary. At this stage of the proceeding it is undoubtedly true that the court at that time abused its discretion in closing the estate, but the remedy for that was an appeal at that time. If he just made an error in judgment, that is just too bad.

Mr. Beatie: That is right."

STATEMENT OF POINTS RELIED UPON

POINT NO. I

THE ADMINISTRATION OF AN ESTATE OF A DECEASED PERSON IS AN ACTION IN REM AND AFTER THE NOTICE REQUIRED BY LAW THE PROCEEDING IS BINDING UPON ALL THE WORLD AND

UPON ALL PERSONS HAVING ANY CLAIM IN THE ESTATE.

POINT NO. II

A DECREE OF DISTRIBUTION IN A PROBATE PROCEEDING IS A FINAL DETERMINATION, SUBJECT TO ATTACK ONLY IN A DIRECT PROCEEDING FOR EXTRINSIC FRAUD.

POINT NO. III

NEITHER THE ADMINISTRATOR NOR THE SURETY CAN BE HELD LIABLE FOR A MISTAKE OF JUDGMENT IN A DECREE OF THE COURT.

POINT NO. IV

THERE WAS NO PROOF OF EXTRINSIC FRAUD IN THE CASE AT BAR.

POINT NO. V

THERE WAS NO PROOF IN THE CASE AT BAR FROM WHICH THE COURT COULD INFER THAT LOREN G. NORTON, AS ADMINISTRATOR OF THE ESTATE OF CHARLES CARSON, DID NOT EXERCISE THE CARE AND PRUDENCE OF A REASONABLY PRUDENT ADMINISTRATOR WITH RESPECT TO THE MATTER OF GIVING NOTICES AND MAKING ANY SEARCH FOR THE PLAINTIFFS IN THIS ACTION.

ARGUMENT

POINT NO. I

THE ADMINISTRATION OF AN ESTATE OF A DECEASED PERSON IS AN ACTION IN REM AND AFTER THE NOTICE REQUIRED BY LAW THE PROCEEDING IS BINDING UPON ALL THE WORLD AND UPON ALL PERSONS HAVING ANY CLAIM IN THE ESTATE.

In *Snyder v. Murdock*, 26 Utah 233, 73 Pac. 22 (1903) the Court stated, quoting a California case:

"By filing the petition for the distribution of the estate and giving the notice required by Section 1665, Code Civil Procedure, the Superior Court acquired jurisdiction to distribute the estate 'among the persons who by law were entitled thereto.' The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also the 'proportions or parts' to which each of these persons is entitled; * * * A probate for distribution is in the nature of a proceeding in rem, the res being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or claim therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive

upon him, subject only to be reversed, set aside or modified on appeal. A decree is just as binding upon him if he fail to appear and present his claim as if his claim, after presentation, had been disallowed by the court."

In the case at bar it was stipulated repeatedly that the Court in the Estate of Charles Carson, et al., acquired jurisdiction; that notices of the hearing of the petition for letters of administration had been given by mailing and posting, as required by Section 102-2-8, U.C.A. 1943.

In the case of *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522 (1909), the Supreme Court of Utah held that this original notice is the only notice in the proceeding that is jurisdictional.

"The whole question, therefore, hinges upon whether notice of the hearing on the application for distribution is essential to give the court jurisdiction. * * * From the provisions contained in Section 3779 "(identical with Sec. 102-2-7, Utah Code Ann. 1943) * * * "probate proceedings are deemed to be proceedings in rem and that the court acquires jurisdiction of the res—that is—the property of the estate—and all of the persons who have or claim to have any interest in the property by the notice required to be given for the appointment of an administrator or executor as the case may be. * * * All other notices provided for, however important they may be, in certain cases and under certain circumstances, are, nevertheless, not jurisdictional. * * * When the notice for the appointment of an administrator was given as required by statute, we think that the effect of such notice was to bring all the parties who have or acquired any interest in the estate into court. * * * We think the more reasonable and safer doctrine is that, when the

statutory notice that an administrator will be appointed is given, such a notice not only is notice to the parties of the fact, but is notice to all the world, that the court, by the appointment of an administrator, will take charge of the property of the deceased to administer it, and that it will finally distribute the remainder, if any, to the heirs of the deceased."

The Court in the *Barrette* case, *supra*, held that although notice had not been given of the hearing on the petition for distribution, the proper notice had been given of the petition for the appointment of an administrator, and such notice was conclusive on all the world. The decree distributing real property of the estate conveyed good and marketable title, and the purchaser could not object to the failure to give notice of the petition for final distribution of the estate.

These Utah cases state, it is submitted, the universal view upon the effect of administration of the estate of a deceased.

In the estate of Charles Carson, deceased, there were actually three petitions filed praying for letters of administration. The petition of Dr. Howard T. Anderson was filed the day before the funeral, October 11, 1948. Notices of this petition and the hearing thereof were sent by the deputy county clerk on the 16th day of October, 1948, to Grace Catherine Sweeney Carson, 2300 South State Street, Salt Lake County, Utah; R. V. Swann, Chicago, Illinois; Mrs. Mildred Swann Molinari, Chicago, Illinois. Copies of the notice were deposited in the United States Post Office in Salt Lake City, postage prepaid, to the individuals named (Ex. L-1). Subsequently, in the course of the various hearings in the estate, a petition was

filed by D. L. O'Donnell on the 14th day of April, 1949. Notices of this petition and the hearing thereon were sent on the 16th day of April, 1949, "by depositing the same in the U. S. Post Office in Salt Lake City, Utah, postage prepaid, to the following named persons and addresses, to-wit: R. V. Swann, Chicago, Illinois; Mildred Swann Molinari, Chicago, Illinois" (Ex. 19). This case was consolidated with the petitions by Mrs. Carson and Dr. Anderson for hearing.

It thus appears that the only jurisdictional notice required by the Utah statute was given to the plaintiffs in this action. It is true that the notices were sent by the clerk at the instance of petitioners other than Mrs. Carson. The fact remains, nevertheless, that the petitions were all consolidated for hearing and the Court did obtain jurisdiction by the giving of these notices.

Plaintiffs in this action, as heretofore stated, stipulated on several occasions that the Court obtained jurisdiction in the probate of the Charles Carson estate. Certainly the mailing of notice to the two plaintiffs under the only names by which they were known by any of the parties to the probate proceeding, and to the only addresses which were known to any of the parties, would not have reached them at any time in 1949 or 1948. The fact that the notices apparently did not reach the plaintiffs is, of course, immaterial in determining whether the Court obtained jurisdiction of the res and of the plaintiffs insofar as the probate of the estate is concerned.

POINT NO. II

A DECREE OF DISTRIBUTION IN A PROBATE PROCEEDING IS A FINAL DETERMINATION, SUBJECT TO ATTACK ONLY IN A DIRECT PROCEEDING FOR EXTRINSIC FRAUD.

Benson v. Anderson, 10 Utah 135; 37 Pac. 256, appears to be the first case in Utah where the question of extrinsic fraud was involved. In that case the plaintiff was an elderly Danish woman who had virtually no knowledge of the English language. She had full and complete notice of all the probate proceedings in her husband's estate, but it appeared that she had depended wholly upon others for information as to her rights, and she had been misled and defrauded by such other persons in their representations to her. The Court stated:

"We do not intend to declare that a party to a probate proceeding may sit by when an erroneous decree is entered against him, and negligently permit the time for appeal to expire, and depend on a bill in equity to correct it. But in this case sufficient excuse is shown for the failure to appeal, and no such neglect is shown in this case a sought to deprive the plaintiff of relief."

