

1953

National Trust Company, Ltd. V. Helen Duys et al : Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

In the Matter of the Estate of FLOR-
ENCE P. HOWARD, also known as F. P.
HOWARD, Deceased,
NATIONAL TRUST COMPANY, LTD.,
as Administrator with the Will Annexed of
the Estate of Robert Bown Ferrie, De-
ceased, and COLINA FERRIE,

*Petitioners in Intervention and
Appellants,*

— vs. —

HELEN DUYS, ETHEL FORREST,
ERNEST F. HOWARD, THE PRO-
TESTANT BOARD OF SCHOOL COM-
MISSIONERS and MCGILL UNIVER-
SITY, MILDRED BLACK, HILDA
BLACK, ROGER BLACK, RACHEL
HELPS and WALKER BANK & TRUST
COMPANY, a Utah Banking corporation,
Executor of the Estate of Florence P.
Howard, also known as F. P. Howard,
Deceased,

Respondents.

APPELLANTS' BRIEF

H. F. LAZIER of LAZIER & LAZIER,
JOHN D. RICE, JAMES E. FAUST, J.
LAMBERT GIBSON, and CLEON B.
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*Attorneys for Petitioners in Interven-
tion and Appellants.*

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Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1-7 inc.
STATEMENT OF POINTS.....	7-8 inc.
ARGUMENT	8
POINT NO. 1. THAT THE POSTING OF NOTICES IN THE ESTATE OF FLORENCE P. HOWARD, ALSO KNOWN AS F. P. HOWARD, DECEASED, DID NOT COMPLY WITH THE STATUTORY OR CONSTITU- TIONAL REQUIREMENTS, AND THEREFORE, THE ENTIRE PROBATE PROCEEDINGS ARE A NULLITY..	8
A. THE POSTINGS WERE NOT IN THREE PUB- LIC PLACES, AS DEFINED BY STATUTE.	
B. THE NOTICES, AS GIVEN, WERE NOT CAL- CULATED TO IMPART KNOWLEDGE OF THE PROBATE PROCEEDINGS TO THE HEIRS, DEVISEES AND LEGATEES.	
C. NO NOTICE WAS MAILED TO THE HEIRS OR TO APPELLANTS.	
POINT NO. II. APPELLANTS' MOTION TO INTER- VENE SHOULD HAVE BEEN GRANTED AS A MAT- TER OF RIGHT, AND THE COURT HAD NO DIS- CRETION IN THE MATTER.....	18
POINT NO. III. STATUTE OF LIMITATION HAD NOT RUN ON INTERVENTION.....	25
POINT NO. IV. APPELLANTS HAD REASONABLE CAUSE TO BELIEVE THEY WOULD BE SUCCESS- FUL IF PERMITTED TO INTERVENE.....	29
POINT NO. V. SINCE THE PROPOSED INTER- VENORS WERE DENIED INTERVENTION, THE COURT SHOULD NOT HAVE MADE FINDINGS, CON- CLUSIONS AND JUDGMENT AS THOUGH THEY HAD BEEN GRANTED A TRIAL AND WERE PARTIES, AND SHOULD NOT HAVE ATTEMPTED TO BIND THEM BY SUCH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE, AS SIGNED IN THE PURPORTED WILL CONTEST.....	44
CONCLUSION	47

TABLE OF CONTENTS—(Continued)

TABLE OF CASES CITED

	Page
Barber vs. Anderson, 73 U. 357, 247 P. 136.....	19
Barrett vs. Whitney, 36 U. 574, 106 P. 522, 37 L.R.A. (N.S.) 368	12, 17
Bjors Estate (Calif.), 229 P. 2d 468.....	30
Bromley vs. Bromley (Ill.), 191 N.E. 268.....	28
Bryan's Estate, 1907 Prob. 125, 6 B.R.C. 25.....	30
Bunting's Estate, 30 U. 251, 84 P. 109.....	10, 18
Butzow's Estate (Calif.), 68 P. 2d 374.....	27
Cache LaPoudre Irrigating Co. vs. Holley, 43 Colo. 32, 95 P. 317	22
Clark's Estate (Calif.), 149 P. 2nd 465.....	30
Dempsey vs. Lawson L.R., 2 Prob. Div. 98.....	34, 42
Drake's Estate, 15 N.J. Misc. R. 44, 192 A. 428.....	35
Fawcett's Estate 1941 Prob. 86.....	30
Foy vs. Foy, 125 Iowa 424, 101 N.W. 144.....	41
Gensimore's Estate, 246 Pa. 216, 92 A. 134.....	42
Goods of Hartley, 50 L.J.P.D. 1.....	41
Houston Real Estate Investment Co. vs. Hechler, 44 U. 64, 138 P. 1159.....	22
Iburg's Estate, 196 Colo. 333, 238 P. 74.....	42
Kearns vs. Roush (W. Va.), 126 S.E. 729.....	41
Marx's Estate, 174 Calif. 762, 164 P. 640, 28 A.L.R. 2nd 546 and 555.....	30
Maurier vs. Miller, 77 Kan. 92, 93 P. 596, 8 A.L.R. 2nd 111....	29
McClure's Estate, 309 Pa. 370, 160 A. 24.....	40
Myreck vs. Kahle, 120 Wis. 57, 97 N.W. 506.....	17
Parker vs. Ross (Utah), 217 P. 2d 373.....	40
Peck's Estate, 153 Wash. 687, 280 P. 87.....	27
Phillip's Estate, 86 U. 358, 44 P. 2d 699.....	14-15
Plenty vs. West, 6 C.B. 201, 16 Beg. 173, 51 Eng. Rep. 743, 9 Jur. 458.....	30, 42
Powell vs. Koehler, 52 Ohio 102, 39 N.E. 195, 26 L.R.A. 480, 49 Am. St. Rep. 705.....	28
Roach vs. Eugene, 23 Ore. 376, 31 P. 825.....	17
Rogers vs. Trans American Corp. (Calif.), 44 P. 2d 635.....	46
Sampson vs. Foxon, 1907 Prob. 34.....	41

TABLE OF CASES CITED—(Continued)

	Page
Sandford vs. Vaughan, 1 Phil. Eccl. Rep. 39, 161 Eng. Re-print 907	33
Shiel vs. O'Brien, Ir. Rep. 7 Eq. 64.....	34
Tidd vs. Smith, 3 N.H. 178, 2 A.L.R. 1013.....	17
Tiller vs. Norton (Utah), 253 P. 2nd 618.....	39
Venable's Will, 127 N.C. 344, 37 S.E. 465.....	41
Voyce vs. Superior Court (Calif.), 127 P. 2d 536.....	27
Weichold vs. Day (Okla.), 236 P. 649.....	28
Wells vs. Kelley, 11 U. 421, 40 P. 705.....	9
Weyant vs. Utah Savings & Trust Co., 54 U. 181, 182 P. 189, 9 A.L.R. 1119.....	17
Williams vs. Miles, 68 Neb. 463, 94 N.W. 705.....	41
Wupperman's Estate, 300 N.Y. Supp. 344, 28 A.L.R. 2nd 535..	30

STATUTES

Section 74-1-22, Utah Code Annotated, 1953.....	39
Section 74-2-2, Utah Code Annotated, 1953.....	29
Section 75-3-5, Utah Code Annotated, 1953.....	9, 16, 17
Section 75-4-8, Utah Code Annotated, 1953.....	16, 18
Section 75-14-14, Utah Code Annotated, 1953.....	19, 28
Section 75-14-21, Utah Code Annotated, 1953.....	47
Rule 24, Utah Rules of Civil Procedure.....	19

TEXT BOOKS

2 Abbott's Probate Law, Sec. 853.....	10
21 Am. Jur. 435.....	17
30 Am. Jur. 951.....	45
31 Am. Jur. 74.....	45
39 Am. Jur. 251.....	17
57 Am. Jur. 757.....	30
2 A.L.R. 1008.....	17
28 A.L.R. 2nd 552, 554.....	30
1 Bancroft's Probate Practice, 2nd Edition, 410.....	26
2 Bancroft's Code Practice & Remedies, 1139.....	21
46 Corpus Juris 560.....	17
1 Freeman on Judgments 899.....	44
15 Iowa Law Review 232.....	41

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Howard, also known as F. P. Howard,
Deceased,

Respondents.

