

1966

In the Matter of the Estate of Claudius Wallich, Deceased, Fred R. Wallich V. A. C. Wallich, et al : Brief of Appellant

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IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of

CLAUDIUS WALLICH, Deceased,
FRED R. WALLICH,

Petitioner and Appellant

—vs—

A. C. WALLICH, et al.,

*Cross-Petitioners
and Respondents.*

Case No.
10569

FILED

MAY 9 - 1966

State Supreme Court, Utah

BRIEF OF APPELLANT

Appeal from Judgment of the Third Judicial
District Court in and for Salt Lake County,
The Honorable A. H. Ellett, *Presiding*

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE
OF THE CASE

In this action, petitioner-appellant Fred R. Wallich seeks a determination that a prior Decree of Distribution of the District Court made and entered in these probate proceedings in 1959 distributed the residue of the decedent's estate to him outright, or that under the Will of the decedent herein, he was the beneficiary of an outright gift or an estate for years with power to consume principal, and that he has no duty to account to re-

spondents. Respondents, who are some of their heirs of the decedent, cross-petition for an order requiring appellant to account as a testamentary trustee.

DISPOSITION IN LOWER COURT

On trial on January 26, 1966, the District Court of Salt Lake County, the Honorable A. H. Ellett presiding, sustained respondents' objections to the introduction by appellant of evidence and appellant's written offer of proof and, based solely upon the probate file herein, determined that as a matter of law a Decree of Distribution of February 24, 1959 incorporated into its terms a portion of the Will of the decedent, that the Will of the decedent was not ambiguous, and that appellant is a testamentary trustee under the Will of the decedent and ordered appellant to account for his administration of the trust and that the trust res, as determined by the accounting, be distributed to the beneficiaries thereof. From this Order and Decree of January 28, 1966, appellant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the District Court's Order and Decree of January 28, 1966, and remand of the case to the District Court with instructions to enter a decree determining that as a matter of law the Decree of Distribution of February 24, 1959, herein distributed

the residue of the estate to appellant outright and appellant has no duty to account as a trustee, or in the alternative, that the District Court be instructed that the Will of the decedent herein is ambiguous and that it be directed to receive evidence to resolve the ambiguity.

STATEMENT OF FACTS

The testator Claudius Wallich died May 23, 1958, a resident of Salt Lake County, Utah, and his Last Will dated October 11, 1950, with codicils, was duly admitted to probate by the District Court of Salt Lake County. Walker Bank & Trust Company of Salt Lake City, Utah, was appointed Executor by Order made and entered July 16, 1958 (R. 19,20).

On February 5, 1959, the Executor, Walker Bank, filed its Petition for Settlement of Executor's First and Final Account and for Distribution reciting that the estate of said deceased was in all respects in condition to be closed and the beneficiaries of the Will of said deceased were entitled to have all the remaining property now on hand distributed to them. Specifically, in paragraph 13(q), the Executor petitioned that the residue of the estate be distributed "... to Fred R. Wallich, ... to be held and used by him in his discretion in accordance with and pursuant to the provisions of paragraph 8 of the Will of the deceased." (R. 29).

Notice of the hearing of the Petition was given all heirs (R. 49). Only respondent A. C. Wallich objected to the Petition. His objection was that he claimed to be the beneficiary of \$10,000 under paragraph 7 of the Will, a different dispute than the one now before the Court.

Before hearing on the Petition for Distribution, the Executor, Walker Bank & Trust, and respondent A. C. Wallich, through counsel, entered into a Stipulation reciting A. C. Wallich's claim under paragraph 7 of the Will, agreeing that all specific legacies be paid and that:

"All of the rest, residue and remainder of the property now on hand for distribution as in said petition set forth be distributed and delivered to Fred R. Wallich as set forth in said petition, except, that there shall be retained out of said rest, residue and remainder the sum of \$15,000.00 cash; that said \$15,000.00 cash fund shall be ordered retained by the Executor until further order of the court herein, for the purpose of satisfying the claim of said A. C. Wallich to said \$10,000.00 bequest, in the event that he is successful in establishing his right thereto; that in the event he is unsuccessful in establishing his right thereto, or any part of said \$15,000.00 remains after the satisfaction of the claim of said A. C. Wallich, said amount and any accumulations thereon be ordered paid to the said Fred R. Wallich as the residuary beneficiary of the Will of the deceased." (Emphasis added) (R. 49-51).