A similar factual situation was presented by the case of *Rice v. Rice*, 212 Pac. (2d) 685; 182 Pac. (2d) 111. In this case an heir of an estate attempted to set aside a decree of the probate court which had been obtained by misrepresentation of the executrix to the heir as to the property being distributed to the heir. The Court held that where the executrix assured the plaintiff that he would get a certain property

and then distributed the property otherwise in the court proceeding, the heir had been deprived by such act of his day in court, and the executrix had been guilty of extrinsic fraud sufficient to justify the intervention of a court of equity.

Weyant vs. Utah Savings & Trust Company, 54 Utah, 181; 182 Pac. 189, presented a situation where the deceased abandoned his family in the East and eloped with a seventeen-year old girl to Salt Lake City, where he made his home. He was known at his new address for many years as "Fuller." On his death the woman with whom he eloped probated his estate under the name "Fuller" without revealing the fact that she was never married to him, and without revealing his true widow or his children, all of which was fully known to her. The girl fraudulently represented to the Court that she was the widow and in addition she concealed approximately \$12,000 of assets which had belonged to the deceased and should have been inventoried.

The Court announced the following legal principles:

"1. Probate proceedings are in rem, and where the statutory notice has been given, all who are interested in the estate are bound by all orders or decrees duly entered in a particular case, and that ordinarily is the only remedy is by direct appeal.

"2. Judgments and decrees entered by courts of competent jurisdiction, where jurisdiction of the subject of the action and of the person has been legally acquired, can only be assailed on direct appeal or in equity for extrinsic as contradistinguished from intrinsic fraud."

It is significant in the Weyant case that the family had spent considerable money in an attempt to locate their father, Weyant, and the court found that they had been fraudulently misled by the knowing and false representations made to the court in the petition and testimony of the Morgan woman. Where the administrator knowingly causes a false and fictitious notice to be published, the Court held that such an act amounted to extrinsic fraud and that a court of equity would grant relief.

Anderson v. State, 65 Utah, 512, 238 Pac. 557 and *Cantwell v. Thatcher Bros. Banking Co.*, 47 Utah, 150; 151 Pac. 986, are authorities for the proposition that anything less than extrinsic fraud will not justify the intervention of an equity court.

In the *Anderson* case an attempt was made to set aside an adverse judgment in bastardy proceedings upon the ground that the judgment was procured by the perjured testimony of the woman and her mother in the case. In refusing to set the judgment aside, the Court announced this doctrine:

"First, the fraud relied upon must be extrinsic, but not fraud which could have been apprehended in the trial of the case which resulted in the judgment complained of; second, it should appear to the satisfaction of the equity tribunal that had it not been for the fraud the judgment would not have been rendered; third, the fraud, and the effect thereof, should be made to appear beyond a reasonable doubt; and, fourth, the parties seeking the relief must have been free from negligence of the case in which the judgment was rendered."

In the *Cantwell* case plaintiff sought to set aside a decree which was based upon alleged perjured testimony of the president of the bank. The Court held that if the witness committed perjury, the perjury related directly to the subject matter involved in the determination of the Court in the former proceeding.

"If we assume, therefore, that the perjury constituted a fraud against the plaintiff, yet it was fraud which directly arose out of the matter litigated in the prior action, the case, therefore, clearly is not one where some alleged fraud was committed which prevented the plaintiff from fully presenting his case, or where he was deceived or misled, and for those reasons did not make out a case or present his defense, as the case may be, but the alleged fraud—that is the perjury—was committed with respect to the things litigated and which the court adjudicated in the former action. Under such circumstances the great weight of authority is to the effect that a court of equity is not authorized to grant relief."

The judgment of the district court denying relief to Cantwell was affirmed.

It seems appropriate to invite the Court's attention at this time to the fact that plaintiff's counsel at various stages of the proceeding stated in no uncertain terms that he knew he would have to prove extrinsic fraud if relief was to be obtained in the case at bar. In the course of a discussion as to certain rulings of the Court the Court stated:

"Let us inquire into this. There seems to be a lot of argument. I thought we had settled our positions before.

"Mr. Beatie, the basis of your claim here is the decree of distribution, and all proceedings was based on the fraud of the administrator in affirmatively hiding the location and identity of these children.

Mr. Beatie: I fail completely.

The Court: If you fail in that—

Mr. Beatie: From the court; yes.

The Court: Then your decree is *res adjudicata*, and there might have been an injustice but no remedy.

Mr. Beatie: That is right." (R. 434, 435).

The trial of the case at bar was supposedly directed to the proof of such fraud. Plaintiffs well knew and stated to the Court that extrinsic fraud was the nub of their contention.

That extrinsic fraud must be shown in an action of this kind is well settled by cases in other jurisdictions. The basic doctrine of the Utah cases is founded upon *United States v. Throckmorton*, 98 U. S. 61; 25 L. Ed. 93. That case was a land title action to set aside a judgment twenty years after it had been entered. The court confirmed the sanctity of judgments and the fundamental principles to set litigation at rest once there had been a determination, and then sets forth the following circumstances under which relief from a judgment may be granted in equity:

... 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 of 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”

The Court stated as a qualification to the foregoing rule:

“In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

* * * “equity will not go behind the judgment to interpose in the case itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defense in the legal action. * * *

“New matter may in some bases be ground for relief; but it must not be what was tried before.”

POINT NO. III

NEITHER THE ADMINISTRATOR NOR THE SURETY CAN BE HELD LIABLE FOR A MISTAKE OF JUDGMENT IN A DECREE OF THE COURT.

Appellants infer in their brief that the Findings, Conclusions and Decree in the Charles Carson Estate, whereby

the Court determined that Grace Catherine Sweeney Carson was the sole surviving heir of Charles Carson, deceased, was erroneous, and that the Court should not have made such a decree at that stage in the proceedings.

It will be recalled that up until the time this oral decree was first made on or about June 11, 1949, and the written Findings, Conclusions and Decree were signed on or about July, 22 1949 (Ex. L-1), the questions before the Court were with reference to the granting of petitions for letters of administration. Questions of heirship and widowhood were necessarily involved in that proceeding because of their bearing upon the priority in the appointment of an administrator. We do not concede that any error or mistake in judgment was made on the part of the District Court in connection with the making of this order or any other in the Charles Carson Estate. In view of counsel's inferences, however, it is suggested to the Court that even if some error or irregularity occurred, neither the administrator nor his bondsmen can be liable for it in the subsequent suit which attempts in effect to declare that the administrator is guilty of extrinsic fraud.