Case No. 7970

APPELLANTS' BRIEF

STATEMENT OF FACTS

Florence P. Howard, also known as F. P. Howard,
died in Montreal, Canada on the twenty-eighth day of
January, 1952.

On the third day of April, 1952, the Walker Bank & Trust Company, a Utah banking corporation, filed a Petition in the District Court of the Third Judicial District, in and for the County of Salt Lake, State of Utah, entitled, "Petition for Probate of Will and Application for Commission to Take Testimony and Settle Interrogatories" (Record, page 5). Said Petition set forth the names and residences of certain people designated as the heirs, legatees and devisees of the decedent, so far as then known to the Walker Bank & Trust Company (Record, page 6, 7 and 8). Not one of the people on said list was a resident of the State of Utah, and most of them were residents of the Dominion of Canada. Your Appellants, herein, were not listed on said Petition in any manner and are among the nearest heirs of the said Florence P. Howard, also known as F. P. Howard.

That on the first day of May, 1952, the Walker Bank & Trust Company filed a "Supplemental Petition for Probate of Will" (Record, pages 26 to 30). Said Supplemental Petition allegedly set forth additional names and residences of certain heirs, legatees and devisees (Record, page 26), although the name of no additional person was contained in said Supplemental Petition.

No publication of the Petition or Supplemental Petition for Probate of Will was made in any paper, (Record page 25), and the notices given were, mailing of notices, but not to the Appellants, (Transcript, 294 to 295), and three postings: One of which was at the West entrance

of the City and County Building, in Salt Lake City, Salt Lake County, State of Utah (Transcript 274). The second notice was in the Federal Post Office on Vine Street in Murray, Utah, immediately East of State Street (Transcript, 274). The third notice was on a bulletin board located immediately East of State Street on 33rd South Street in Salt Lake County, State of Utah (Transcript, 274). Said bulletin board is a wooden board, approximately three and one-half feet wide and approximately five and one-half feet long, standing on two wooden supports, approximately two inches by four inches in size (Transcript 275), and said board is not illuminated and is not designated as a public posting board, nor has it any sign on it stating that it is a public posting board (Transcript, 281). It is merely a flat board upon which the notices are placed by means of thumb tacks or tacks (Transcript 282), and said board is located between the North sidewalk of 33rd South Street and the North boundary of the vehicular travelled portion of 33rd South Street, Salt Lake County, State of Utah, (Transcript, 275). The notices were placed on that part of the board facing the vehicular travelled portion of said street, and the rear of the board being to said sidewalk. Papers, so posted, cannot be seen from the sidewalk to the North of the board (Transcript, 276). Water and splashings from the travel, of course, get upon said posted notices (Transcript 275 and 282). Immediately to the rear of said board and North of said sidewalk is a lot containing trees and lawn and a building known as the South Salt

Lake Stake Tabernacle is to the East and North of said board. Said board is not enclosed in any building (Transcript, 271 to 287).

On the fourteenth day of May, 1952, based upon such posting, and without any notice having been mailed to these Appellants (Transcript, 294), four holographic instruments were admitted to probate as the last Will and Testament of said Florence P. Howard, also known as F. P. Howard, deceased (Record, page 33), and the Walker Bank & Trust Company was appointed Executor of the Estate of said decedent (Record, page 35).

Subsequent to the admission of the instruments to probate, the Walker Bank & Trust Company, realizing that it had listed in its Petition, almost entirely persons listed as friends and knowing there were heirs whose names had not been set forth on the Petition for Probate, and having determined that decedent had relatives other than those who were listed in the Petition for Probate of Will, petitioned the Court for an Order (Record, pages 53 to 55), which was granted (Record page 52), on the third day of September, 1952, directing the Walker Bank & Trust Company to notify the additionally discovered heirs that said documents had been admitted to probate as the last Will and Testament of decedent. That your Appellant, National Trust Company, Ltd. was not included in the list of names to whom notice was given on the said third day of September, 1952, although in August

of 1952, the said Walker Bank & Trust Company had written to the National Trust Company, Ltd. and Colina Ferrie (Record, page 51).

On the twelfth day of November, 1952, Helen Duys, Ernest F. Howard and Ethel Forrest filed a Contest of Order Admitting Wills to Probate (Record, page 131). No notice of said Contest was served upon either of the Appellants herein (Record, pages 129, 130, 135 and 136), although Colina Ferrie was then an heir of record.

On or about the sixth day of December, 1952, Hilda, Mildred and Roger Black and Rachel Helps, filed an Answer to said Contest (Record, page 62).

On the sixteenth day of December, 1952, the McGill University and the Protestant Board of School Commissioners of Montreal, each filed Answers to said Contest (Record, pages 64 and 66), and Walker Bank & Trust Company also filed an Answer to said Contest (Record, page 119).

On the fifteenth day of November, 1952, the Walker Bank & Trust Company filed a "Petition to Construe Will" (Record, page 74). That the Petition to Construe Will and the Contest of Will, were consolidated for hearing.

On the fourteenth day of January, 1953, Appellants herein, filed a Motion to Intervene in the said Will Contest and asked permission to file the attached Answer and

Cross-Complaint in Intervention (Record, page 141). On the same date, they filed their position and Answer in the Petition to construe the Will (Record, page 162).

On the nineteenth day of January, 1953, the Motion to Intervene was heard in said District Court and the Honorable Judge thereof, denied Appellants' right to intervene in said Will Contest (Record, page 196).

After denying Appellants right to intervene in the Will Contest, the Court heard arguments in relation to the construction of the four holographic instruments which had been admitted as a Will, and on February 10, 1953, Ordered, "That the four instruments in the Executor's Petition to Construe the Will are declared to be the last Will and Testament of the deceased, Florence P. Howard, and that all four Wills are valid and constitute the Will of said deceased and should be administered as a whole, except insofar as they are irreconcilable as to particular bequests, and each should be given effect insofar as possible." (Record 198). Thereafter, and after this Intermediate Appeal was granted by your Honorable Court, the Attorneys for Helen Duys, Ernest F. Howard and Ethel Forrest prepared, and on March 22, 1953, asked the Court to sign, Findings of Fact and Conclusions of Law and Decree in the Will Contest, wherein it was stated that the Appellants herein were represented in said action and ignored the Order, theretofore signed by the Court, on February 5, 1953, denying leave to intervene, and said Findings, Conclusions and Decree pur-

ported to dismiss the Cross-Complaint in Intervention, although Appellants were not permitted by the Court to file it or to support it by evidence or law, (Record, page 247 to 249).

STATEMENT OF POINTS

POINT NO. I.

THAT THE POSTING OF NOTICES IN THE ESTATE OF FLORENCE P. HOWARD, ALSO KNOWN AS F. P. HOWARD, DECEASED, DID NOT COMPLY WITH THE STATUTORY OR CONSTITUTIONAL REQUIREMENTS, AND THEREFORE, THE ENTIRE PROBATE PROCEEDINGS ARE A NULLITY.

- A. THE POSTINGS WERE NOT IN THREE PUBLIC PLACES, AS DEFINED BY STATUTE.
- B. THE NOTICES, AS GIVEN, WERE NOT CALCULATED TO IMPART KNOWLEDGE OF THE PROBATE PROCEEDINGS TO THE HEIRS, DEVISEES AND LEGATEES.
- C. NO NOTICE WAS MAILED TO THE HEIRS OR TO APPELLANTS.

POINT NO. II.

APPELLANTS' MOTION TO INTERVENE SHOULD HAVE BEEN GRANTED AS A MATTER OF RIGHT, AND THE COURT HAD NO DISCRETION IN THE MATTER.

POINT NO. III.

STATUTE OF LIMITATION HAD NOT RUN ON INTERVENTION.