Note that this stipulation does not purport to create a trust.

Based upon this Stipulation and there being no other objection to the Petition, the District Court on February 24, 1959, made and entered its Order Settling Executor's Account, Fixing Compensation, and of Partial Distribution (R. 52-63), which provided in paragraph 6:

"All of the rest, residue and remainder of the property now on hand for distribution, together with all property unknown that may hereafter discovered to have been owned by the deceased at the time of his death or to have been acquired by his estate subsequent thereto, be, and the same is *hereby distributed to Fred R. Wallich, to be held and used by him in his discretion in accordance with and pursuant to the provisions of paragraph 8 of the Will of the deceased.*" (Emphasis added)

Thereafter, the Executor obtained and filed two Receipts executed by the appellant, both dated May 9, 1960.

The first acknowledges the receipt of 3,000 shares of Crown Zellerbach Corporation common stock, "under the provisions of the order of the above entitled court made and entered on the 24th day of February 1959, to have, hold, administer and dispose of the same as Testamentary Trustee and pursuant to the provisions

of Paragraph Eight of the Last Will and Testament of said Claudius Wallich, Deceased.” (R. 199)

The second Receipt recites the receipt of 3,000 shares of Crown Zellerbach Corporation common stock by Fred R. Wallich as an individual without reference to any capacity as Trustee and states that the distributee is, “to have, hold, administer and dispose of the same as pursuant to the provisions of Paragraph Eight of the Last Will & Testament of said Claudius Wallich, Deceased.” (R. 201)

Thereafter, this Court affirmed the District Court’s judgment that respondent A. C. Wallich was entitled to the additional bequest of \$10,000. (R. 180). *Wallich v. Wallich* (1960) 10 Utah 2d 192, 350 P. 2d 614.

On May 10, 1960, Walker Bank, as Executor, petitioned the District Court for final distribution (R. 202-216). On May 10, 1960, the District Court made its Order Settling Final Account, of Supplemental and Final Distribution and for Discharge of Executor (R. 217-221), authorizing and directing the residue be distributed to appellant, saying:

“3. That the remaining assets of the Estate, consisting of the sum of \$4,000.00 cash be immediately distributed and paid by the Executor to *Fred R. Wallich, the residuary beneficiary of the Will of the deceased, . . .*” (Emphasis added)

Note that this Order for Final Distribution makes no reference to the discretion vested in Fred R. Wallich nor to the provisions of Paragraph 8 of said Will which references were contained in the above quoted provisions of the Order for Partial Distribution.

On June 10, 1960, the District Court made and entered its Final Discharge of Executor, discharging Walker Bank and Trust Company as Executor. (R 222).

Paragraph 8 of the decedent's Will provides:

"8. All the rest, residue and remainder of my estate, . . . I hereby give, devise and bequeath to my said nephew, Fred R. Wallich, son of my deceased brother, Julius C. Wallich, in trust, nevertheless, to be held and used by him in his sole and absolute discretion, and without restriction or control of any kind whatsoever, together with the income therefrom, if any, as a reserve to meet any emergencies that may arise in, and for the use and benefit of, the Wallich family, that is, my blood relations, regardless of their degree of kindred or relationship to me; said fund, and the income therefrom, to be held and used by my said nephew until his death or for a period of five (5) years after the date of my death, whichever shall first occur, and upon the occurrence of such event, my said nephew, or in the event of his death prior to five (5) years after my death, then his wife, Loretta Wallich, who shall act as successor Trustee without bond, shall distribute any part of the Trust fund that may be then on hand, to my heirs at law then

living, upon the principle of representation. My said nephew in the administration of the trust herein imposed upon him shall act without the necessity of furnishing any bond or any other security, and without the necessity of making any accounting of any nature whatsoever to any person or party concerning the administration of his trust."

