

1953

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

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

In the Matter of the Estate of FLORENCE
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 PROTEST-
ANT BOARD OF SCHOOL COMMIS-
SIONERS and MCGILL UNIVERSITY,
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.

BRIEF OF
RESPONDENT
WALKER
BANK
& TRUST
COMPANY
Case No. 7970

ROMNEY AND BOYER

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Walker Bank and Trust Company

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Case No. 7970

BRIEF OF RESPONDENT
WALKER BANK AND TRUST COMPANY

STATEMENT OF FACTS

The Statement of Facts of the Appellants contains
allegations not supported by the record. It also omits

certain facts which should be considered by this Court. Therefore, Respondents herein submit the following as the facts essential to a determination of this cause:

Florence P. Howard, also known as F. P. Howard, died in Montreal, Canada, on January 28, 1952. At the time of her death the decedent was a resident of Salt Lake County, State of Utah. On April 3, 1952, Walker Bank and Trust Company filed in the office of the Clerk of Salt Lake County, State of Utah, a Petition for Probate of Will and Application for Commission to Take Testimony and Settle Interrogatories (Record 5). Said Petition, in good faith, set forth the names and residences of certain persons designated therein as all the heirs, legatees and devisees of the decedent so far as then known to the Petitioner (Record 6, 7 and 8). On April 3, 1952, an Order was made by the Court fixing the time and place of hearing said Petition with respect to authorizing a commission to take testimony and settle interrogatories, which order fixed the manner of giving notice thereof (Record 3). Notice was given pursuant to said order of the Court by mailing to the persons named in said Petition (Record 2) and by posting in three public places in Salt Lake County, as shown by the Affidavit of Robert A. Olsen (Record 1).

On May 1, 1952, Walker Bank and Trust Company filed a Supplemental Petition for Probate of Will (Record 26) and an Order was made setting the time for hearing thereof on May 14, 1952, and fixing the manner of

giving notice thereof by posting and by "mailing to the heirs, legatees and devisees of the above named decedent who are listed and whose addresses are shown in the schedule attached to the Supplemental Petition for Probate of Will of Walker Bank and Trust Company now on file with the Clerk of the above entitled Court" (Record 25). Notice of the hearing was given pursuant to said Order. Proof of mailing is shown by Affidavit of Thressa G. Fowler, Deputy County Clerk (Record 23) and Proof of Posting by the Affidavit of Robert A. Olsen, which recites that notices were posted "on the 3rd day of May, A. D. 1952, in three public places Viz: West front entrance of the County Court House; on a public posting board at the Northeast corner of the intersection of 33rd South & State Streets, and in the Post Office in Murray, Salt Lake County, State of Utah. That said notices remained posted for ten days." (Record 22). Upon the hearing of said Petition an Order was entered on May 14, 1952, admitting the four holographic instruments previously submitted for probate as the Last Will and Testament of the said decedent and appointing Walker Bank and Trust Company the Executor thereof (record 33).

The names of the Appellants were not included in the list of persons designated as heirs, legatees, and devisees of the decedent in either the original or supplemental Petition for Probate of Will, and notice of the hearing was not mailed to them.

Prior to the filing of said Petition for Probate of Will and Supplemental Petition for Probate of Will, for the purpose of determining who other relatives of the decedent might be, Walker Bank and Trust Company made inquiry of various persons, including one Mary Stuart Tinling, who was the only known relative of decedent then known to the Bank and who was the only relative of the decedent mentioned in any of the testamentary instruments. In response to said inquiry the said Mary Stuart Tinling, who resides in Montreal, Canada, addressed a letter to Walker Bank and Trust Company, which read in part as follows:

“As to the second letter, there are no relatives of Mrs. Howard that I know of—certainly there are no nephews—nieces or first cousins. She was very much alone in the world.” (Record 169).