Section 102-1-7, U.C.A., 1943, provides as follows:

"No order or decree affecting the title to real property, heretofore or hereafter made in any probate or guardianship matter, shall be held to be void at the suit or instance of any person claiming adversely to the title of the decedent or ward, or under a title not derived from or through the decedent or ward, on account of any want of notice, defect or irregularity in

the proceedings, or of any defect or irregularity in such order or decree, if it appears that, before the order or decree was entered, the executor, administrator or guardian, as the case may be, was appointed by a court of competent jurisdiction upon such notice as was or may be prescribed by law; and in a probate matter in which a competent court shall have appointed an executor, administrator or guardian upon due notice, no objection to any subsequent order or decree therein can be taken by any person claiming under the deceased or under the ward, on account of any such want of notice, defect or irregularity, in any other manner than on direct application to the same court, made at any time before distribution or on appeal."

In *Cook v. Ringer*, 244 N.W. 615, (Sup. Ct. Wis., 1932), it appeared that the probate judge had received a letter at the time of the hearing on the question of distribution, in which a claim was made that there were living children of the administrator—apparently brothers and sisters of deceased—who were entitled to share in the estate. The father of the deceased and administrator of the estate represented to the Court that he was the sole surviving heir and entitled to receive all of the estate. The probate judge decreed that the estate should be distributed to the administrator and father.

The plaintiffs brought an action to set aside the finding and decree and to recover against the bondsmen on the theory that the bondsmen were liable for a wrongful distribution.

The Supreme Court of Wisconsin held that the testimony of the administrator that he was the sole heir was not extrinsic fraud and that the representation to the Court was a mixed question of law and fact. The conclusion of the pro-

bate judge was undoubtedly erroneous but his error in judgment was not because of the failure of the administrator to disclose all facts in the administrator's possession. The probate judge had all the knowledge of the claims of purported heirs, as did the administrator:

"Consequently, as no fraud was committed by any person in connection with the entry of the final decree on October 21, 1930, it cannot be held that that decree was procured by fraud, or that it could be set aside because of fraud. That being true, the actual payment by Herman Ringer as administrator to himself in his individual capacity, pursuant to, and in compliance with, that final decree, and while it was in force and effect, constituted proper performance on his part under the Court's order and judgment, and was therefore in full compliance with, and not a breach of, the administrator's bond. * * * That consequence followed even though the payment was made by Ringer in his representative capacity to himself in his individual capacity."

This case held:

1. Representation of the administrator that he was the sole heir in a petition for distribution was not fraud.
2. The administrator performed properly under the decree, awarding the proceeds of the estate to himself, even though the administrator knew of the existence of the brothers and sisters of the deceased.
3. The mistake in law of a probate judge could not be imputed to the administrator.

4. There was no liability on the bond because of an error in judgment by the probate court.

In the case at bar it is undisputed that from the time of the filing of the first petition on October 11, 1948, until the time the Court made its determination in the matter, June 11, 1949, everyone who had taken any interest whatever in the proceeding knew that there was a claim made that deceased had two children whose last known address was Chicago, Illinois. There was also a claim made that Grace Catherine Sweeney Carson was not the lawful wife of Charles Carson.

All the facts which could be assembled and presented to the Court concerning these claims were diligently presented by the special administrator and his counsel. Hearings were held on these very questions on November 26, 1948, December 8, 1948, January 19, 1949, January 26, 1949, February 23, 1949, February 26, 1949, March 25, 1949, May 23, 1949, and June 11, 1949 (Finding of Fact No. 10; R. 147). At these hearings the efforts that had been made to locate the purported two children were made apparent in great detail. Sixty to seventy letters were sent to various individuals and agencies in an effort to find plaintiffs.

The Court found in the instant case that the search included contacting by mail and by telephone all known relatives and friends of deceased in West Virginia, Ohio, Illinois and South Dakota. Inquiries were directed to chiefs of police at Chicago and Omaha, Nebraska, and inquiries were made in medical schools in and around Chicago, because of the be-

lief that Mrs. Molinari had a son attending one of these schools (Finding of Fact No. 8; R. 146). The special administrator, through his trust officer and attorney, inquired into the marital status of the deceased at great length and reported the results of these investigations to the Court.

Attorneys for the special administrator were paid \$550.00 for their services; the special administrator was awarded \$150.96 for expenses in the search, and \$100.00 was allowed to Lawrence Barclay for his services in connection with his search at the request of the deceased of the alleged children.

At the conclusion of all of this testimony, rightly or wrongly, the probate judge made and entered an order in which it was stated that Grace Catherine Carson with the surviving wife of Charles Carson and the only known heir at law of Charles Carson (Ex. L-1; see Findings, Decree and order signed July 22, 1949). All of the proceedings and all of the evidence that was before the Court at the time this order was entered were before the Court and a part of the probate file at all other hearings and determinations made by the Court to the completion of the proceeding.

How can it now be contended that an administrator who was admittedly not trained in the law, who had to rely upon his counsel as to the meaning of the orders of the Court and their significance and the proper procedure in probate matters (R. 616, 617), should be held legally liable because it is now inferred that the Court's order was improper? Norton was a party to the proceeding up until June 11, 1949; he was a petitioner for letters of administration, and was making

certain contentions and asking for certain relief in connection with that petition. He properly relied upon the determination of that date to the effect that he was a successful litigant. Certainly there is nothing wrong or extraordinary about his activities up to that time. Certainly now he cannot be charged with bad faith or held liable on the theory that the Court should not have granted him the relief prayed for.

Nor was the situation any different in this respect at any subsequent hearing. The probate files are considered by the law as a notice to all the world of their contents. Certainly this Court does not wish to announce the doctrine that the probate judges themselves, who sit upon the very matters presented to them by the various petitions and other pleadings, do not have notice of the contents of these files.

It is submitted that the most that can be said about the Charles Carson Estate proceedings is that there is a possibility Judge Jeppson made Findings of Fact and Conclusions of Law more broad than was necessitated by the demands of the pleadings at that time. This, however, is at most a mere irregularity in the proceedings. It is certainly not jurisdictional, and it is certainly not an irregularity for which the administrator or his bondsmen should be made liable in damages in this proceeding.

POINT NO. IV

THERE WAS NO PROOF OF EXTRINSIC FRAUD
IN THE CASE AT BAR.

The amended complaint and the second amended com-

plaint filed by plaintiffs in this action specify fraud on the part of Norton in the following particulars:

A. That at the time Mrs. Carson filed her petition for letters of administration Norton knew that the plaintiffs in this action were the children of the deceased and "to his best information resided in Chicago, Illinois."

B. That Mrs. Carson was not the widow of Charles Carson.

C. That the notice to creditors was improper, having been given prior to the qualification of the administrator.

D. That no legal notice to the heirs or creditors was published.

E. That the widow's allowance petitions were false.

F. That no notices were mailed to plaintiffs after July 22, 1949.

G. That no diligent search was made to locate the plaintiffs.

H. That \$300.00 which he owed the estate was not inventoried or was improperly inventoried.

I. That he knew prior to the death of Mrs. Carson that the plaintiffs were the children of the deceased and were his heirs.

J. That Mrs. Carson was not the widow.

K. That Norton knew of the claim made by other parties to the probate proceeding to the effect that there were children and that despite such knowledge he did not disclose to the court the probability of the existence of heirs and that he had ulterior motives for so acting (R. 31-32, par. 11, R. 80-82, par. 12).