POINT NO. IV.

APPELLANTS HAD REASONABLE CAUSE TO BELIEVE THEY WOULD BE SUCCESSFUL IF PERMITTED TO INTERVENE.

POINT NO. V.

SINCE THE PROPOSED INTERVENORS WERE DENIED INTERVENTION, THE COURT SHOULD NOT HAVE MADE FINDINGS, CONCLUSIONS AND JUDGMENT AS THOUGH THEY HAD BEEN GRANTED A TRIAL AND WERE PARTIES, AND SHOULD NOT HAVE ATTEMPTED TO BIND THEM BY SUCH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE, AS SIGNED IN THE PURPORTED WILL CONTEST.

ARGUMENT

POINT NO. I.

THAT THE POSTING OF NOTICES IN THE ESTATE OF FLORENCE P. HOWARD, ALSO KNOWN AS F. P. HOWARD, DECEASED, DID NOT COMPLY WITH THE STATUTORY OR CONSTITUTIONAL REQUIREMENTS, AND THEREFORE, THE ENTIRE PROBATE PROCEEDINGS ARE A NULLITY.

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Proper notice of the Petition to admit wills to probate must be given to all heirs, devisees and legatees of the decedent, or the proceedings of the Court are void.

In *Wells v. Kelley*, 11 U. 421, 40 P. 705, the Court stated:

“The law is too well settled to require references to authorities that where jurisdiction depends on the publication of a notice, and the trial of the cause is proceeded with before such publication is complete, the Court acts without jurisdiction and its orders are void.”

Section 75-3-5, Utah Code Annotated, 1953, provides:

“Notice and Hearing—When the Petition is filed it must be set for hearing, notice of which shall be given by publication or by posting as the court or clerk may direct and by the mailing of notices to the heirs, and to the executor, if he is not the petitioner.”

The Court may order either publication or posting, but the mailing to the heirs is mandatory.

It will be noted that the Court limited the Clerk in the mailing of notices to certain named persons (Record, page 25), so that the Clerk could not and was not permitted to use independent judgment or to mail notices to any heirs whom he might find. He was limited to the “heirs, legatees and devisees * * * who are listed and whose addresses are shown in the Schedule attached to the Supplemental Petition for Probate of Will.” Such limitation upon the mailing of notices to the heirs is

contrary to the statute above quoted and is an abuse of the court of its power, particularly when such notices are jurisdictional. Neither the Judge, nor the Clerk may make a valid order setting aside the jurisdictional requirements in such a case.

In re Bunting's Estate, 30 U. 251, 84 P. 109, no notice was mailed to the heirs at law. The Supreme Court held that the lower Court had acted in excess of its jurisdiction and set aside the probate proceedings. It stated:

“The purpose of the law in requiring notice to be given of the time and place of hearing petitions for letters of administration is to advise those who are interested in the proceedings and give them an opportunity to be present, and, if they so desire, make objections to the issuance of letters to the party petitioning therefor. * * *”

“Therefore, because Guheen may not have had actual, positive knowledge at the very moment of filing his petition, of the place of residence of the heirs, all of whom were minors at the time Bunting died, and all, except one, at the time the petition was filed, did not dispense with the necessity of mailing notices to them as required by Sec. 3818, Revised Statutes, 1898, of the place and time of the hearing on the petition at Blackfoot, Idaho, the place where Bunting resided at the time of his death, and which was known to Guheen when he filed his petition.”

The Court, in the above case, quoted with approval, 2 *Abbott's Probate Law*, Sec. 853, wherein it was stated:

“All jurisdiction of persons or property depends upon notice. It is the one fundamental and indispensable foundation for ‘due process of law’, and it may be said, as a rule without exception, that no judicial action whatsoever, is valid or binding without some notice, actual or constructive. It is likewise fundamental that the requirements for giving notice must be strictly complied with, and this rule applies with increased force to what are termed ‘special proceedings’. Proceedings in probate belong to this class.”

Most of the names set forth in the Petition and Supplemental Petition of Walker Bank & Trust Company, for probate of the will, were listed as friends. Walker Bank & Trust Company, by its “Supplemental Petition to Probate”, at least implied to the Court that additional heirs, legatees and devisees had been found, but the said Supplemental Petition contains the name of not a single additional person. Later on, as shown by the Affidavit of Walker Bank & Trust Company (Record, page 168-169), the bank determined from Rosamond Lamb that many additional persons were heirs of Florence P. Howard, also known as F. P. Howard, deceased. This determination was apparently made well after the instruments had been admitted to probate and after the time of the jurisdictional notices. It will be noted that Walker Bank & Trust Company was well acquainted with Rosamond Lamb. Rosamond Lamb had picked up the old wills from the bank and had taken Mrs. Howard to Montreal with her. Mrs. Howard died while visiting with Rosamond Lamb and in a hospital in Montreal where the

said Rosamond Lamb lived. Rosamond Lamb had, after the death of Mrs. Howard, filed a request to have a Five Thousand Dollar (\$5,000.00) check, issued by Mrs. Howard prior to her death, honored and paid (Record, page 44), and the said Rosamond Lamb was one of those who the bank knew to be associated with the affairs of Mrs. Howard. This should have caused Walker Bank & Trust Company to inquire of Miss Lamb, one of the very close friends of Mrs. Howard, as to who were the heirs of Mrs. Howard. If the bank had so inquired, the names of the people listed in the Affidavit of the bank, would have been known to the bank prior to the Petition and prior to the Supplemental Petition for Probate of Will, and the jurisdictional requirements of mailing could have been met.

In the case of *Barrett v. Whitney*, 36 U. 574, 106 P. 522, cited with approval in the *Bunting* case, the Court said:

“Section 4026 provides the time for which notice must be given, and this court, in a direct proceedings, (in re Bunting’s Estate, 30 U. 251, 84 P. 109), held that, unless the notice is given for the time and in the manner provided in said Section, the court acquires no jurisdiction of the proceedings.”

The case further implies that the court must be fully advised of all the premises, including names of all heirs, or if there may be unknown heirs, or heirs with unknown addresses, that fact must be set forth. The court stated:

“The heirs may be numerous, and may live in different parts of this, or even in some other Country. When their names and places of residence are thus given, or when the fact is made to appear that they are unknown, *as it must be* (emphasis added) in the position for the letters of administration, the probate court is fully advised with respect to the true situation. While the court may assume that, as a matter of law, and for the purpose of jurisdiction, both the known and unknown heirs are before the court, yet, whether the heirs are living in different states, or otherwise, it cannot be presumed that a prudent and careful Judge would ordinarily proceed to distribute, without notice to the heirs, or to some accredited person representing them.”

In the case at Bar, it is obvious that none of the heirs were residents of the State of Utah. That most of the heirs, devisees and legatees were residents of the Dominion of Canada, and a “prudent and careful Judge would ordinarily proceed” to have notices published in the Dominion of Canada, or at some other place calculated to come to the attention of the unknown heirs of Florence P. Howard, also known as F. P. Howard, deceased, that a will was to be admitted to probate. Note, that the publication of notice to creditors was had in the South Salt Lake Herald (Record, page 35A and 38). Did the Walker Bank & Trust Company have full realization of its duty to give the kind of notice calculated to come to the attention of the heirs or creditors of a person from Canada, who was in Canada when she died?

In re Phillips' Estate, 86 U. 358, 44 P. 2d 699, the court discussed the question of whether proper notice was given to convey jurisdiction, and in so doing, stated:

“The law did not intend that a mere obeisance should be done to the obligation of providing the world with notice when jurisdiction itself depended upon such notice. The notice is highly substantive and not conventional; it is intended not only to give notice to parties interested, but to raise a notoriety which through the common concourse of mankind might reach persons interested. At a time it was doubted by thoughtful members of the bar whether posting would stand the test of due process. The best that posting can do toward giving notice is none too good. Certainly, concentrating the three postings in a limited area where they simply duplicated the effect of one is insufficient. It does not give the notoriety which in the end may reach interested parties. It does not meet the requirements of the statute. Not an answer is to say that in all probability persons in Boston would not have had communicated to them directly or indirectly notice of the pending probate proceedings, even though the notices were posted widely over the county.”