That in the month of June, 1952, subsequent to the hearing on the Petition for Probate of Will and after Walker Bank and Trust Company had been appointed and qualified as Executor thereof, one Rosamond Lamb, who resides in Montreal, Canada, came to Salt Lake City, Utah, and discussed the affairs of the estate of the said decedent with certain officers of Walker Bank and Trust Company, and its attorneys. That the said Rosamond Lamb then informed Walker Bank and Trust Company that the said Mary Stuart Tinling had other brothers and sisters and that there were living descendants of some of her (Mary Stuart Tinling's) deceased brothers or sisters. That thereupon a further investiga-

tion as to the relatives of the decedent, Florence P. Howard, was made by Walker Bank and Trust Company and its attorneys, and from various sources it was determined that said decedent might have relatives other than those who were listed in the Petition for Probate of Will (Record 169). On September 3, 1952, Walker Bank and Trust Company filed a Petition with the Court in which the names and residences of other and additional persons who might be heirs of the decedent so far as then known to the Petitioners, and their addresses were listed (Record 53, 54 and 55). Pursuant to said Petition the Court entered an order on September 3, 1952, directing the Clerk of the Court to give notice to the persons named in said Petition that the four holographic instruments dated February 6, 1939, June 3, 1940, May 7, 1949 and January 14, 1952, were admitted to probate on May 14, 1952, and that Walker Bank and Trust Company of Salt Lake City, Utah, was appointed Executor of the estate of said decedent on that date (Record 52). Pursuant to said Order the Clerk of the Court caused notice in accordance with the provisions of said Order to be mailed to the persons named in said Petition at the addresses listed therein. That Colina Ferrie, one of the Appellants herein, is one of the persons included in the list to whom notice thereof was sent (Record 51). That officers of Walker Bank and Trust Company had information that Robert Bown Ferrie might be an heir of Mrs. Howard and was then deceased and therefore caused notices to be sent to Leighton Ferrie and Dr. Kenneth Ferrie, who the officers of Walker Bank and

Trust Company were informed and believed were the sons of the said Robert Bown Ferrie, deceased. Under date of August 12, 1952, Walker Bank and Trust Company, addressed a letter to Colina Ferrie, one of the Appellants, at Hamilton, Ontario, Canada, which read in part as follows:

“We are writing with the hope that you can help us to ascertain the heirs at law of the late Florence Patterson Howard. Incident to a formal court construction of four testamentary instruments left by the late Mrs. Howard it is essential that we learn the identity of her heirs at law. This is necessary in order that such persons might be given formal notice of the court proceedings.” (Record 170.)

That under date of August 20, 1952, the National Trust Company, Ltd., one of the Appellants herein, addressed a letter to Walker Bank and Trust Company, which read in part as follows:

“Miss Colina Ferrie, who is a client of this Company, brought in your letter to her of August 12, 1952. We have some papers in our files which may contain some of the information you require, and we will have a search made.” (Record 170).

That in answer to said letter of August 20, 1952, on or about September 5, 1952, Walker Bank and Trust Company mailed a letter to the said National Trust Company, Ltd., which read in part as follows:

"As requested in your letter dated August 20, 1952, we are pleased to give you the following information :

- "1. Florence P. Howard died at Montreal, Canada, on or about January 28, 1952.
- "2. She left an estate in excess of \$550,000.00.
- "3. Copies are enclosed of four holographic instruments which were admitted to probate. You can readily see that it will be necessary for the Court to formally construe these instruments." (Record 170).

On November 12, 1952, Helen Duys, Ernest F. Howard and Ethel Forrest filed a Contest of Order Admitting Will to Probate (Record 131). On November 20, 1952, Walker Bank and Trust Company filed a Petition to Construe Will (Record 74). On December 18, 1952, an Order was made by the Court consolidating for hearing the Petition to Construe Will and the Contest of Order Admitting Wills to Probate. (Record 140). On January 14, 1953, Appellants filed a Motion to Intervene (Record 141) and on January 16, 1953, they filed an Answer to the Petition to Construe Will. The matters came on for hearing before the Honorable Ray Van Cott, Jr., one of the Judges of the Third Judicial District Court, on January 19, 1953, at which time an oral order was made denying Appellants' Motion to Intervene and a written Order was made thereon on February 5, 1953 (Record 196) from which the appeal herein has been taken.

STATEMENT OF POINTS
POINT NO. I

NOTICE OF THE PROBATE PROCEEDINGS WAS GIVEN ACCORDING TO LAW AND AS DIRECTED BY THE COURT.

POINT NO. II

APPELLANTS HAVE NO RIGHT TO INTERVENE ON THE BASIS ATTEMPTED.

POINT NO. III

COMMENT REGARDING APPELLANTS' POINTS IV AND V.

ARGUMENT

POINT NO. I

NOTICE OF THE PROBATE PROCEEDINGS WAS GIVEN ACCORDING TO LAW AND AS DIRECTED BY THE COURT.

The Court's attention is directed to the following sections of the Utah Code Annotated, 1953:

"75-3-3. CONTENTS OF PETITION. A Petition for the probate of a Will should show:

"(3) The names, ages and residences of the heirs, legatees and devisees of the decedent, so far as known to the Petitioner."