At the close of plaintiffs' evidence, the various defendants submitted their motions to dismiss the complaints and action, and the court had occasion to further clarify the position of Mr. Beatie with respect to his claims in the case and what he considered that the evidence showed. The court stated:

"Mr. Beatie, the court is of the opinion you have undoubtedly made a prima facie showing that the plaintiffs are in fact the son and daughter of H. F. Swann and that H. F. Swann is the same person as Carson, who died here, and that had the two children been located or had appeared at the original probate they would have received a share of the estate. Your evidence is sufficient in that regard, and, of course, the evidence is clear that they did not receive it. They were living in Chicago, apparently, under your evidence, at the time of the proceedings, under the name of Tillier and Molinari. The Molinari name was known at that time.

Now your case, as I understand it, has been based upon the claim that Mr. Norton, as administrator, was guilty of fraud, allowing a distribution of the estate under the circumstances that the evidence discloses here.

Now, as I understand it, the administrator is under a very great duty to disclose to the court, at the time distribution is made, all known facts relative to heir-

ship, and in those cases where the administrator himself actually receives, either directly or indirectly, the benefits of the estate when the heir doesn't show up, that his failure to use reasonable diligence to locate them does constitute, or can be considered a fraud upon that particular heir.

What do you claim in this case Mr. Norton knew, or did affirmatively, that constituted a fraud?

Do you claim that the evidence shows that he had any knowledge of the whereabouts of these children, that he did not disclose?"

Mr. Beatie: To that question, no.

The Court: Do you claim that he did anything affirmatively to prevent the discovery of the whereabouts of these children?

Mr. Beatie: Yes, with reference to that. An affirmative act which is negatively operated in failing to make any investigation by which he could inform the court the result of his investigation.

The Court: He answered and testified here that he did nothing, after he was appointed administrator, affirmatively, to locate these children; that he knew of the prior inquiries of yourself and Tracy's; and the effect of his testimony was that, at least as I interpreted it, that he believed he could do nothing further.

Mr. Beatie: That is correct.

The Court: It is your position, isn't it, it was his duty to do something further, and, in the absence of doing it, that constituted fraud? What should he have done?

Mr. Beatie: He should have at least made some independent investigation upon his own.

He should have, during the lifetime of Mrs. Carson, determined what she knew with reference to it; she being the prime mover by which he became administrator of the estate, to determine from her actually whether she knew anything with reference to these children.

The Court: Is there any evidence to the effect he did not do that, that he didn't make inquiry from Mrs. Carson; or is there any evidence to show if he had made inquiry from Mrs. Carson, it would have done any good?

Mr. Beatie: No direct evidence, Your Honor. It all has to be inferred evidence, at least as we adopted the petitions have been filed by both he and Mrs. Carson with reference to Cases 30762 and 30771. Those are the two, No. 30761 and 30762 . . .

The Court: My question was whether he had done anything affirmatively, to prevent discovery. That, of course, would constitute a fraud, if he did anything like that.

Is there anything else in regard to the actions of Mr. Norton that you claim constituted fraud, except his failure to make any inquiry under the circumstances?

Mr. Beatie: Yes. I claim this: That Mrs. Carson, having knowledge of the fact at the time of the filing of her petition, was under the duty, under the statute, to disclose to the court the names of any known heirs, which she has not done in anywise; that in conjunction with the appointment of Mr. Norton as her appointee,

that he failed in his duty to then further require an amendment to my petition, to inform the court that there might be heirs, and ask then that money be designated from the estate to make such search or to disclose to the court what search he had made; in which event the court, undoubtedly—as I will be able to show by cases—undoubtedly would have made such an order.

* * * * *

The Court: Of course, in looking in retrospect that is what should have been done. There is no question about that. These children are here at this stage of the proceedings. Of course, as the case goes forward they may have some evidence to the contrary. At this stage of the proceedings it is undoubtedly true that that court at that time abused its discretion, in closing the estate. But the remedy for that was an appeal at that time. If he just made an error in judgment, that is just too bad.

Mr. Beatie: That is right.”

The court then pointed out that the only way relief could be granted is by showing fraud (R. 753-756).

The court then asked Mr. Beatie:

“Assuming that you have shown a prima facie case of fraud, what do you claim relative to this no marriage between the Carsons? Isn't that just a bunch of inferences? The burden is on you to establish now and negative it. There is a finding that they were married. Have you done anything except give me some information from which I may have a suspicion? Is there anything I can base a finding on?

Mr. Beatie: Yes.

The Court: What?

Mr. Beatie: The exhibit which is an exemplified certified copy of the divorce decree as between Maydie Tiller and R. C. Tiller, in December of 1924, at Chicago. That is the point at which there would be no liability, no further liability upon Mr. Tiller to enter into a marriage contract." (R. 756).

The court was then advised in further detail that the plaintiffs relied upon an alleged deposition in the Charles Carson estate in which Mrs. Carson supposedly stated that she had been married to Mr. Carson from 25 to 35 years before the taking of her deposition. The plaintiffs' position was that as a matter of mathematical deduction she could not have been married that long because Mr. Tiller was under a disability since the divorce from Mrs. Tiller was not complete at that time (R. 756-758).

To be successful, the plaintiffs' proof of fraud in this action must rise to an exacting standard: The defendant Norton must have known of the existence of other heirs and for the purpose of defrauding such heirs and benefitting himself must have failed to notify the Court of the existence of such heirs, and must have knowingly filed false petitions with the court, representing that there were no such heirs. In such a case he would be guilty of extrinsic fraud. See *Hewett et al. vs. Linstead et al.*, 122 Pac. (2d) 355 (D.C. of App. 1st Dis., Div. 1, Cal. 1942) and cases cited. The Court stated in this case that a different rule would be "in effect to hold that an administratrix is under a positive duty at her peril to discover

the existence of possible heirs of whose existence she has no reason or ground to respect.” As to determination of widowhood of Grace Catherine Carson, plaintiffs in this action have the burden of overcoming the presumption of the lawfulness and validity of the second marriage as this Court has recently passed upon that subject in *H. E. Anderson v. Alvira Magdaline Anderson*, No. 7693, decided.....,..... Pac. (2d) The plaintiffs’ proof does not even begin to approach these standards.

Plaintiffs’ cases, which are quoted in their brief, are not in point to the facts of this case. There is no case which plaintiffs cite, and we submit no case in existence which holds that an administrator owes any duty to disclose to the court that which the court already knows. When a court gets a probate file in which it appears from the file itself that there has been a long standing dispute as to questions of heirship and whether a woman is the surviving widow and a determination is made on those questions, it certainly can hardly be contended that the administrator has to disclose the fact of the controversies in the petition which he files to the court which has determined these matters. That is precisely what the plaintiffs contend in this case.