In the case at Bar, nothing was done, “to raise notoriety, through which the common concourse of mankind might reach persons interested.” The Petitioner for Letters Testamentary knew that Mrs. Florence P. Howard came originally from Canada, was born and grew to young womanhood in that Dominion, and that her family, insofar as they had knowledge of them, continued to re-

side in Canada. However, it did nothing, nor did it attempt to do anything, to cause any notoriety in the Dominion of Canada, which might come to the attention of any of the heirs of Mrs. Florence P. Howard, also known as F. P. Howard.

In *re Phillips' Estate*, the court further stated:

“That the mere negative finding that the posting in this case is not sufficient, is of little guide to the persons whose duty it is to post notices. On the other hand, an affirmative rule, of what is sufficient, depends so much upon the situation in every county, and perhaps the situation in the cases themselves, that hard and fast rules cannot be enunciated. * * * There should be customary places at which all notices should be posted, which places should be at conspicuously public points and not on the by-ways. * * *”

“The proof of posting, contained in the probate files, reveals the posting to have been at the West entrance of the City and County Building, on University Avenue, and on Center Street. We cannot take judicial notice that these streets are in Provo, or that they are actually within 80 yards of each other. We are confined to the facts set out in the petition to set aside for that information.”

In the case at Bar, the testimony shows that all notices were posted immediately adjacent to the East of State Street, as it runs through Salt Lake County (Transcript, 280). The notice posted in the Post Office at Murray, was posted on Federal property, and within

the jurisdiction of the United States. The notice posted on 33rd South Street was not such a notice as would give notoriety to the pending action. The paper upon which the notice was written, could not be seen by people walking along the sidewalk, and could be seen only by cars driving West, or parked on the North side of 33rd South Street (Transcript, 276). The notice, itself, could not be read from such cars, nor could it be read by people along the sidewalk on 33rd South Street. The only possibility for reading the same, would be on foot, between the "bulletin board" and the vehicular travelled portion of 33rd South Street. The testimony further shows that the "bulletin board" was situated in such a position that it was a common occurrence for muddy water to be splashed thereon and to obliterate the notices posted thereon (Transcript, 282). As a practical matter, the only way such a notice would be seen, would be for a person to make a special trip for that particular purpose and to walk around behind the "bulletin board" and to read therefrom.

We further desire to call the Court's attention to the fact that no notice was mailed to the Appellants herein (Section 75-4-8, and Section 75-3-5, Utah Code Annotated, 1953), on the Petition or Supplemental Petition to Probate the Will, and the sole and only basis upon which it might be claimed that notice was given to them was the posting heretofore discussed, which does not meet the requirements of the constitutional provision of due

process of law, and is not that type of notice calculated "to raise a notoriety which, through the common course of mankind reach persons interested."

The following citations, cover certain cases in which the posting of notices have been held insufficient because of the place where posted.

Myreck v. Kahle, 120 Wis. 57, 97 NW 506;
Tidd v. Smith, 3 N.H. 178, 2 ALR 1013;
Roach v. Eugene, 23 Ore. 376, 31 P. 825.
 See also the discussions in 2 ALR 1008, 39
Am. Jur., page 251 and 46 C.J. 560.

It will be noted that in the instant case, no notice of the Petition, or Supplemental Petition to Probate the Will was ever mailed to any of the Appellants.

21 *Am. Jur.*, page 435, states:

"Where a requirement of notice is jurisdictional, unless the notice is given for the time and in the manner provided, the court acquires no jurisdiction of the probate."

Citing:

Weyant v. Utah Savings and Trust Company,
 54 U. 181, 182 P. 189, 9 ALR 1119;
Barrett v. Whitney, 36 U. 574, 106 P. 522, 37
 LRA (NS) 368.

The Utah Statutes on the subject are as follows:
 Section 75-3-5, Utah Code Annotated, 1953, reads:

"When the petition is filed, it must be set for hearing, notice of which shall be given by publication or by posting as the court or clerk may direct,

and by *mailing of notices to the heirs*, and to the executor if he is not the petitioner." (Emphasis added).

Section 75-4-8, Utah Code Annotated, 1953, reads:

"When a petition praying for letters of administration is filed, the court or clerk must set the petition for hearing and give notice thereof by publication, or by posting and by *mailing notices to the heirs*." (Emphasis added).

In the instant case, there was no publication of notice and no mailing to the Appellants herein. The only possible notice given to them was that given by the so-called posting.

In *re Bunting's Estate*, Supra, holds that the notice provided for in the above Sections of the Statutes must be mailed to the heirs.

POINT NO. II.

APPELLANTS' MOTION TO INTERVENE SHOULD HAVE BEEN GRANTED AS A MATTER OF RIGHT, AND THE COURT HAD NO DISCRETION IN THE MATTER.

The Appellants herein feel that the entire proceedings of the lower Court in the Estate of Florence P. Howard, also known as F. P. Howard, deceased, are a nullity. However, they desire to present the arguments on the next four points to your Honorable Court, in the event that your Honorable Body decides the first point contrary to their position.

Appellants' Motion to Intervene was not discretionary with the Court, but the right is given by Utah Rules of Civil Procedure and Utah cases. Volume 9, Utah Code Annotated, 1953, gives Rule 24 of the Rules of Civil Procedure, which states:

- (a) Intervention as a matter of right. "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is the custody or subject to the control or disposition of the court or an officer thereof."

This Application for Intervention was filed prior to the time the case was called for trial and was heard prior thereto. In the case of *Barber v. Anderson*, 73 U. 357, 274 P. 136, the Utah Supreme Court held, the person who asked leave to intervene on the day of the trial had made timely application for intervention and she was permitted to intervene in such case.

Appellants were entitled to intervene under each of the subheadings of the Rule. The first sub-heading which states, they are permitted to intervene "when a statute confers an unconditional right to intervene", is covered by Section 75-14-14, Utah Code Annotated, 1953, which Section states:

“Any person shall have a right to be heard by the court at any hearing on any question affecting a probate or guardianship matter in which he is interested.”

In the case at Bar, the Appellants herein are vitally interested in the Will Contest, and the Statute, above quoted, gave them the right, unconditionally, to be heard in the matter.

The second point under the Rule provides them unconditional right to intervene, “when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action”. There is no question in the instant case, but that the representation of Appellants’ interest was inadequate. This matter is conclusively shown by the fact that all parties to the action, including the Executor, Walker Bank & Trust Company, resisted the intervention and resisted the right of Appellants to be heard, and the Stipulation between some of the parties (Record, page 178 to 182), and the payment of the Claim of Five Thousand Dollars (\$5,000.00) by the Executor to Rosamond Lamb. No one who was in the case, represented Appellants’ interest in any degree.

The third point, that “when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court” has direct application in the instant case. Appellants are some of the

heirs at law of Florence P. Howard, also known as F. P. Howard, and they are so situated as to be adversely affected by the distribution of the estate of Florence P. Howard, also known as F. P. Howard, deceased. This Estate is in the custody and subject to the control and disposition of the Court.

We submit, that in the instant case, the Utah Rule is peculiarly applicable to Appellants, and their Motion to Intervene should have been granted as a matter of right, pursuant to such Rule, and that the lower Court had no discretion to deny such Motion.

2 Bancroft's Code Practice and Remedies, page 1139, states:

“The conditions prerequisite to the exercise of the right of intervention, depend largely, of course, upon the wording of the Statute under which the right is asserted. However, it may be broadly stated that when the applicant is not an indispensable party, intervention will not, as a rule, be allowed, when it will retard the principle suit, or will require a reopening of the case, or delay the trial, or change the position of the original parties, or will change the form of the action or the issues. But it is to be born in mind, that it would be practically impossible for one to intervene in an action without presenting a question of fact not involved in the pleadings of the original parties, and if this were inhibited, then the Code provision on the subject of intervention, would be of no avail. The question, therefore, whether or not, a new issue of fact is presented by a Petition for Intervention, is not the test to apply

in determining whether an issue, different from that between the original parties will be made by the intervenor; it is sufficient that the ultimate issue to be determined, remains the same."