Five years elapsed following the decedent's death. Respondent, A. C. Wallich, demanded that the appellant account, as testamentary trustee, for the disposition of the estate distributed to him. (R. 237).

Appellant then on August 20, 1965 filed his "Petition for Discharge of Testamentary Trustee," (R. 226-232), seeking determination of his duties, if any there be, in order to resolve the demand of A. C. Wallich. All heirs were given notice of the hearing of the appellant's Petition.

Respondent A. C. Wallich and some of the other heirs-at-law filed their Answer and Cross Petition requesting that appellant be required to account. (R. 237-241). In such, respondents claim a trust was created by the Order of Partial Distribution and the Will and that appellant, as Testamentary Trustee, is required to account for his administration of the trust and to pay to the heirs-at-law of said deceased living five years after the date of his death any sums not disbursed by appellant during the trust period, and that appellant

is estopped by the Stipulation between the Executor and A. C. Wallich and by the acceptance of the residue under the Order for Partial Distribution of February 24, 1959, from asserting that he did not take as Testamentary Trustee.

Respondents claim to represent 9/24's of the heirs of the decedent. (R. 320).

Respondents moved for summary judgment. (R. 243-244). After hearing full argument, the District Court, Judge Alden J. Anderson presiding, denied respondent's Motion for Summary Judgment on the ground "That there is a genuine issue of a material fact and that cross petitioners are, therefore, not entitled to a judgment as a matter of law." (R. 261).

Respondents renewed their Motion for Summary Judgment at pretrial conference on November 10, 1965, but the same was again denied by the District Court, Judge Stewart M. Hanson presiding. (R. 278)

Appellant's Petition for Discharge of Testamentary Trustee came on regularly for trial in the District Court, Judge A. H. Ellett presiding, on January 26, 1966.

Upon trial, appellant contended the Decree of Partial Distribution neither created a trust nor incorporated by reference the provisions of paragraph 8 of the Will,

but distributed the residue outright to appellant. In the alternative, appellant contended that the Will itself was ambiguous, and offered written and oral extrinsic evidence concerning the facts and circumstances surrounding the execution of the Will and written declarations of the decedent to resolve the ambiguities in the Will and to show that the testator did not intend to create a trust but intended an outright gift to appellant or a gift for five years with power to consume principal. Respondents objected to the introduction of any extrinsic evidence and their objection was sustained on the ground that the Will and Decree of Distribution were free from ambiguity. The Court so held even though two other judges had previously denied motions for summary judgment upon the Order of Partial Distribution and the Will.

Appellant then made his written Offer of Proof which is included in the record on appeal and marked Exhibit 1. No further evidence was offered by any party.

As shown by his written Offer of Proof, contained in the Exhibits file in the record, appellant, if permitted, would have offered the following:

1. O. W. Moyle, Jr., would testify that he, a Utah attorney, prepared the decedent's will and that he knew the decedent 20 years before his death. That a few days before the Will was signed, the decedent had written out

and brought to him a typewritten sheet on decedent's letterhead which decedent said expressed the wishes he desired incorporated into the Will to be drawn, a copy of which sheet is attached to the Offer of Proof. On the sheet the decedent said:

"The remainder of my estate, if any, to go to my nephew Fred R. Wallich to be held by him as a reserve for any emergencies in the Wallich family, but may be disposed of by him at any time and in any manner that he deems best for all concerned. without (sic) bond or restrictions of any kind whatever, and without the necessity of rendering an account of his transactions to any one."

In another portion of the sheet, the decedent wrote out a specific bequest to A. C. Wallich "to serve as trustee for Wilhelmina Wallich." The decedent did not use the word "trust" in orally discussing the sheet and the gift to appellant, but the insertion of the word was Mr. Moyle's own idea. On execution of the Will on October 11, 1950, Mr. Moyle told the decedent he had grave doubts as to whether paragraph 8 of the Will created an enforceable trust and that it might be construed as an outright gift to appellant, and the decedent said in substance he did not care how it was construed. On many occasions before March 1954, the decedent said he had not seen more than one or two of his relatives other than appellant for thirty to forty years and that he was closer to appellant than his other relatives.