The cases which they cite are not relevant to the factual situation. The case at bar is distinguished, and should be distinguished from the cases cited by plaintiffs and appellants in this respect: In the case at bar the administrator disclosed all the facts in his possession to the court at all times and findings, conclusions and decree were made, wherein the court

found that Grace Catherine Carson was the sole surviving heir and the widow of the deceased. Before that time, the administrator was one of several persons presenting adverse claims to the court. At no time did the administrator make any statements of fact or representations to the effect that there were no heirs. Norton has simply stood by while the other parties to the law suit attempted to convince the court that there were heirs and that Mrs. Carson was not the widow. Norton had knowledge of all of the claims made to that time. Neither he nor Mrs. Carson made objections to the proceedings or hindered the efforts made to locate the heirs. The court then made its order that Mrs. Carson was the widow and there were no other known heirs. Norton's counsel, as well as Norton, presented no petitions to the court contrary to this determination. Norton's counsel incorporated the findings of the court into written form and the court adopted them. The effect of this proceeding was the determination of heirship under the Utah Statute. It bound all parties to the proceeding. It was accomplished in conformity with the provisions of the Utah Statute relating to this very subject. True, it may have been that the court did not have to find and determine that Mrs. Carson was the sole surviving heir at that time, but in view of the contentions made as to purported children, the court did, nevertheless, make that finding and conclusion, and at subsequent stages of the proceeding this determination was reiterated. Now, the question in this case is whether without any new or different knowledge of plaintiffs, the administrator, having adopted the finding of the court in the contested matters in his subsequent petition, was guilty of any extrinsic fraud. Certainly, the

cases cited by the appellants do not sustain the position that he was. Let us examine appellants' case with reference to this proposition. Let us first consider the Utah cases appellants cite.

In re Pilcher's Estate, 114 Ut. 72, 197 Pac. 2d 143, (1948), is cited by appellants at page 44 of their brief. In this case, the deceased married Mabel Vaughn Pilcher in Lyon County, Kansas in 1901. They lived as husband and wife for several years in Kansas where six children were born, four of whom were living at the time of the trial. These parties separated in 1925. Thereafter the parties were in contact with each other to some extent, according to Mabel Vaughn Pilcher, on cross examination, and he told her that he had divorced her. In 1926, apparently in reliance upon the statements of deceased, Mabel Vaughn Pilcher began living with one Hal F. Showers, ostensibly as his wife, although she denied at the trial that she was his wife. The decedent and Mildred Pilcher were married on June 26, 1941, at Logan. Mildred was 19 and he was 59 at the time. Mildred testified that he told her he had not been married but she discovered his prior marriage about a month after their marriage and she was assured that he had obtained a divorce. Thereafter, for some time, Mildred and the deceased lived in California as husband and wife. There was testimony that the deceased had told Mabel Vaughn Pilcher, while he was living with Mildred in California, that he had not divorced her. When Pilcher died, Mildred filed a petition for and was granted letters of administration. During the course of administration, Lee Brown, who was the son of Mabel and William Pilcher,

came to Mildred purporting to represent all the children of Mabel and William and insisted upon a settlement with her on behalf of the children. Mildred paid to him the sum of \$3,000 and certain personal property belonging to the deceased. Mildred proceeded to administer the estate and notices were sent to the named heirs. Thereafter, Mabel filed an "objection to final account in petition for distribution" and also served and filed a "petition for removal of administratrix and for letters of administration." The lower court found for the contestant and by its decree revoked and cancelled letters that had been issued to Mildred. She prosecuted the appeal. The court set aside the judgment of the lower court and remanded the case on the theory that the contestant below did not prove with clear and convincing evidence that the second marriage was invalid and the first divorce of no effect. The court cited opinions from a number of jurisdictions to the effect that the second marriage is clothed with every presumption of validity and that the law presumes innocence, not guilt, morality, not immorality, marriage, not concubinage.

This Court has very recently added weight to the already established proposition that the second marriage is clearly presumed to be valid. *H. A. Anderson v. Elvira Magdaline Anderson*, No. 7693, P 2d It appears that the respondent in that case attacked their marriage there with the same kind of evidence relied upon by appellants here.

Mr. Justice Wade wrote a separate concurring opinion in the *Pilcher* case, *supra*, in which he discussed in detail the significance of the presumption that the marriage was valid. He concluded:

"In other words, it is judicially deemed socially desirable that where a marriage ceremony consummated by cohabitation is shown, an innocent person shall not be branded as having lived in unlawful cohabitation or innocent children be branded as illegitimate, even though if the truth were proved, such would be the case. To avoid such hardships on innocent persons the courts have created a barrier against such results by creating a presumption in favor of a lawful marriage, which presumption is not overcome by satisfying the ordinary burden of persuasion. Such a presumption persists until it is overcome by clear, convincing and *conclusive* evidence. See authorities quoted in the main opinion. I agree that such is the correct policy of the law." (Emphasis by the court). (See particularly Pages 153, 154, Pacific Reporter.)

It is difficult to see that plaintiffs and appellants are benefitted by this opinion. The necessity of disproving or overcoming the presumption of legitimacy of marriage is emphatically upheld. In the case at bar it is submitted that this presumption was not met even if the question of widowhood was not *res adjudicata* in the probate proceeding. Certainly the Pilchers Estate does not add any force to the proposition that Norton and/or Mrs. Carson were guilty of fraud in the Charles Carson estate.

In *Rice v. Rice*, Utah, 212 Pac. (2d) 685, (1949) an executor not only misconstrued the amount of a legacy and the construction of a will to the court in her petition for distribution, but also the executrix denied to her brother the opportunity of a hearing on a matter which the court said that she must have known to have been in dispute. The Court held that under the circumstances of the case, in view of the

dispute which the executrix knew would exist if her interpretation of the will was correct, the affirmative lack of candor in presenting the matter for the determination of the Court constituted extrinsic fraud.

In the case at bar the very fact which the plaintiffs seek to have relitigated was in fact determined after a contest in the probate court. The plaintiffs' counsel admitted that the administrator had not withheld any information from the Court, and that the Court was not prevented from passing upon the subject matter and the issues which plaintiffs now seek to have litigated. Certainly there is a broad line of demarcation between the principles applicable to the facts of the *Rice* case which merely affirmed the fundamental doctrine announced in *United States v. Throckmorton*, 98 U. S. 61; 25 L. Ed. 93, and our case, where the administrator in fact relied upon a judgment of the court which passed upon the very questions in dispute.

In *re Pingree's Estate*, 82 Utah 437, 25 Pac. (2d) 937, (1933), cited by appellants at Page 51 of their brief, has no bearing upon the facts in this case. It is true that the Court there stated that the special administratrix had a special duty to preserve property until a general administrator was appointed. However, the facts there have no application to the problems in the case at bar, and the case is not in point in any particular whatever. In the case at bar the fact is that the special administrator, whether it had such a duty or not, whether it was empowered or not, made a very thorough and complete search for the plaintiffs in this action. That search

was made by one in privity with the general administrator as stated in the Pingree case.

It is submitted that the Pingree case does not add any strength whatever to appellant's position here.

Weyant v. Utah Savings & Trust Co., 54 Utah 181; 182 Pac. 189 (1919) stands upon its own facts and is certainly not authority for the proposition appellants contend for in the case at bar. There the husband eloped with another woman and lived a fictitious name. When at his death she secured letters of administration and probated the estate under a representation that she was his wife, it was held that a court of equity had jurisdiction to set aside the proceeding on the ground that the notice required by the Utah Statute was not given. The Court stated:

"This court is committed to the doctrine contended for by counsel for appellant, viz: that probate proceedings are in rem and that where the statutory notice has been given, all who are interested in the estate are bound by all orders and decrees entered in a particular case and that ordinarily the only remedy is by direct appeal."

The court held that since none of the notices were given in the deceased's name, and since the entire proceeding was conducted with a view to preventing the known children and wife of the deceased from having the hearing, the Court was justified in setting the entire proceeding aside and the distribution aside on the ground of extrinsic fraud. Certainly there can be no quarrel with such a decision with reference to the facts involved.