"75-3-5. 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 notice to the heirs, and to the executor, if he is not the petitioner.”

“75-14-1. NOTICES — TIME AND MANNER OF GIVING. Whenever it is provided in this title, or whenever the court, judge or clerk may direct, that notice shall be given, and the manner of giving the same is not provided or directed, it shall be sufficient, if the notice is published in any newspaper having general circulation in the county, or if posted, as provided in section 75-14-9; and in any case in which the time is not provided or directed it shall be sufficient, whether the notice is given by publication or posting, that the notice be given for not less than ten days; but the court or judge, or the clerk when authorized, may order or direct the precise manner of giving notice, or more than one manner of giving the same, or may prescribe a longer notice than ten days. The clerk shall give the notice where not otherwise provided, and it shall be his duty to mail copies of all notices in probate proceedings to the known heirs, devisees and legatees.”

“75-14-9. NOTICE BY POSTING — REQUIREMENTS. In all cases in which it is provided in this title, or in which the court, judge or clerk may direct, that notice be given by posting, it shall be sufficient if the notice or order is posted in at least three public places in the county, one of which must be at the courthouse of the county, for the time required by law, or prescribed by the Court, judge or clerk.”

In addition to the other items required by Section 75-3-3 supra, the original and supplemental petition for probate of will showed “the names, ages and residences of the *heirs*, legatees and devisees of the decedent *so far as known to the Petitioner.*” The record shows that the Petitions were set for hearing as required by Section 75-3-5 supra, and notice thereof was given by posting, as required by Section 75-14-9 supra, and by mailing to “*the known heirs, devisees and legatees*” as required by Section 75-14-1 supra. (Italics supplied.)

Appellants contend that in limiting the Clerk to mailing notice to the persons named in the Petition the Court abused its powers and that such was contrary to the statute. Appellants’ contention would seem to be based solely upon Section 75-3-5. No authority need be cited in support of the proposition that all of the pertinent sections of the statute must be construed together. Section 75-5-3, requires the Petitioner to set forth the “names, ages and residences of the heirs, legatees and devisees of the decedent *so far as known to the Petitioner.*” (Italics ours.) It seems clear that “the known heirs, devisees and legatees” in Section 75-14-1 must mean “those who are known to the Petitioner”, as stated in Section 75-3-3. Nowhere does the statute as a condition precedent to giving notice impose the burden of responsibility on the Clerk or the Court to determine heirship, or to verify, or to ascertain independently the names and residences of the heirs. The statute requires the Petitioner to include *such information regarding the*

heirs, as is then known, in the Petition, and as stated by this Court in *Barrett v. Whitney*, 36 Utah 574, 106 Pac. 522, 527:

“When their names (heirs) and places of residence are thus given, or when the fact is made to appear that they are unknown, as it must be, in the Petition for Letters of Administration, the probate Court is fully advised with respect to the true situation”

and based thereon the Court may direct the manner of giving notice. Or the Court may in its discretion rely upon the provisions of the statutes which apply when “the manner of giving notice is not provided or directed.” The requirement of Section 75-3-5 of “mailing of notice to the heirs” rather than being violated is complied with when notices are mailed to the persons designated in the Petition as “*heirs, legatees and devisees of the decedent, so far as known to the Petitioner.*” (Italics supplied.)

Furthermore, in the instant case, not only were the provisions of the statutes, which would be applicable in cases where the manner of giving notice is not provided or directed, followed, but the Court in fact made an appropriate order specifying precisely what notice should be given, and to whom. The order required that the Petition for Probate of Will be heard on May 14, 1952, “and that notice of the time and place of said hearing be given by posting and by mailing 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." (Record 25). No contention is made by Appellants that this express direction of the Court was not exactly followed by the Clerk. The notice as specified in the Order required by that Order was given by the Clerk and the requirements of Section 75-14-1 were therefore satisfied.

Appellants rely on *In Re: Bunting's Estate*, 30 Utah 251, 84 Pac. 109. The Petition in the *Bunting* case recites the heirs of the decedent were unknown to the Petitioner. No notice was mailed to them. Elsewhere in the Petition it was made to appear that the Petitioner had knowledge of the names of the heirs and of the name of their Guardian, and that he also knew the place of residence of the father of the heirs, who were minors at the time of their father's death. The Court held that the domicile of the infant is that of his father and that the domicile of the infant is at the place where the father was domiciled at the time of his death, and that inasmuch as the Petitioner knew these facts that notice should have been mailed to the minor heirs. The *Bunting* case has no application to the case at bar. At the time Petitions for Probate of Will were filed Walker Bank and Trust Company had no knowledge of the existence of any persons claiming to be heirs of the decedent, other than those listed in the Petitions.