2. Victor R. Hansen would testify that he is a practicing California lawyer, that he was for six years a Judge of the Superior Court for the County of Los Angeles, that he was an Assistant Attorney General in charge of the Anti-Trust Division of the U. S. Department of Justice and had known the decedent and had seen him two or three times per year from the end of 1950. The decedent said that appellant was like a son to him; that he had always been thoughtful of him; that decedent's estate was largely due to a gift from appellant's father; that his housekeeper and appellant had been the closest to him, and that appellant was really his heir; that there wasn't anyone else that had been close to him at all during the later years of his life; that on the occasion of appellant's daughter's wedding, decedent put his arm around appellant and said "Fred is going to be my heir; this is really my son"; and that similar expressions were used on a number of other occasions.

3. Appellant, the decedent's nephew, would testify in the same manner as Judge Hansen. Additionally, he would testify that he saw the decedent and his wife frequently from 1920 on; that they expressed affection for him. After the decedent's wife died in 1949, decedent and appellant visited six or seven times a year in Los Angeles or Salt Lake City. Forty-one letters written by decedent to appellant and his wife between 1944 and 1952 are attached to the Offer of Proof. Appellant and decedent frequently took trips together. Decedent said

he never saw any of his other relatives, except on one occasion. Decedent said he felt alienated from the rest of his family because his father had disinherited him, but appellant's father (the decedent's brother) gave decedent the share decedent would otherwise have received under their father's will, that such provided the foundation for decedent's estate and that appellant's father having died, the only way decedent could express his gratitude would be in the Will he would draw.

Reference is made to the Offer of Proof for further details of the foregoing.

After rejecting the Offer of Proof, the District Court then made its Findings of Fact and Conclusions of Law (R. 309-310), and in Finding No. 2 found that the Court by its Order of Partial Distribution dated February 24, 1959, distributed the residue of decedent's estate to the appellant Fred R. Wallich:

“. . . to be held and used by him together with the income therefrom during the period of five years after the date of the death of the testator, in his sole and absolute discretion and without restriction or control of any kind whatsoever, to meet any emergencies that may arise in and for the use and benefit of the Wallich family, and at the end of said five-year period, said Fred R. Wallich, or his successor Trustee should he be deceased, should distribute any of the trust fund that might then be on hand to their heirs-at-law of Clandius Wallich then living.”

As Conclusions of Law, the Court recited that appellant, as said testamentary trustee, should be required to fully account and upon said accounting should be ordered to distribute to said heirs-at-law all of the trust funds on hand at the expiration of said five-year period as shown by the accounting approved by the Court.

Based upon said Findings of Fact and Conclusions of Law, the Court made its Order and Decree dated January 28, 1966 (R. 312-313) ordering appellant, as testamentary trustee, within thirty days, to fully account and that upon approval of the accounting the appellant, as testamentary trustee, be ordered to deliver the trust fund, if any there be, to said heirs-at-law.

This appeal is prosecuted from said Order and Decree.

SUMMARY OF APPELLANT'S CONTENTIONS AS TO GROUNDS FOR REVERSAL

The appellant presents the following summary of grounds for reversal of said Order and Decree, each of which will be thereafter argued and presented in detail:

POINT I

THE DECREE OF DISTRIBUTION CANNOT BE
IMPEACHED BY THE WILL.

A decree of distribution under a will supersedes the will and becomes the final and conclusive adjudication of the testamentary disposition made by the decedent and the validity, interpretation and effect of each provision in the will and this is true even though the decree is erroneous or inaccurate in respect to specific provisions in the will and the will cannot be used to impeach the decree of distribution.

POINT II

UNDER THE DECREE OF DISTRIBUTION APPELLANT IS NOT A TRUSTEE.

The Decree of Distribution of February 24, 1959, constitutes an outright bequest of the residue of appellant, is free from ambiguity and does not create a trust. Said decree does not incorporate paragraph 8 of the Will by reference.

POINT III

UNDER THE DECREE OF DISTRIBUTION, APPELLANT IS NOT REQUIRED TO ACCOUNT AND CANNOT NOW BE REQUIRED TO ACCOUNT.