As heretofore stated, however, in the case at bar there was no failure to disclose, there was no probate in an improper name, there was no lack of good faith on the part of the administrator. Instead of there being an effort to conceal from the Court the name of the deceased and all of the appropriate circumstances, all of these matters were placed before the court in an extensive proceeding lasting nine months. Certainly the facts in the Weyant case distinguish it from the principles applicable in the case at bar.

Barrette v. Whitney, 36 Utah 574; 106 Pac. 522 (1909) certainly does not add any strength to appellants' argument. The Court there affirmed positions taken in prior Utah cases that probate proceedings are in their nature proceedings in rem. The Court held that when a petition for letters of administration is filed and the notice is given by mailing and posting, as provided by the Utah statute, the whole world is brought before the Court. The Court stated that subsequent notices "however important they may be in certain cases and under certain circumstances, are nevertheless not jurisdictional; that is, are not made essential conferring power upon the court to act and hence to disregard them would constitute a mere irregularity which would have to be assailed and corrected in a direct proceeding, and, if not so attacked, in the absence of fraud, would be conclusive as to all the world."

This case is discussed in detail elsewhere in this brief (Page 24). It is submitted that nothing in this case lends any support to the appellants' assertion that the administrator was guilty of fraud in the case at bar.

Appellants cite *Child et al. v. District Court of the Second Judicial District, et al.*, 80 Utah 243; 14 Pac. (2d) 1110 (1932) for the proposition that an heir is entitled to notice of proceedings in a probate of an estate. Of course, this proposition if stated in the abstract is not deniable. However, there is nothing in this case that lends any support to the view of appellants as far as the facts in the case at bar are concerned. In the Child case the Court stated that a probate Court had jurisdiction to determine a question of heirship at any time during the probate proceeding, and that was true before the time for final distribution. This case certainly is contrary to the view of appellants with respect to the propriety of the Findings, Conclusions and Decree entered by Judge Jeppson in the Charles Carson Estate on or about July 22, 1949, and the oral order made by Judge Jeppson on or about June 10th. Counsel in that case stated their proposition to be that "there is no occasion for the determination of heirship until the time for distribution * * * unless there is some action to be taken in the distribution of the estate which may adversely affect the heirs' interest." The Court found, however, that "the jurisdiction to determine heirship is inherent in the probate court to protect the interests of all the heirs. Where the court is given general jurisdiction, and no limitation is placed on its exercise, it must be that it is given such power to properly discharge its general duty. The probate court is required to distribute the estate; it must require proof and it must determine questions of sale and mortgage of property, and pass on the right to family allowance. If at any stage of the proceedings the Court, in order to properly discharge its general duty as a court of probate, should de-

termine the question of heirship, in the absence of a statutory limitation on its right to do so, this court will not prohibit its free determination of that question."

It is again pointed out to the Court that in the case at bar counsel have expressly stipulated that the Court obtained jurisdiction of the Charles Carson Estate in the probate proceeding for that purpose. It was expressly stipulated, moreover, that proper notices were given on the petition for letters of administration and of the hearings pertinent to the determination of questions involved in the conflicting petitions. Certainly Exhibit L-2 is explicit on that subject.

All of the notice which the law requires was given to the plaintiffs in this action. It is submitted that the *Child* case does not add any stature to their position.

At Page 79 of their brief appellants quote from *In Re Stevens' Estate*, 102 Utah 255, 130 Pac. (2d) 85 (1942), where the Court quoted from the case of *In Re Listman's Estate*, 57 Utah, 471, 197 Pac. 596, 660 (1921). The appellants, however, apparently failed to take into account in their citation of the case the last sentence quoted, to-wit: "He" (the administrator) "is not an insurer, and if he exercises ordinary care and diligence in the performance of his duties, he may not be held for a mistake or error in judgment." In that case the court stated that the administrator made a reasonable attempt to prevent the sale of certain stock. He acted reasonably and prudently in the light of the circumstances which then existed, and in view of that fact the decree of the lower court settling the account was approved. Certainly we subscribe to the question of law announced by the court in that case.

In the case at bar Norton knew of the long search made by at least two lawyers, one trust officer and the deceased himself, comprising not less than sixty or seventy letters and involving one or more trips to the east to locate the children of Charles Carson. Norton further knew that all of the facts and proceedings before the Court had disclosed these searches in great detail. He knew that based upon all of the evidence the Court had made a finding and decree in a controversy involving the very question that Mrs. Carson was the sole surviving widow and the only known heir of Charles Carson. If acting upon this knowledge and this determination of the Court is negligence, then certainly Norton was negligent in this case. However, it may be assumed that under these circumstances the appellants could have produced evidence of what the standard of care is which a reasonably prudent man would have followed. Not only did appellants fail to produce and prove such a standard, but we submit that no such standard exists under the facts and circumstances of this case. Norton did act as a reasonable and prudent man in relying upon the order of the Court. He is not an insurer.

It is submitted that the Stevens Estate case does not help the appellants in the case at bar.

The cases cited by appellants under their Point No. IV from jurisdictions other than the State of Utah are also authority for a proposition not involved in the case at bar. None of them are in point.

In *Hewett, et al., vs. Linstead, et al.*, 122 P (2d) 352, (Dist. Ct. of App., 1942) erroneously cited by appellant as

122 P. 352, the petitioner filed false petitions alleging that there were no other heirs when he knew that there were, in fact, living heirs of the deceased. In *Larrabee vs. Tracy, et al.* (Sup. Ct. of Calif. 1943, 134 Pac. 2d 265), the executor led the daughter of the deceased legatee, who resided outside of the state, to believe that she would receive a share of the estate and he did not inform her that the executor would dispute the daughter's right to share in it. He further lead her to believe that the distribution would be made as soon as a fair price could be obtained for certain real property in the estate. Correspondence covered a period of five years and the appellant never, at any time, indicated there was any question about respondent's right to be substituted in her mother's place. Of course, the court held under these circumstances that the failure to permit the claim to be litigated amounted to extrinsic fraud. Certainly this is not the situation before the court in the case at bar.

In *Purinton vs. Dyson*, 65 Pac. 2d 777, (Sup. Ct. of Calif. 1937, the court found that the executor filed his petition for probate of the deceased's will at a time when he knew that the respondent was the granddaughter of the deceased; that she was residing in Los Angeles; and that his failure to disclose her existence was for the purpose of defrauding respondent out of her share of the estate. The executor then suppressed all information which he had from the court and represented Thomas Purinton to be the only son of the deceased. Under these circumstances the California court, of course, held that the executor was guilty of extrinsic fraud because his act of omission and prevented ressondetns from

being heard. In the case at bar there is an express finding of the court and an admission by plaintiffs' counsel at the trial that the administrator and all persons in privity with him did not fail to disclose to the court any fact in their possession.