In the instant case, the ultimate issue to be determined is to whom some or all of the property of Mrs. Florence P. Howard, also known as F. P. Howard, should be distributed. That was the ultimate question in the Contest, as filed, and that is the ultimate issue raised by the Motion to Intervene.

In the case of *Houston Real Estate Investment Company v. Hechler*, 44 U. 64, 138 P. 1159, at page 1162, this Honorable Court stated:

"As we understand the purpose of the Statute relating to intervention, it is not intended to be implied only where a third person may have such an interest in the subject of the action which makes him an indispensable party; but the Statute applies where such third person, at some stage of the proceedings before trial is shown to have an interest which would make him a proper party."

We submit, in the instant case, that the Appellants had such an interest as would make them proper parties. The determination of the Will Contest will, to a large extent, declare who will receive the bulk of the Estate of Florence P. Howard, also known as F. P. Howard, deceased.

In the case of *Cache Lapoudre Irrigating Company v. Holly*, 43 Colo. 32, 95 P. 317, the Supreme Court of

Colorado, in discussing the questions raised by intervention, stated:

“It would be practically impossible for one to intervene in an action without presenting a question of fact not involved in the pleadings of the original parties, and if this was inhibited, then our Code provision on the subject of intervention would be of no avail. The question of whether or not a new issue of fact is presented by a petition of intervention is not the test to apply under a Code provision as broad as ours, in determining whether an issue different from that between the original parties will be made by the intervenor. * * * True the intervenor pleaded facts upon which it predicated a right to the subject-matter of controversy which are not stated in the original pleadings, and which, if established, would prevent the judgment which the plaintiffs seek, but that has not changed the original issue. It still remains as it was, i.e., are or are not the plaintiffs entitled to divert the water from the stream which they claim? In other words, although intervenor predicates its right to the subject-matter of controversy upon which it relies for a judgment in its favor, and to defeat a recovery in favor of plaintiffs upon facts not stated in either of the pleadings of the original parties, yet the ultimate issue to be determined, the right to divert water from the stream, remains the same, and this appears to be the general rule by which to determine whether or not the intervenor has injected a new issue into the case in which he is allowed to intervene.”

In the instant case, the ultimate question involved, is to whom should the property of Florence P. Howard,

also known as F. P. Howard, deceased, be distributed. The Answer and Cross-Complaint of Appellants, raises the same ultimate question, to-wit: To whom should the property of Florence P. Howard, also known as F. P. Howard, deceased, be distributed. No new ultimate issue need be determined.

McGill University and the Protestant Board of School Commissioners of Montreal, prayed in their Answers, that all four instruments together constitute the last Will and Testament of Florence P. Howard, also known as F. P. Howard, deceased. This, of necessity, raises the negative, that none of the instruments constitute the last Will and Testament of Florence P. Howard, also known as F. P. Howard, deceased, and that is one of the positions taken by Appellants in their Answer and Cross-Complaint. It is thus obvious, that not only is the ultimate issue, as raised by the Appellants, the same, but the fact situation to be determined is identical with that raised by McGill University and the Protestant Board of School Commissioners, to-wit: Do, or do not, the four instruments constitute the last Will and Testament of Florence P. Howard, also known as F. P. Howard, deceased?

The Answer of Mildred Black raises that issue and the issue of the revocation of the former wills by the will dated January 14, 1952.

POINT NO. III.

STATUTE OF LIMITATION HAD NOT RUN ON INTERVENTION.

In the instant case, a Will Contest was filed in due time, by Helen Duys, Ernest F. Howard and Ethel Forrest, in which they claimed that the first two instruments were revoked by the instrument dated May 7, 1949, and that the instrument dated January 14, 1952 was a Codicil to the 1949 instrument (Record, page 131).

On the sixth day of December, 1952, Mildred Black, for and on behalf of herself and her brother and sisters, Hilda Black, Roger Black and Rachel Helps, filed an Answer to said Will Contest; and in said Answer, Mildred Black claimed that the said instrument of January 14, 1952 was intended by Florence P. Howard, also known as F. P. Howard, to be her sole will, to the exclusion of all other documents (Record, page 62).

On the sixteenth day of December, 1952, McGill University and the Protestant Board of School Commissioners of Montreal, each filed Answers in said Will Contest, wherein each alleged that the four holographic instruments constituted the last Will and Testament of said decedent (Record, pages 64 and 66).

On January 14, 1953, Appellants herein, filed a Motion to Intervene in said Will Contest and attached to said Motion their Answer and Cross-Complaint in Intervention, which alleged that none of the documents was

the last Will and Testament of Florence P. Howard, also known as F. P. Howard, deceased, but that if any of them were, it was the last document written and executed and dated January 14, 1952, by the said Florence P. Howard, also known as F. P. Howard, deceased (Record, page 141). This latter position is identical to the position taken by Mildred Black, Hilda Black, Roger Black and Rachel Helps (Record, page 62).

In their Answer and Cross-Complaint in Intervention, Appellants further raised the jurisdictional facts discussed under Point I, *supra*, which had not been raised by any of the other parties.

On the nineteenth day of January, 1953, the Motion to Intervene was heard by the said District Court of the Third Judicial District, in and for the County of Salt Lake, State of Utah, and the Honorable Judge thereof, on January 19, 1953, orally denied Appellants right to intervene in said Will Contest, and later, to-wit: On the fifth day of February, 1953, signed a written Order, denying Appellants' Motion to Intervene (Record, page 196).

The position of the Appellants is that the filing of the Contest of Wills tolled the six months statute of limitations, so that it did not apply as to anybody.

1 *Bancroft Probate Practice*, Second Edition, page 410, states:

“But once the jurisdiction of the Court, to determine the validity of a will attaches by the timely filing of a contest, the court does not lose

jurisdiction thereon until disposition has been made of the matter, or stating it in another way, the order admitting the will to probate does not become final within that period authorized by the particular state for contest, if a contest is filed."

See *Voyce v. Superior Court* (Calif.) 127 P. 2d 536;

Pecks' Estate, 153 Wash. 687, 280 P. 87.

In any event, Appellants should have been permitted to intervene to the extent of the issues already raised in the Will Contest by the Answer of Mildred Black, Hilda Black, Roger Black and Rachel Helps, to-wit: That the instrument dated January 14, 1952, constituted the last Will and Testament of Florence P. Howard, also known as F. P. Howard, deceased, to the exclusion of the other instruments.

There are many cases which hold, and it is almost universally accepted that a Will Contest filed within the statutory time inures to the benefit of any interested party intervening after such time, and the Statute of Limitations is no defense to his petition in intervention.

See *Butzow's Estate*, (Cal.), 68 P. 2d 374, wherein it is stated:

"The question does not appear to have been decided in this state; and it appears from decisions from other jurisdictions that a contest filed within the statutory time inures to the benefit of an interested party to intervene after the statutory period, and that the statute of limitations is not a defense to such a petition. (Citing cases).

In illinois, however, the contrary was held. Bromley v. Bromley, Ill., 191 NE 268, 93 ALR 1041. As between the two lines of decisions, we prefer to follow that which seems to be the more liberal rule declared by the Kansas and Ohio courts."

In *Weichold v. Day*, (Okla.), 236 P., page 649, the court stated:

"This court has held that, where an action to set aside a will is properly brought by a bona fide litigant who is not barred by the Statute of Limitations from maintaining it, such action inures to the benefit of all others concerned who intervene in the action, although they themselves would be barred by the Statute of Limitations from instituting it." (Citing cases.)

The court cited with approval:

Powell v. Koehler, 52 Ohio 102, 39 NE 195, 26 LRA 480, 49 Am. State Reports 705 to the same effect.