Appellants would criticize the Bank for failing to obtain more information regarding the heirs of the decedent before filing the Petitions for Probate of Will.

They suggest the Bank should have acquired information from the decedent's nurse, one Rosamond Lamb, when three months before Mrs. Howard's death she picked up the Wills from the safety deposit box in the Bank. It would hardly seem within the bounds of propriety and good taste for the Bank to have made inquiry of Mrs. Howard's nurse as to the contents of any Will or as to who Mrs. Howard's heirs or beneficiaries might be before her death. Certainly the law imposes no such requirement on a prospective Executor.

Appellants state on Page 12 of their Brief:

“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.”

This is an admission by Appellants that the Bank at the time of filing the Petitions for Probate of Will did not know of any other relatives or alleged relatives of Mrs. Howard who were later discovered or came forth. As pointed out heretofore, the statute requires notice to be given only to the persons named “so far as known to the Petitioner.” Appellants ignore the fact that the record shows that prior to filing the Petition for Probate the Bank made inquiry of various persons, including Mary Stuart Tinling, the only relative of Mrs. Howard then known to the Bank, in response to which Mrs. Tinling wrote:

“There are no relatives of Mrs. Howard that I know of—certainly there are no nephews, nieces or first cousins. She was very much alone in the world.” (Record 169).

Appellants state on Page 13 of their Brief:

“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.”

The futility of the statement is apparent on its face. Rather than censure the bench, the Appellants should analyze the facts. The record shows that many parties in interest reside in various scattered places throughout the Dominion of Canada. Where in Canada should publication have been made? The record also shows that many parties in interest reside in various scattered places throughout the United States. It is possible even at this late date that other unknown potential parties in interest might reside in other parts of the world. Where is the “other place calculated to come to the attention of the unknown heirs of Florence P. Howard?” The Appellants are “prudent and careful” not to emphasize the fact that in none of her testamentary instruments does the decedent give clue to the existence of any relative except the aforesaid Mary Stuart Tinling, and especially does she in no way give clue to the existence of Appellants.

It is contended that the posting of notice was not made according to law. Appellants rely chiefly on *In Re*:

Phillips Estate, 86 Utah 358, 44 Pac. 2d 699. The *Phillips* case held that where all notices were posted on the Court House property that they simply duplicated the effect of one and were insufficient. Rather than being an authority in support of Appellants' contention that the posting in the case at bar is insufficient, the *Phillips* case, as will be hereafter shown, supports the Respondent's position that the posting was sufficient.

Posting of Notice was made by Robert A. Olsen. His Affidavit with regard to posting on the original Petition for Probate of Will is found at Page 1 of the record, and his Affidavit with regard to posting on the Supplemental Petition for Probate of Will is found at Page 22 of the record. The following is a quotation from both Affidavits:

"That he posted three copies of the hereto attached notice . . . (giving the date) in three public places Viz: West front entrance of the County Court House; on a public posting board at the Northeast corner of the intersection of 33rd So. & State Streets, and in the Post Office in Murray, Salt Lake County, State of Utah. That said notices remained posted for ten days."

The Court made findings with respect to both Petitions that the Notice had been given according to law (Record 14, 33).

Section 75-14-9 *supra*, states:

"... It shall be sufficient if the notice or order is posted in at least three public places in the

county, one of which must be at the courthouse of the county . . .”

There is no question that one notice was posted at the West side of the courthouse (Record 1, 22, 274). One of the other notices was posted on the main floor of the Post Office in Murray, Utah, which is located on Vine Street about one-half block East of State Street (Record 281). Murray is the second largest city in Salt Lake County and is approximately six miles South of the courthouse. The third notice was posted on a board which was located about 12 feet East of State Street on the Northeast corner of the Intersection of State Street and 33rd South Street (Record 280). The board is referred to in the Affidavit of Robert A. Olsen as a public posting board (Record 1 and 22), and otherwise was described as a bulletin board (Record 281) and a sign board (Record 284). The posting board was a few feet South of the North sidewalk. It is approximately 3 x 5 feet in size and stands approximately two feet above the ground and the top part is about on the level of the eye of an average person (Record 285). It is located in Salt Lake County and not in Salt Lake City (Record 280). It is on the same corner of the intersection as a church building is located (Exhibit 2).