Assuming that the Order of Partial Distribution of February 24, 1959, incorporates the provisions of paragraph 8 of the Will, it incorporates all of the provisions and, as incorporated, each and every provision by that adjudication is final and conclusive even though it may

be erroneous. This includes the provision in the Will that no accounting may be required of appellant, as trustee. The Court may not now enforce some of the provisions of paragraph 8 of the Will and disregard other provisions. Therefore, the provision of paragraph 8 of the Will to the effect that appellant shall not be required to account was adjudicated in the Order of Distribution and was conclusive even though it may be erroneous. The District Court erred in ordering appellant to account, in contravention of the Order of Distribution.

POINT IV

APPELLANT IS NOT A TRUSTEE UNDER THE WILL.

Assuming that paragraph 8 of the Will was incorporated in the Decree of Distribution, even without the aid of extrinsic evidence, paragraph 8 of the Will does not create a trust but is an outright gift of the residue or an estate for years in appellant.

POINT V

THE WILL IS AMBIGUOUS AND THE COURT ERRED IN EXCLUDING PAROLE EVIDENCE IN INTERPRETING IT.

Assuming that the Decree of Distribution of February 24, 1959 does incorporate the provisions of para-

graph 8 of the Will, the result is to create many ambiguities concerning the intent of the testator as to what he meant by paragraph 8 and some of the provisions of paragraph 8 are in conflict with other of its provisions. Under these circumstances it was error for the District Court to sustain respondents' objection to the introduction of extrinsic evidence offered for the purpose of interpreting paragraph 8 and resolving the ambiguities and conflicts so that the intent of the testator would be ascertained, declared and enforced.

POINT VI

THE EVIDENCE IS INSUFFICIENT TO REQUIRE APPELLANT TO ACCOUNT.

It was error to order appellant to account in violation of the provisions of paragraph 8 of the Will, at least in the absence of proof on the part of respondents that the alleged trustee was guilty of fraud.

POINT VII

APPELLANT IS NOT ESTOPPED TO ASSERT HE IS NOT A TRUSTEE.

Neither of the receipts signed by appellant are relevant because they were executed after the entry of the Decree of Distribution and cannot impeach or modify a judgment which has become final. There is no evidence that the respondents changed their position in reliance thereon to their detriment.

ARGUMENT

POINT I

THE DECREE OF DISTRIBUTION CANNOT BE
IMPEACHED BY THE WILL.

The law applicable is clearly set forth in 34 C. J. S. commencing at page 456 (Executors and Administrators, paragraph 529) as follows:

“A decree of distribution under a will is a final and conclusive adjudication of the testamentary disposition made by decedent of his property, the validity, meaning, interpretation, and effect of the will and particular provisions thereof, the property covered by the will, the rights of legatees and devisees, see *supra* this section and subdivision, and incidental questions necessarily involved in the determination of the foregoing matters; and this is true even though the decree may be erroneous or inaccurate in respect of specific provisions of the will, as the will is only evidence on which the court passes in rendering the decree, it is merged in the decree, and cannot be used to impeach it, . . .”

The authorities cited in support of this proposition are numerous and fully support the text. It is only necessary to refer to a few of the supporting authorities.

In *Cook v. Cook*, 111 P. 2d 322 (Cal., 1941) the Will provided as follows:

“I am leaving 40% of what I possess to my son Nelson, knowing that he will pay his sister the \$40.00 a month referred to, or more, if he is able.”

The Decree of Distribution distributed 40% of the estate to Nelson without including any provision requiring him to pay any sum to his sister. The sister then brought action claiming the son took the property as trustee under the provision in the Will for the payment of the \$40.00 a month.

The Court held that the failure to include in the Decree of Distribution any language declaring that the property was distributed in trust was a conclusive and final adjudication, that there was no trust for the sister and, rightly or wrongly, the sister was barred from going behind the Decree of Distribution. Held:

“If there is a will the court must pass upon the validity of the disposition attempted by the testator, and the decree of distribution is conclusive thereof.