In *Caulk, et al vs. Lowe, et al.*, 178 Pac. 101 (Sup. Ct. of Okla. 1918) the administratrix represented that she was the sole heir of the deceased at a time when she knew that there was a living daughter of the deceased and it appears that the administratrix' nominee knew that the daughter was a non-resident of the State of Oklahoma. The court held that the failure of the administratrix, who was nominee of Fannie M. Caulk, to give the notice prescribed by the Oklahoma Statute rendered the probate void and that the representation in view of the knowledge of Mary C. Lowe was extrinsic fraud. Under the circumstances the court held that she was bound to disclose her knowledge to the court. It is submitted that these facts are not the facts before the court in the case at bar.

In *Jorgensen v. Jorgensen*, 193 Pac. 2d 728, Sup. Ct. of Calif. 1948) the husband had not only concealed certain assets from his wife and the court at the time a property settlement agreement was made and approved by the court but he had misrepresented the amount of property at the time that the settlement was entered into. The court stated that the husband was the manager of community property under the California Statute and that as such he occupied a fiduciary relationship to his wife and was bound to disclose to her in good faith all of the property at the time of a settlement of

this kind (Pac. Rep. p. 733). The court stated that his violation of duty prevented the wife from a fair opportunity to submit her case fully to the court and that there was, therefore, extrinsic fraud from which the court of equity would grant relief. Certainly, this case is distinguishable on the facts.

Crow vs. Madsen, 111 Pac. 2d 7, (Dist. Ct. of App. 4th Dist. Calif. 1941), must also be distinguished from the case at bar. There the executor did not report, inventory, or account for four parcels of real property and various personal property which belonged to the deceased at the time of her death. Instead, the executors attempted to claim title through an assignment and purported deed from the deceased. Plaintiffs asserted that the purported deed and assignment was never executed and that it was never delivered; that it was without consideration and that there was no intention to make a gift. The Court held that this action, which was all taken by the executor with knowledge of the facts and knowledge of the untruthfulness of the petitions and other documents filed with the court, constituted extrinsic fraud and justified the intervention of a court of equity.

But here again there was an affirmative representation to the court at a time when the executor had knowledge that the representations made were untrue. As applied to the facts this is undoubtedly good law, but how can it be cited as competent authority for the question before this court?

In *Anderson v. Lyons*, 32 N. W. (2d) 849 (Sup. Ct. of Minn.; 1948) the executor knowingly and intentionally concealed from the court the existence of the plaintiff, who

was apparently a nephew of the deceased, thereby preventing him from making any claim in the estate. It appears from the discussion of the Court on Page 850 that the executor not only knew the name of plaintiff but also his place of residence. The Court said that failure to make the disclosure was fraud. We agree. How can this be authority for the case at bar?

In *Hewitt v. Hewitt*, 17 Fed. (2d) 916, (9 C. C. A. 1927), the administratrix knew that her husband had an adopted son; she knew that the husband had made provisions for the son as late as 1920, thus indicating that the husband did not believe in the reported death of the son. She made no inquiry for the son at his last known place of address or elsewhere, and she knew that the court had no knowledge of the existence of the son. The son in this case had caused a telephone call to be made to Los Angeles about seven months after the death of Hewitt and the woman who answered the 'phone stated that Hewitt lived there but was out of town for about two weeks. While it did not appear who answered the telephone, the Court obviously gave consideration to the fact that the son had been in touch with the whereabouts of Hewitt for some time and had employed attorneys to obtain information as to whether he was living or dead.

There is nothing in this case to in any way indicate or infer that if the Court had had the same knowledge that the administratrix did, that if a search had been conducted under the direction of the Court for a period of nine months in the probate of the very estate in question, that the Court would have held that failure to make any further search or

to disclose the existence of the claim that plaintiff was an heir, would have constituted fraud. The facts in this case are clearly distinguishable and must be distinguished in fairness to the case at bar.

At no place in their briefs do appellants make one reference to the record where there is any evidence that the administrator in the Charles Carson Estate had any knowledge that was not fully disclosed to the Court. At no place is there any evidence that Mrs. Carson had any knowledge that was not disclosed to the Court. The fact that there was a claim of the existence of two children was, of course, apparent from the file itself. Notice was given to the children in statutory form. The Court acquired jurisdiction of the estate without question. Nine months were spent making searches, conducting hearings. From sixty to seventy letters were sent by the special administrator alone. Carson himself had made a search. His attorneys had had correspondence with various public officers and private individuals in an endeavor to locate the plaintiffs.

Paintiffs, if they are the children, were living under names different from those by which they had ever been known to their father or to their other relatives or childhood acquaintances. The Court had possession of all knowledge and facts relating to purported children and of the facts and claims as to the widow. It made a decision to the effect that Grace Catherine Sweeney Carson was the sole surviving heir of Charles Carson, deceased.

In subsequent petitions the administrator Norton adopted

the finding of the Court and reported to the Court that she was the sole surviving known heir.

It is submitted that there is no authority and no law and no principle of justice which asserts that the defendant Norton is guilty of extrinsic fraud under these circumstances. Certainly appellants have been unable to point to any such authority in Utah or elsewhere in their brief in this case.

POINT NO. V

THERE WAS NO PROOF IN THE CASE AT BAR FROM WHICH THE COURT COULD INFER THAT LOREN G. NORTON, AS ADMINISTRATOR OF THE ESTATE OF CHARLES CARSON, DID NOT EXERCISE THE CARE AND PRUDENCE OF A REASONABLY PRUDENT ADMINISTRATOR WITH RESPECT TO THE MATTER OF GIVING NOTICES AND MAKING ANY SEARCH FOR THE PLAINTIFFS IN THIS ACTION.

Plaintiffs and Appellants urge in their brief under Point No. 5 in substance that Loren G. Norton was guilty of negligence in failing to make further search for the alleged children of Charles Carson during the administration of his estate. The appellants cite *In Re Stevens Estate*, 102 Utah, 255, 130 P 2d 85 (1942), *Welch v. Flory, et al*, 200 N.E. 900, (Supreme Judicial Court of Mass., 1936, and *Morris v. Mull*, 144 N.E. 436, (Sup. Ct. of Ohio, (1924). These cases do not assert the proposition that an administrator is liable for failure to make a search on the grounds of extrinsic fraud, or that the Decree of Distribution can be held

for naught and set aside in effect for failure to make a search. The question of fraud was not even considered.

The Utah case has been discussed heretofore. It holds in effect that when an administrator exercises the care of a reasonable man, he is not liable for mistake or error in judgment.

In *Welch v. Flory*, supra, neither the administrator nor any other person interested in the estate wrote any letters or solicited any knowledge of the alleged heirs from the Police Department of Boston. The fact of the claim of an heir was never brought to the attention of the probate judge. The administrator did not examine the city records or seek any information from that source by letters of inquiry. He did not even address a letter to the alleged heir or examine the Boston City Directory.

Certainly in the case at bar the situation is entirely different. As has been heretofore reiterated, a search was made for nine months by the court, the special administrator and his counsel, and the deceased and his counsel before that. Letters were addressed to the public officials in all of the states where there was any indication that the alleged heirs may be located. Nearly \$1,000.00 was paid out of the estate funds to the persons engaged in this search. The search made by the deceased prior to his death—personal visits to all of the prior residences of the family in North Dakota and Chicago—and was reported to the court and came to the attention of the administrator. Based on the evidence of these efforts, the judge made its Order, supported by Findings and Conclusions,

to the effect that Mrs. Carson was the only known heir. Certainly the standard of reasonableness which the court passed in *Welch v. Flory* is not applicable to the standard of Norton in the case at bar.