Section 75-14-14, Utah Code Annotated, 1953, states:

"Any person shall have a right to be heard by the court at any hearing on any question effecting a probate or guardianship matter in which he is interested."

On the authority of this Statute, the Court should have permitted the Appellants to intervene in said Will Contest. Certainly, the Appellants should have been permitted to intervene to the extent of the issues raised by the pleading of Mildred Black, Hilda Black, Roger Black

and Rachel Helps, and McGill University and the Protestant Board of School Commissioners of Montreal, and Walker Bank & Trust Company.

See *Maurier v. Miller*, 77 Kan. 92, 93 P. 596, 8 ALR 2nd 111.

POINT NO. IV.

APPELLANTS HAD REASONABLE CAUSE TO BELIEVE THEY WOULD BE SUCCESSFUL IF PERMITTED TO INTERVENE.

Appellants should have been granted leave to intervene, and after intervention should have been allowed to introduce evidence and the Court should have heard evidence concerning the surrounding circumstances of the execution of the wills, exclusive of her oral declarations, and should have granted to Appellants a trial of the issues before a jury, if asked for.

Section 74-2-2, Utah Code Annotated, 1953.

Appellants not only should have been granted leave to intervene, but had a more than reasonably fair chance of having their position sustained on a Will Contest, namely that none of the instruments constituted the last will of Florence P. Howard, also known as F. P. Howard, deceased, or if any instrument be her will, it is the instrument dated Jan. 14, 1952. While there is a presumption in *some* states that the will of a person should be construed so as to prevent partial intestacy, the *Utah* Statute says, that it should be construed so as to prevent

total intestacy. The blood heirs of the testator may not be cut off without clear and unequivocal language, (*In re Clark's Estate* (Cal.) 149 P. 2d 465, 57 Am. Jur. 757, and cases cited there). The interpretation propounded by the Respondents herein, would completely cut off the blood heirs of Florence P. Howard, also known as F. P. Howard, deceased. In addition, there is a series of cases which hold that a later will not disposing of the residue, revokes an earlier will which does dispose of the residue.

See *Plenty v. West*, 6 C.B. 201, 16 Beg. 173,
51 Eng. Rep. 743;

In re Estate of Bryan, 1907 Prob. 125, 6
B.R.C. 25;

In re Estate of Fawcett, 1941 Prob. 86;

See also the annotation following *Estate of Bryan*, at 6 B.R.C. 25;

In re Wupperman's Estate, 300 N. Y. Supp.
344;

In re Bjor's Estate (Cal.) 229 P. 2nd 468.

In 28 ALR 2nd 535, 546, the annotator cites *In re Marx's Estate*, 174 Cal. 762, 164 P. 640 (the case cited below by respondents as contra to appellants position) as turning on the theory of "dependent relative revocation". In the instant case no such theory is involved. In 28 ALR 2nd 554 and 555, there is a discussion of many cases holding contrary to *In re Marx*, especially good is the discussion of *In re Wupperman*, 300 N.Y. Supp. 344, as is contained on page 552.

The primary rule for the construction of a will is to ascertain the testator's intention. In the instant case, several bequests of specific personal property were changed from will to will.

The manner in which the testatrix changed the objects of her bounty concerning certain bequests, should have caused the court to have allowed intervention and testimony, and in view of the cases cited herein, should have persuaded the court that the intent of Florence P. Howard, also known as F. P. Howard, deceased, was to make a final will on January 14, 1952, which was so inconsistent with the former instruments, as to result legally in their revocation. Illustrative of this, is the disposition of various personal items:

SILVER TOILET SET:

Given to Marie Petry in instrument appended to holographic will, dated June 3, 1940.

Given to Miss Mildred Black in instrument dated May 7, 1949.

Given to Rosamond Lamb and Mary Stuart Tirling in the instrument dated January 14, 1952, along with other personal effects, which were not specific bequests. Marie Petry is given \$5,000.00 and some little thing, in the 1952 instrument, and Miss Mildred Black is given \$2,500.00 and a diamond watch in the same instrument.

SOLITAIRE DIAMOND RING:

Given to Isobel Budden in the instrument dated June 3, 1940.

Given to Isobel Budden in the instrument dated May 7, 1949, and also \$3,000.00.

Given to Isobel Budden in the instrument dated January 14, 1952.

OLD SILVER TEAPOT:

Given to Ernest F. Howard in the instrument dated June 3, 1940. He is also given a portion of the residue.

Given to Ernest F. Howard, (address from Mrs. H. M. Duys, Montclair) in the instrument dated May 7, 1949.

Given to Rosamond Lamb and Mary Stuart Tinling in the instrument dated January 14, 1952, along with other personal effects, which were not specific bequests, and Ernest F. Howard was given a portrait of his grandfather.

DIAMOND AND EMERALD RING:

Given to Mrs. H. H. Lamb, ("or if she predecease me to her daughter, Rosamond") in the instrument dated June 3, 1940, and also \$1,000.00.

Given to Rosamond Lamb in the instrument dated May 7, 1949, and also \$2,000.00.

Given to Rosamond Lamb in the instrument dated January 14, 1952, together with \$50,000.00 and one-half of balance of personal effects.

DIAMOND WIDE BROOCH:

Given to Mrs. C. P. Howard, in the 1940 instrument, and described as being a circular diamond brooch.

In the instrument dated February 6, 1939, one Cavie P. Howard or his heirs, are given \$2,000.00.

Given to Mrs. William Stewart in the instruments dated January 14, 1952, and May 7, 1949.

DIAMOND WATCH:

Given to Gertrude (Petry) Lewis in the instrument dated June 3, 1940, and called a diamond and platinum watch. In 1939, Mrs. Gertrude (Petry) Lewis is given 3/20ths of the remainder of the estate.

Given to Mrs. Percy E. Radley in the instrument dated May 7, 1949.

Given to Mildred Black in the instrument dated January 14, 1952.

It will be noted that in the 1940 instrument, Mrs. Helen M. Duys is given a box of pictures and a large native *rare basket* in case, which were stored at Hagers Warehouse, and in the 1939 instrument, a Mrs. Helen Howard Duys is given 3/20ths of the remainder of the estate, and in 1949, she is given the old silver tea caddy. In 1952, Mrs. Henry M. Duys is given the solitaire diamond pendant. And note the language of the 1952 instrument, where all of the personal effects go to Rosamond Lamb and Mary Stuart Tinling, subject to certain special bequests.

In *Sanford v. Vaughan*, 1 Phillip Eccl. Rep. 39, 161 Eng. Reprint 907, the court held that this denoted an intention to substitute one will for the other, and held that by bequeathing the specific personal property differently in the second will, the testator had in effect, substituted the second will for the first and had impliedly revoked the first.

In the case of *Dempsey v. Lawson*, LR. 2 Prob. Div. 98, the court held that a second will, repeating various bequeaths in the first will, and appointing the same executor as in that document, revoked the first will, though it contained no residuary clause.

In the instant case, it was stipulated that Mrs. Florence P. Howard, also known as Mrs. F. P. Howard, had the three former instruments with her at the time she wrote the fourth instrument, and in the case of *Shiel v. O'Brien*, IR. Rep. 7 Eq. 64, the Court held that if a person with an earlier will before him, executed a second will, complete in form, the intention of the testator was obviously to revoke the first.

It will be noted by an examination of the original instruments, (not the photostats), that the testatrix knew the difference between a codicil and a will, since she had written on the top of one page, "Codicil", although she had not written anything more than that. She had also written at the top of the instrument dated June 3, 1940, "appended to holographic will", and had used the phrase, "this is the last will of me, Florence P. Howard" in the will of January 14, 1952, as well as in a previous instrument, so that the instrument of January 14, 1952 is not a codicil and was not intended to be such. It will be noted also, at the top of the page of that will, testatrix used the term "holographic will" and underlined the same words.