“The decree is necessarily a judicial construction of the will and fixes the several interests of the distributees by designating the persons and the proportions or parts to which each is entitled, and is conclusive thereof. Legacies not mentioned in the decree are cut off. A claim of interest upon a legacy should be asserted in the proceeding for distribution, and a distribution without interest is a determination that the legatee is entitled to none.

“The will is merely a part of the evidence upon which the decree is based, and becomes merged in and superseded by the decree, the decree becoming the measure of the rights of the beneficiaries and the law of the estate. The decree therefore is conclusive as against collateral attack, even though in contravention of the terms of the will. In other words, the will cannot be used to impeach the decree.”

The same principle was applied to the opposite factual situation in *Shattuck v. Shattuck*, 192 P.2d 229 (Ariz. 1948). There, the Will specifically provided for the residue to be distributed in trust to a named trustee for the testator's children.

At the conclusion of administration, the estate was distributed pursuant to the Will by the Decree of Distribution which recited as follows:

“To Spencer S. Shattuck as trustee of the Lemuel C. Shattuck trust;

“All the rest and residue of said property and estate to be held in trust as provided under the last Will and Testament of Lemuel C. Shattuck as above described . . . be, and the same is hereby distributed to Spencer S. Shattuck as Trustee, above mentioned, and to be handled by him in accordance with the trust provisions of the Last Will and Testament of Lemuel C. Shattuck.”

One of the heirs claimed that the trust created by the Will was invalid and that the residue should pass according to the laws of intestate succession. The Court held that the Decree of Distribution was final and conclusive even if erroneous and that the validity of the trust created by the Decree was *res adjudicata*. Held:

“The will has been probated, the estate distributed, and the proceedings in probate ended by a final decree. . . . A decree of distribution supersedes the will and prevails over the provisions thereof and the will becomes merged in the decree, which itself becomes the measure of the rights of the beneficiaries and the law of the estate (Citing many authorities).

* * * * *

“It is generally held also that a will may not be used to impeach a decree of final distribution, but may be used only in aid of it. (Citing authorities)

* * * * *

“The power and jurisdiction conferred upon the Superior Court sitting in probate includes the power of the probate court to construe the will of the decedent, the ascertainment of the persons who succeed to the property of the estate, and the validity and effect to be given the language of the will, and this in the exercise of its original and exclusive jurisdiction.

* * * * *

“All probate proceedings and judgments rendered therein are in the nature of proceedings *in rem*, and a final decree of distribution has the force and effect of a judgment *in rem*.

* * * * *

“A decree of final distribution is a judicial construction of a will, conclusive upon all heirs, devisees and legatees, and immune from collateral attack unless it is void on its face.

* * * * *

“The will attempted to create a trust which, considered by itself, was no doubt invalid under the rule declared in the Estate of Fair, 132 Cal. the decree, which itself becomes the measure 523, 60 P. 442, 64 P. 1000, 84 Am.St.Rep. 70. The validity of the trust is, however, no longer open to question. The decree of the superior court distributing the residue of the estate to trustees upon certain trusts is a conclusive adjudication of the validity of the disposition made by the testator. (citing cases). And it is equally conclusive as an ascertainment and adjudication of the terms of the trust, and of the rights of all parties claiming any legal or equitable interest under the will. (citing cases). The decree supersedes the will and prevails ‘over any provision therein which may be thought inconsistent with the decree.’ (citing cases). In determining the rights of the widow, we are, therefore, to look, not to the terms of the will, but to those of the decree of distribution.” (Emphasis added)

In Re Wallace’s Estate, 219 P.2d 910 (Cal. 1950)
held:

“It is settled by a long line of authorities that under the doctrine of *res adjudicata* a will cannot be looked to for the purpose of impeaching or contradicting the plain and unambiguous provision in a Decree of Distribution once the Decree has become final.”

In *Miller v. Walker Bank & Trust Company*, 17 Ut. 2d 88; 404 P.2d 675, this Court recently held:

“The probate of the estate was a proceeding in rem and the decree after the time for appeal expired became final and conclusive and it not subject to attack, except for fraud.”

See also *Bindley v. Mitchell*, (Kan. 1951) 228 P.2d 689 and *In re Lorings Estate* (Cal. 1946) 175 P.2d 524. In the latter, the Court said at page 529:

“It is settled, however, that, once final, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error.”