The Court stated in *Re: Phillips Estate*, *supra*:

“The paramount controlling principle which should guide the poster of the notices is that the two notices which are to be posted other than at the courthouse should be placed in the county at

places most likely to reach parties interested. When the two extra courthouse notices have, for a long period of time, been posted at customary points which are in fact different places and not in effect one place, and the experience of such practice leads to a fair conclusion that the postings have served to provide the notice intended, there will be a presumption that such places are places most likely to reach persons interested and that they are within the purview of the statute. There should be customary places at which all such notices should be posted, which places should be at conspicuously public points and not on the byways."

The record shows that the notices in this case were posted in the same places as notices have been posted by the Salt Lake County Clerk for many years (Record 285).

It was held in *Hart v. Smith*, 44 Wis. 213, 2 A. L. R. 1011 that a post office is a public place.

"A board 6 feet long and 10 inches wide, fastened in or against the roadside wall, and facing the road" was held to be a public place in *Seabury v. Howland*, 15 R. I. 446, 8 Atl. 341. It was contended that this place was not safe, as well as public inasmuch as the board might be thrown down or carried away so that the notice might not remain for the time required by statute. However, the Court held the notice had been posted according to law.

The author of *Corpus Juris* states in 66 C. J. S. Page 665:

“There are certain places which *prima facie* may be regarded as public places for the posting of notice, so that the party claiming otherwise must show the grounds of his objection, as, for example, houses of worship, inns, and post offices.” Citing *Hoitt*, v. *Burnham*, 61 N. H. 620, and *Scammon* v. *Scammon*, 28 N. H. 419.

Roach v. *Eugene*, 23 Ore. 376, 31 Pac. 825, cited on page 17 of Appellants’ Brief, rather than holding the notice to be insufficient, as stated by Appellants, actually held that the notice was sufficient. The following is a quotation from the opinion on Page 826:

“The next contention is that the certificate of the recorder does not state the facts which show that copies of the printed notice were posted in three public places. His certificate recites that he posted copies of the printed notice in three conspicuous places in the City of Eugene, to-wit: ‘On the bulletin board at the city hall, and at the courthouse, and on the northwest corner of A. V. Peter’s brick building, situated on the corner of Willamette and Eighth Streets.’ It would be difficult to conceive any statement of facts that would better indicate or show that a notice was posted in a public place than the statement that it was posted on the bulletin board at the city hall, or at the courthouse, or on a store on the corner of two public streets.”

The record and authorities cited above show conclusively that notices were posted according to law.

It has long since been settled in this jurisdiction that probate proceedings are in rem. The legislature has defined what notice is necessary to give the Court jurisdiction. This Court stated in *Barrett v. Whitney*, 36 Utah 575, 106 Pac. 522, 527:

“Probate proceedings being in rem, it was within the power of the Legislature (within reasonable bounds) to say what should constitute sufficient notice to give the court jurisdiction of the estate and what should be sufficient to appraise those interested therein that the court will administer and ultimately distribute the property among the parties in interest.”

In Re: Apostolopoulos's Estate, 68 Utah 344, 250 Pac. 469, it was held that the heirs were not deprived of their property without due process of law by its escheating to the State under the escheat statute, when they failed to make a claim thereto within the statutory period and when notice was given in the estate as required by the statute. In that case the Petition for Letters of Administration alleged on information and belief that the decedent had relatives and heirs in Greece. Notice was given by publication only. None was mailed to the heirs. In answer to the contention of the heirs that they were entitled to actual notice, the Court said on Page 474:

“Where, however, as in the case at bar, the heir is unknown, there is no basis for such a contention whatever, and to attempt to enforce it would be to attempt the impossible. In this jurisdiction the question as to what constitutes due

process of law in probate proceedings has, however, been settled beyond controversy both by our statute and by decisions of this court. The question was directly presented in *Barrett v. Whitney*, 36 Utah 575, 106 P. 522, 37 L. R. A. (N. S.) 368. That case has been the declared law of this state for upwards of 16 years, and, so far as the writer is aware has not been questioned."

It has been shown herein that notices of the Petitions for Probate of Will were given according to law. Such being true, the Court had jurisdiction and Appellants are bound by the proceedings. There is no defect in the proceedings in this case. If any complaint that the statute is lacking in the manner of prescribing notice is justified it should be made to the Legislature. The jurisdictional notices in this case have been given according to law. In any event, Appellants are not prejudiced for the reason that they had actual notice of these proceedings through correspondence with the Bank in August, 1952, which was some ninety (90) days before the time expired within which they were permitted to contest the admission of the Wills to probate.