In the case of *In re Drake*, 15 N.J. Misc. R. 44, 192 A. 428, the court held that the second will revoked the first, although the result was a partial intestacy, and stated:

“The two wills are inconsistent because in the first will he disposed of all his property by will and made provisions for the contingency of his wife’s pre-decease, while in the second will he did not provide for such contingency, but left the disposition in such case to the provisions of the laws of intestacy in force at his decease and the circumstances existing at that time. The result is not necessarily the same and is not the same in this case, and in any case the two modes of disposition are legally different and pass a different estate.”

In the instrument of January 14, 1952, a bequest is made to one Marie Petry of Port Hope, Ontario, and to Mrs. Peter Lewis of the same place, and a bequest is made to Mrs. Henry M. Duys and to Ernest Howard, the brother of Mrs. Henry M. Duys. In the instrument of May 7, 1949, a statement is made, “balance of estate after bequests, expenses have been paid to be divided as follows:” Thereafter, a certain percentage is given to Mrs. Helen Howard Duys, Ernest F. Howard, Marie Petry and Mrs. Gertrude Petry Lewis. It is important to know whether or not the Marie Petry mentioned in the instrument of January 14, 1952 is the same as the Marie Petry mentioned in the 1949 instrument, and whether or not Mrs. Peter Lewis, mentioned in the January 14, 1952 in-

strument is the same as Mrs. Gertrude Petry Lewis mentioned in the 1949 instrument, and whether Mrs. Henry M. Duys is the same person as Mrs. Helen Howard Duys mentioned in the 1949 instrument, and whether Ernest Howard, mentioned in the January 14, 1952 instrument, is the same person as Ernest F. Howard mentioned in the 1949 instrument. If evidence had been allowed to be introduced, and the intervenors allowed in the case, this matter could have been developed, and if they were found to be the same persons, it would have great bearing on the intention of the testatrix in the January 14, 1952 will, in this: That she did take care of those whom she desired who were residuary legatees under the 1949 will, and it clearly shows an intention to revoke the bequests giving certain property in the 1949 instrument, especially if we consider the language in the will, "balance of the estate after bequests, expenses have been paid to be divided as follows:" with the language in the 1952 instrument, "if after taxes and estate expenses are paid, there is a surplus of over \$50,000.00; I wish the above cash (tax free) bequests to be doubled — including \$50,000.00 to Rosamond Lamb, Montreal."

In the 1952 will, Marie Petry is given \$5,000.00, which is to be doubled, if after taxes and estate expenses are paid, there is a surplus of over \$50,000.00. In the same manner, Mrs. Peter Lewis is to get \$3,000.00 to be doubled in the same manner. In the 1939 will, the balance of the estate is to be divided as follows: 7/20ths to Mrs. H. J. H. Petry, and should she predecease the testatrix,

the above 7/20ths to be divided as follows: 4/20ths to Marie Petry and 3/20ths to Mrs. Gertrude Petry Lewis; 4/20ths to Mrs. Helen Duys, and 3/20ths to Ernest Howard, and evidence should have been adduced as to whether or not Mrs. H. J. H. Petry predeceased Mrs. Florence P. Howard, also known as F. P. Howard. In the 1949 will, the balance of the estate, after bequests and expenses have been paid, is to be divided as follows: 3/20ths to Mrs. Helen Howard Duys, 3/20ths to Ernest F. Howard, 3/20ths to Mrs. Gertrude Petry Lewis and 3/20ths to Marie Petry. The change in the dispositive provisions for these persons appeared not only in the 1952 will, but there is a change between the 1939 and the 1949 instruments. In the 1939 instrument, Marie Petry was to get 4/20ths of the 7/20ths, and Mrs. Gertrude Petry Lewis was to get 3/20ths of the 7/20ths. And in the 1949 will, Marie Petry was to get 3/20ths instead of 4/20ths. In the 1952 will she was to get \$5,000.00 which is to be doubled under certain circumstances. If Mrs. Florence P. Howard, also known as F. P. Howard, did not intend by her will of 1952 to revoke the previous dispositive provisions in favor of Marie Petry and Mrs. Peter Lewis, who it appears may be the same person as Mrs. Gertrude Petry Lewis, she would not have asked that the bequests in their favor be doubled if there was a certain surplus. In other words, the doubling of the bequests in the 1952 will was intended to take care of the contingency of there being a surplus after the specific bequests, expenses of administration and taxes, rather than to

have the surplus distributed under the residuary provisions of the 1949 will. To disregard this arrangement would be to fly in the face of precedent and would result in the court writing a will for the testatrix contrary to her expressed intention. It would require a court to hold that although the testatrix, in the will of 1952, had especially provided for Marie Petry and Mrs. Gertrude Petry Lewis and Mrs. Henry M. Duys and Ernest Howard, and did not provide for the other residuary legatees mentioned in the 1939 or the 1949 wills, to-wit: Mrs. Gordon Burleigh and Mrs. Ethel Forrest and Henry Howard Petry, she did not so intend. It may be noted that there are seven persons named as those to take the balance of the estate in the 1949 will, and six to take the balance in the 1939 will, if Mrs. H. J. H. Petry predeceased the testatrix. One of the differences between the names of those to get the balance of the estate, between the 1939 and the 1949 will is Henry Howard Petry, who may or may not be the husband or son of Mrs. H. J. H. Petry. In any event, this points out further the fact that the Motion to Intervene should have been granted and evidence taken on the contest. To give a construction that would require the holding that these dispositive provisions in the 1952 instrument are not so inconsistent with the 1949 and 1939 instruments as to show an intention on the part of the testatrix to revoke the previous instruments, would result in a disregard of the testatrix's intention to revoke the provisions as to the balance of the residuary legatees in the 1949 will.

It will be noted that Section 74-1-22, Utah Code Annotated, 1953, provides that a prior will is revoked by a subsequent will where the "later contains an express revocation or *provisions* wholly inconsistent with the terms of the former will * * *." This statute does not say that all of the provisions must be wholly inconsistent, or that the will must be wholly inconsistent, but that the later will contained "provisions" wholly inconsistent.

It will be noted that the Executor in this case, the Walker Bank & Trust Company, objected to the Motion of Appellants to intervene, although it was apparent from the record that no notice of the hearing of May 14, 1952, for the admission to probate of the instruments, was given either by mailing to the Appellants, or by publication or lawful posting.

In view of *Tiller, et al., vs. Norton, et al.*, a Utah case, decided February 20, 1953, found at 253 P. 2d 618, not yet reported in the Utah Reports, wherein the Trust Company went to great effort to ascertain the heirs in above entitled case, the executor here should have welcomed any action which would have determined the heirs and legatees. The Court stated in the case of *Tiller vs. Norton*:

"Under the facts and the authorities, we cannot say that the trial court erred in concluding there was no such fraud, although we are constrained to believe and to note that the probate well might have been deferred by the court a little

longer in this case in the hope that what happened would happen, * * * the appearance of the children, who became the unwilling victims of a *damnum absque injuria*."

And in the concurring opinion of Justice Wolfe, reference is made to the case of *Parker vs. Ross*, (Utah), 217 P. 2d 373.

In the instant case, the executor, upon being apprised that there were heirs and that there was a question as to the disposition of the property, objects to the intervention of such heirs and the taking of testimony concerning the dispositive provisions of the instruments.

In the case of *McClure's Estate*, 309 Pa. 370, 165 A. 24, an unattested will, informally drawn, was held to revoke a prior will, even though the unattested later will was ineffective as to the charitable residuary bequest constituting its chief disposition. The court said:

"Testatrix, in her second will, after providing for funeral expenses and the care of her lot, directs all her property to be reduced to cash, and gives it all to the Home for Protestant Children. That is what she intended to do, and by so doing she completely annulled her pre-existing intention to give six bonds to the League of Women Voters. She disposes of 'everything else belonging to' her. There could be no clearer expression of intent than this provision. The mere fact that the will did not carry with it a sufficient execution to make the gift complete does not destroy the thought in the testatrix's mind when

she wrote that paragraph, nor can we say that her intention was not complete because the will lacked two signatures."

An interesting discussion is found in 15 *Iowa Law Review* 232.

