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James W. Beless, Jr.; Brayton, Lowe & Hurley; Attorneys for Plaintiff and Respondent;
Bryce E. Roe; Fabian & Clendenin; Attorneys for Defendant and Appellant;

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OCT 14 1964

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
AUG 5 - 1964
Clerk, Supreme Court, Utah

VERA T. CALLISTER,
Plaintiff-Respondent,

vs

LUCY C. CALLISTER, individually, and as Executrix of the Estate of Alfred Cyril Callister, deceased,
Defendant-Appellant.

Case No. 10013

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

Appeal from a Judgment of the Third District Court
for Salt Lake County
Honorable A. H. Ellett, Judge.

BRAYTON, LOWE & HURLEY and
JAMES W. BELESS, JR.
1001 Walker Bank Building
Salt Lake City 11, Utah
Attorneys for Plaintiff and Respondent.

BRYCE E. ROE
Fabian & Clendenin
800 Continental Bank Building
Salt Lake City 1, Utah
Attorneys for Defendant and Appellant.

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TEXTS AND TREATISES

Utah Rules of Civil Procedure
Rule 60(b) 1

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IN THE SUPREME COURT
of the
STATE OF UTAH

VERA T. CALLISTER, *Plaintiff-Respondent,* vs LUCY C. CALLISTER, individually, and as Executrix of the Estate of Alfred Cyril Callister, deceased, *Defendant-Appellant.*	Case No. 10013

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

I.

THE COURT DID NOT MISTAKE THE NATURE OF THE PROCEEDINGS.

Lucy is mistaken in her assertion that the action was not under Rule 60(b). Lucy's partial quote of Rule 60(b) omits the pertinent parts under which this action was brought, and the rule specifically contemplates an independent action as was brought here. Rule 60(b) provides for relief for

> "(7) any other reason justifying relief from the operation of the judgment. . . . This rule does not limit the power of a court to entertain an

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> independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

The time limitation of three months does not apply to the above quoted portions.

The court therefore had discretion to set aside the judgment in accordance with the rule.

The fact that the judge ruling on the independent action could have been a different individual from the probate judge is immaterial. The important criterion is that the court, whether sitting in probate or otherwise, should be able to control its officers.

II.

NO DOUBT IS CREATED BY THE DECISION.

The decision merely recites that there are issues which still have to be decided, and which will be decided by the trial court in determining whether there was or was not intent to defraud creditors.

The opinion points out the fact that there is yet a lawsuit to be tried and all the trial court did was to set aside the settlement to allow the trial to proceed.

Here, as in *Mastic Tile Division of the Ruberoid Company* vs *Acme Distributing Company,* 15 Utah 2d 136, 389 P.2d 56, 57, both sides moved for summary judgment. There, this court said:

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> "Both sides laid the matter in the lap of the court by their mutual motions, and under the facts of this particular case unequivocally invited and authorized the court to decide the case. . . . we do not think the court should be required to submit to the subsequent urging of the loser that although he took his chances without reservations, he must have another go at the case. . . ."

III.

THE DECISION DOES NOT OVERLOOK THE PROBATE CODE.

Lucy argues that the probate code provides that interested parties should be preferred as administrators. This is conceded, but the code does not imply that an executor should therefore have license to take unfair advantage of creditors. The very language quoted by Lucy from *Fry* vs *Fry,* 155 Iowa 254, 135 NW 1095, states that the executor must be "open and above board". The lower court and this court have found that Lucy's actions were not.

IV.

THE FIDUCIARY RELATIONSHIP HAS NOT TERMINATED.

The cases cited by Lucy on page 12 of her petition are either not relevant, because they do not deal with a court official, or they are helpful to Vera. *Collins* vs *Collins*, 48 Cal. 2d 325, 309 P. 2d 420, is a husband and wife community property divorce case. *Pepper* vs *Litton,* 308 U.S. 295, 84 L.Ed 281 and *Western Grain Company Cases,* 264 Ala. 145, 85 So. 2d. 395, are stockholders suits

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against directors. In these latter three cases there is no court appointed fiduciary and there is a fact question as to whether there ever was a true fiduciary relationship. *Waddy* vs *Grimes,* 154 Va. 615, 153 S.E. 807, involved a question as to the incompetence of a ward, and because the ward was found competent the court held there was no fiduciary relationship. That case fully supports the rule that a court appointed trustee cannot deal with the ward without divesting him of all advantage which his character as fiduciary confers. In re *Blodgett's Estate,* 93 Utah 1, 70 P. 2d 742, is the prime Utah authority requiring full disclosure by an executor. It was fully discussed by this court in its decision.

So long as Lucy is executor, she is a fiduciary and court officer. She did not resign as executor as she could have done, and so long as she remains as executor she should discharge the duties of her office. The court properly controlled her actions by setting aside the judgment, where there was no full disclosure nor fair dealing.

Respectfully submitted,

BRAYTON, LOWE & HURLEY and
JAMES W. BELESS, JR.,

Attorneys for Plaintiff and Respondent.
1001 Walker Bank Building
Salt Lake City, Utah

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