It is interesting to observe that if the contention of the Appellants were correct, it would be impossible in handling many estates to have a lawful probate proceeding. Frequently the Petitioner in such a proceeding does not know and can not by the means at his disposal, discover the names of all heirs of the decedent. In such cases Appellants suggest by their argument that the hands of the Court would be tied and lawful probate of

the estate could not be had. This, because notice of the proceeding could not be given directly to all of the heirs.

We do not understand this to be either the policy of the law or the view taken by our Legislature which has set out the method to be followed in giving notice in such cases.

The case before the Court on this appeal is one of the sort referred to. The Petitioner, Walker Bank and Trust Company, used all reasonable means to discover the names and addresses of the heirs of decedent and used the information thus obtained in filing its Petition for Probate of the Wills. The Appellants' names were not included because they were not known at the time. Although not required by the statutes of this state, notice was later given to Appellants. It is worthy of note that by August 20, 1952, that is to say, within approximately three months after the Wills were admitted, both Appellants had notice of that fact (R. 170). Were this proceeding to be begun anew and were use to be made of all information presently available, it does not appear from the record or otherwise that any person now known would receive notice who did not receive such notice approximately three months prior to the expiration of the time within which the contest of the admission of the Wills could have been properly filed.

POINT NO. II

APPELLANTS HAVE NO RIGHT TO INTERVENE ON THE BASIS ATTEMPTED.

Respondent, Walker Bank and Trust Company, joins the Contestant Respondents in their discussion of Points II and III—Intervenors' Brief. In addition thereto Respondent Bank submits the following:

The jurisdiction of the trial court to hear and determine a Will contest was invoked by the filing of the Contest of Order Admitting Will to Probate by the Contestant Respondents.

The only ground of contest alleged therein is as follows:

"3. Your Petitioners believe and allege that said instruments dated February 6, 1939 and June 3, 1940 were revoked and superseded by said instrument dated May 7, 1949, and that said last named instrument became, and was and is the Last Will and Testament of decedent, except as modified or amended by said instrument dated January 14, 1952." (Record 131).

The Appellants sought to intervene on the basis of their Answer and Cross Complaint in Intervention which contains the following allegations:

"3. Deny the allegations of paragraph three of said Contest and allege that none of the said instruments constitute a testamentary disposition of the property, or are the last Will and Testament of the decedent.

"Admit that if the instruments, dated February 6, 1939, and June 3, 1940, would be construed

as the last Will and Testament of said decedent, that said instruments were revoked and superseded by the instrument dated May 7, 1949, which in turn was revoked and superseded by the instrument dated the 14th day of January, 1952, and allege that none of said instruments constituted, were or are the last Will and Testament of decedent. But if any of said instruments is the last Will and Testament of the said Florence P. Howard, also known as F. P. Howard, deceased, it is the instrument dated January 14, 1952."

"10. That the four instruments, heretofore admitted to probate by the above entitled Court are:

"(a) So vague, uncertain and ambiguous as to amount to a nullity.

"(b) Not prepared, written and executed in compliance with the Statutes of the State of Utah.

"(c) Conflict with each other to such an extent as to be entirely inconsistent, and not to represent the last Will and Testament." (Record 151, 154).

Obviously the grounds of contest alleged by Appellants are not the same as those of the Contestant Respondents. As pointed out in the Brief of the Contestant Respondents the Court, therefore, properly denied the Appellants' Motion to Intervene. The Court's jurisdiction was limited to the issues raised in the Contest which was filed within the statutory time. No other pleading was filed within the lawful period. Therefore an issue

raised by any person including Appellants, which is at variance with the original issues, is beyond the scope of the jurisdiction of the Court.

POINT NO. III

COMMENT REGARDING APPELLANTS' POINTS IV AND V.

The matters contended for in Appellants' Points IV and V are not necessary to a determination of this appeal. However, Respondent Bank takes the position that the four testamentary documents have been properly admitted to probate as the Last Will and Testament of Mrs. Howard. To the extent that the Brief of the Protestant Board of School Commissioners and McGill University supports this position, the Bank joins therein. The Bank also joins in the statement of Contestant Respondents with respect to Point V—Intervenor's Brief.

Respectfully submitted,

ROMNEY AND BOYER

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