In discussing *Kearns vs. Roush*, 146 S.E. 729 (W. Va. 1929), the review says:

"The expression is often used that a subsequent will only revokes the former insofar as the two are so inconsistent that they cannot stand together. 1 Williams, Executors (7th Am. Ed.) 212. As a general rule, this may be true; but the statement is frequently made where there is no necessity for language of such a sweeping nature. In re Venables Will, 127 N.C. 344, 37 S.E. 465 (1900), Williams vs. Miles, 68 Neb. 463, 94 N.W. 705 (1903), Sampson vs. Foxon (1907) Prob. 34. There is a noticeable tendency of the courts to harmonize, if at all possible, the conflicting instruments. Foy vs. Foy, 125 Iowa 424, 101 N.W. 144 (1904). This is prompted by an abhorrence of a partial intestacy. Great inconvenience is occasioned when a portion of the property passes by the laws of testate succession and the remainder by the distinctly different laws of intestacy. In re Marx Estate, 174 Cal. 762, 164 P. 640 (1917), Goods of Hartley, 50 L.J.P.D. 1 (1880). Perhaps too great an emphasis is placed upon the presumption against partial intestacy which originated at an early period when religious custom was a forceful inducement to make a will, but today no such reason exists. With the adequate provision for the disposition of intestate property at the present time it might well seem that since

the reason for the presumption no longer exists, it should be abolished. More consideration should be given to the true intention of the testator, by this, we mean his desire with respect to the apportionment of the property, rather than to the form of the will or the mechanics of disposition *Dempsey vs. Lawson*, 2 P.D. 98 (1877). If the intention of the testator is to be given paramount consideration it might logically follow that, when the terms of the subsequent will clearly show a desire to depart from the terms of the former document, the first will should be revoked in its entirety despite the fact that a partial intestacy might result. *Plenty vs. West*, 9 Jur. 458 (1845), *Dempsey vs. Lawson*, *supra*. If the general rule that the first will is revoked by the second only insofar as it is inconsistent, were strictly followed it would seem that where no executor was appointed by the latter will, the executor named in the first should be carried over, but that was not the result. To justify this departure from logic two solutions may be advanced. The first requires a distinction between the executor and the beneficiary and treats the former as an exception to the rule and is in a category by himself. Many courts have recognized the difference between executor and beneficiary, but have dismissed the matter in a perfunctory manner without attempting to establish a legal distinction. In *re Gensinore's Est.*, 246 Pa. 216, 92 Atl. 134 (1914), in *re Iburg's Estate*, 196 Colo. 333, 238 Pac. 74 (1925). The differences are readily apparent. The interest of the executor is earned while that of the beneficiary is in the nature of a gift. The executor is an officer of the court which further distinguishes him from the beneficiary. At an early stage of the law the appointment of an

executor is not required. Even though these are marked differences, it may be questioned if they would warrant the application of distinctly different rules. The other view is of a more liberal nature, and would disregard the distinction between executor and beneficiary. If this stand is taken the principal case might be considered as an extension of the doctrine of revocation by implication."

It will be noted, that of the seven residuary legatees mentioned in the 1949 document, several of them have specific bequests in the 1952 document and several others, under slightly different names have also such specific bequests, for example: The 1949 will makes Marie Petry a residuary legatee, and the 1952 will makes a specific bequest to Marie Petry. The 1949 will makes Ernest Howard one of the residuary legatees and the 1952 will makes a specific bequest to Ernest Howard. The 1949 will makes Mrs. Helen Howard Duys a residuary legatee, and the 1952 will makes a specific bequest to Mrs. Henry M. Duys. The 1949 will makes Mrs. Gertrude Petry Lewis one of the residuary legatees and the 1952 will makes a specific bequest to Mrs. Peter Lewis of the same address. If these latter four people, are not the same two under different names, the 1952 will has specifically taken care of four of her residuary legatees, and such fact is confirmatory of her intent that the 1952 will be her sole existing testament at the time of her death. The lower Court should at least have taken evidence to establish whether these people are the same or are four different people.

POINT NO. V.

SINCE THE PROPOSED INTERVENORS WERE DENIED INTERVENTION, THE COURT SHOULD NOT HAVE MADE FINDINGS, CONCLUSIONS AND JUDGMENT AS THOUGH THEY HAD BEEN GRANTED A TRIAL AND WERE PARTIES, AND SHOULD NOT HAVE ATTEMPTED TO BIND THEM BY SUCH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE, AS SIGNED IN THE PURPORTED WILL CONTEST.

It will be noted that after the Intermediate Appeal had been granted by this Honorable Court, one of the Attorneys for Respondents, prepared and had signed by the Court, Findings of Fact and Conclusions of Law and Decree, attempting to bind Appellants in the purported Will Contest.

In 1 *Freeman on Judgments*, page 899, it states:

“Thus one who merely enters an appearance for the purpose of intervention, but withdraws before filing a petition, does not become a party, so as to be bound by the subsequent judgment, and the same is true of one whose petition has been dismissed, or whose attempt to intervene is defeated by the adverse party, or whose claim has been withdrawn before judgment.”

It will be noted that Appellants' attempt to intervene was defeated by the adverse parties, and Appellants not only should not be bound, but no reference should be made to them in the Findings and Conclusions and particularly in the introductory part, where it states

that the Appellants were present and appeared by counsel, which is not legally true, as is shown by the Court's Order, denying leave to intervene.

30 *Am. Jur.*, page 951, Section 220 states:

Strangers to Judgment.—“It is well settled that, with certain exceptions hereinafter noted, the doctrine *res judicata* does not operate to affect strangers to a judgment, that is, to affect the rights of those who are neither parties nor in privity with a party therein. The judgment is not available as an adjudication either against or in favor of such other persons, whether it is attempted to be used in connection with the cause of action previously litigated, or in connection with particular issues determined therein. A party to the principal case is regarded as a stranger to the judgment rendered in the previous action where he was not directly interested in the subject matter thereof, and had no right to make defense, adduce testimony, cross-examine witnesses, control the proceedings, or appeal from the judgment, even though he could have made himself a party to the previous action. The right to intervene in an action does not, in the absence of its exercise, subject one possessing it to the risk of being bound by the result of the litigation, under the doctrine of *res judicata*.”

31 *Am. Jur.*, page 74, Section 411, states:

Opportunity to be heard.—“It is a fundamental doctrine of the law that a party to be affected by a personal judgment must have a day in court, or an opportunity to be heard. In this connection, it is sometimes declared broadly that

every man is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interests, before he is affected by any judicial decision on the question. The judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

It will be observed that in the instant case, Appellants attempted to intervene, but were denied the right, and are in at least as good a position as a person who had the right to intervene but did not exercise it.

We further submit, no attempt should be made to bind the Appellants without granting them their "day in court" and to permit them to introduce testimony in support of their position.

In the case of *Rogers vs. Trans American Corporation* (Calif.), 44 P. 2d 635, it was stated:

"When a party is dismissed from an action he becomes a stranger thereto, and no judgment or order can be rendered against him therein until the dismissal is vacated."

To paraphrase the above words slightly, and to carry the theory over, we would like to submit the true rule is:

When a party attempts to intervene in an action and he is denied such right, he remains a stranger thereto, and no judgment or order can be rendered against him therein, until the denial of intervention is vacated.

It is submitted that pending determination of this Intermediate Appeal, an Order of the Supreme Court should issue directing the lower Court to withdraw and rescind its said Findings of Fact, Conclusions of Law and Judgment.

CONCLUSION

It is submitted:

That the Order admitting the wills to probate was not a valid order, because the Court had no jurisdiction of the matter, and therefore, the six-months time for filing a Contest, provided by statute, could not commence to run until there was a valid order.

That the Motion to Intervene should have been granted.

That since the Court did not allow the Appellants to intervene, the Findings of Fact and Conclusions of Law and Decree in the matter of the Contest, should be set aside as not binding upon the Appellants.

That the Court order that the costs of Appellants on this appeal be paid out of the assets of the estate. Sec. 75-14-21, U.C.A. 1953.

Respectfully submitted,

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