In *Morris v. Mull*, the Supreme Court of Ohio, 144 NE 436 (1924), cited by appellants on page 83 of their brief, pointed out that no notice whatever was given to the sister of the executor. "It is true that he claimed to have written letters which were returned to him; yet unfortunately they were not produced in evidence." The court pointed up facts which indicated that the executor knew of the whereabouts of his sister and had nevertheless reported to the probate court that he did not know her address and had not heard from her for more than four years. The executor there had not followed the means of information at his disposal relative to the whereabouts of his sister. The court held that there was a lack of good faith and a failure to use any diligence to learn the whereabouts of his sister.

Certainly the facts in the *Morris v. Mull* case must be distinguished from the case at bar. Here, after the contest which lasted nine months, the administrator, not being trained in the law and not understanding fully the complexities of the probate procedure, relied upon his attorneys and the findings of the probate judge that Grace Catherine Carson was the sole surviving heir.

It is easy enough, as Judge Lewis pointed out at the trial, to look back now and say that most diligent administrators would have made application to the court for further instruc-

tions. However, the law does not require an administrator to possess the learning of a historian looking on the matter in retrospect.

Bancroft states (Bancroft Probate Practice, Second Edition, Vol. II, page 282, Sec. 335): "The duty of making an investigation of the claims of alleged heirs and of taking or considering the dispositions in connection with their claims is likewise not part of the ordinary duties of an administrator." The Supreme Court of Wyoming held in *Black's Estate*, 30 Wyo. 55, 215 P. 1059 (1923), that searches for heirs and investigators' claims of heirs was not an ordinary duty of an administrator. Bancroft says that "In general, his duties are to preserve the estate until distribution, to collect and safely keep the property, to pay the indebtedness of the deceased and the charges of administration, and to put the estate in such a condition that distribution may be had, and, when claims are satisfied, to pass the estate pursuant to order of court on to those entitled." *Supra*, page 279, Sec. 334. As between the contesting heirs or legatees, an administrator or executor is a mere stakeholder and his duties are passive.

There is no need to speculate in this case as to whether the probate judge might have or could have, or even should have made an order requiring the use of estate funds to make further search for alleged children of Charles Carson before the estate was distributed. As heretofore pointed out, the only way in which the plaintiffs can recover in this case is by showing extrinsic fraud. It is sincerely submitted that acting upon and pursuant to the order of the court in making dis-

tribution under the circumstances of this case certainly was not negligent. *A fortiora* there was no indication of fraud.

A proper consideration of alleged negligence by the administrator in not making a further search for Charles Carson's children in the case at bar is the matter of proximate cause and the fact that both plaintiffs in this action lived under such circumstances that it is very probable that an expenditure of several thousand dollars could not disclose their whereabouts. It is entirely speculative as to whether the plaintiffs ever could have been found by the most diligent search. Mildred Molinari could not remember the number of names she had used since 1923 (R. 469). While her best judgment at the commencement of the cross examination was that there were about five (Ibid), it appeared that she used the name Mildred Allen in Detroit, Mildred Pelligrini in Chicago, Ann Manners in Chicago, Mildred Pelli in California, Marian Ruso, Joan Wood in Chicago, Marcella Gordon in Chicago, and Mildred Pelligrini in Milwaukee. In 1941 she gave her name as Mildred Pelligrini in Chicago, and in August, 1948, and January, 1950, in Chicago she gave her name as Mildred Pelligrini.

These names were given to public officers, i. e. judges, police sergeants, clerks of courts in the various cities and on the dates named (See R. 469-474). She admitted that she had never represented herself to any public official as Mildred Molinari, and she could not remember one instance where she had made a public record under that name. She owned real property in the names of her two boys (R. 477); she

had been in touch with none of her relatives or the relatives of her husband or family. It appears that she could name no relatives that even knew her address for a period of several years (R. 486-487). She had never made any effort to find out what happened to her father's property at Vetat, South Dakota (R. 487); she had no social security number (R. 492), and she was not listed in a telephone directory either by her business or personal address or under her name (R. 492-494.) She has never owned an automobile (R. 496); she could not remember ever having a driver's license (R. 495) except when she was in California she had a license under the name Pelligrini (R. 497).

She stated that she had voted in Chicago since 1937 under the name Pelligrini (R. 499).

Can it be stated that the proximate cause of any failure to find Mrs. Pelligrini was a lack of diligence by the administrator? A purposeful plan to cut herself off from all of her relatives and friends could hardly have been more complete.

The other plaintiff was known since 1927 or 1926 under the name Tillier. He was never known under the name Tiller or Swann. The driver's licenses and renewals identified as "Exhibit A" all refer to "Robert Tillier." The City of Chicago Vehicle Licenses for 1947, 1948 and 1949 refer to "Tillier." The chauffeurs licenses introduced for the years 1942, 1945, 1946, 1948 refer to "Robert Tillier." See also Exhibits D, E, F, and G, showing that all the chauffeur's

and driver's licenses, registrations as a voter, the name given to his employer and the name to which his telephone bill was sent was "Tillier." Exhibit H shows that his rent was paid under the name "Tillier." Exhibit I indicates that his light bills were paid under this name. Exhibit J shows that his gas bills were paid as Tillier, and Exhibit K shows that his income tax returns were made under the name "Tillier."

This plaintiff stated on cross examination that he changed his name from "Swann" to "Tillier" in approximately 1927 because he wanted to get back to the family name but he did not remember of his father ever having his name different than "Tiller." This plaintiff also lost all contact with his family and friends. He never made any attempt to locate his father, except one inquiry of the county recorder at Martin, South Dakota, in or about the year 1947, respecting property. Whether this plaintiff made an effort knowingly to lose his identity may be an open question. Whether he did or not, a more complete job in obtaining this result could hardly be imagined.

Can it be stated that there is sufficient evidence other than speculation that the most diligent administrator could have found plaintiffs? For nearly twenty years they lived under names unknown to their former associates and their relatives. They chose to cut themselves off from their father's family and their mother's family and if one letter was sent by either of them to determine the whereabouts of the father during

this entire period of time, that represents the total extent of their concern for him. If children thus choose to ignore their family ties, live in seclusion, cut off their identity and cut all contacts with their friends and relatives, some consideration should be given to the possibility that they should bear the consequences of their own lack of interest.

CONCLUSION

In this case the trial court dismissed the action after hearing plaintiff's evidence on the theory that it was insufficient as a matter of law to show any fraud or other breach of duty. The probate proceedings being *in rem* and being in compliance with the Utah Statutes the determinations made on these proceedings were *res adjudicata*. It is true that if the plaintiffs are in fact the children of Charles Carson, the effect of the finality of the probate decree may result in some apparent hardship as to them. At least the hopes which have been developed since the decree was entered may meet with disappointment and frustration. But the policy of the law is to require that issues come to final rest after adjudication. Probate matters cannot be held in abeyance indefinitely. Indeed it must be admitted in perfect candor that most probate proceedings are open too long to satisfy reasonable requirements of justice and expeditious handling.

It is submitted that those considerations of public policy which require complete determination of various matters in

probate proceedings require that the determination of trial court in the case at bar be affirmed.

Respectfully submitted,

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