It is therefore established that the Decree of Distribution is a final judgment, conclusive on all matters contained therein even though erroneous which cannot be impeached or modified by reference to the Will.

For the same reason the Decree of Distribution cannot be impeached or modified by reference to the two “Receipts of Distributee” (R. 199-201) signed by the appellant *after* the entry of the Decree.

POINT II

UNDER THE DECREE OF DISTRIBUTION APPELLANT IS NOT A TRUSTEE.

The Order of Partial Distribution of February 24, 1966, was made and entered after petition by the Executor, Walker Bank & Trust Company, after notice to all heirs, and after written Stipulation thereto between the Executor and respondent A. C. Wallich. The Petition of Walker Bank, Executor, the Stipulation of A. C. Wallich, and the Order of Distribution itself all entirely omitted any reference to a "trust." Instead, the Order of Partial Distribution distributed the residue of the estate to appellant "*to be held and used by him in his discretion* in accordance with and pursuant to the provisions of paragraph 8 of the Will;" (R. 62).

The Decree did not designate the distribution as one in trust nor the appellant as a trustee, nor did it name any beneficiaries in whom is vested the right to enforce the trust, nor did it mention a trust purpose, nor a time period. The residue was distributed to appellant to be held and used by him in his discretion.

Paragraph 6 of the Order of Partial Distribution is entirely free from ambiguities. It is only when reference is made to paragraph 8 of the Will that ambiguity can be imported into the Order of Distribution and it has been established in Point I that the terms of the Decree of Distribution cannot be impeached by reference to the Will.

The Stipulation upon which respondent A. C. Wallich's objections to the Petition for Partial Distribution

were resolved, subparagraph (1)(e), (R. 50), unequivocally provides for the distribution of the residue to appellant without any reference to the language in paragraph 8 of the Will and shows that the parties did not intend that a trust would be created. No other heirs objected to the Petition for Partial Distribution, though all had notice (R. 48), and none now claim lack of notice.

The Order of Partial Distribution is in substantial accord with the Stipulation but with the addition of the words, "in accordance with and pursuant to the provisions of paragraph 8 of the Will." The Stipulation describes appellant merely as the residuary beneficiary.

Neither the Court nor the parties intended the language, "in accordance with and pursuant to the provisions of paragraph 8 of the Will" as incorporating the terms of paragraph 8 of the Will into the Order of Partial Distribution as words of limitation.

The Stipulation of the parties upon which the Order of Partial Distribution was based clearly does not contemplate any limitation in the bequest of the residue.

Paragraph 15 (R. 57-61) of the Order of Partial Distribution dated February 24, 1959 distributes fifteen separate specific bequests to various beneficiaries and in each subparagraph the Court recites that the bequest is distributed, "under the provisions of paragraph 4

of the Will of the deceased." This language was not used by the Court for the purpose of limiting the rights of the fifteen distributees or for the purpose of incorporating into the Order of Distribution the language of paragraph 4 of the Will. The use of similar language in paragraph 15(q) (R. 61) of the Order distributing the residue to appellant, cannot be construed to have any different meaning as to appellant than the reference to paragraphs in the Will in distributing the fifteen specific bequests.

If there is any doubt concerning the intention of the Court in the Order of Partial Distribution of February 24, 1959, that doubt can be resolved by reference to the Final Decree of Distribution of May 10, 1960, paragraph 3, (R. 220) wherein the Court upon Petition by the Executor, Walker Bank, ordered, "that the remaining assets of the estate . . . be immediately distributed and paid by the executor to Fred R. Wallich, the residuary beneficiary of the Will of the deceased."

This Final Decree of Distribution unequivocally designates the appellant as the residuary beneficiary without limitation. It is apparent that the Court in this Final Decree did not regard paragraph 8 of the Will to have been incorporated by reference into the Partial Decree of Distribution dated February 24, 1959.

The words in the Partial Decree of Distribution "in accordance with and pursuant to paragraph 8 of the Will" are descriptive only and not limitations.

This Court has previously held in another case that as a matter of law the words in a Decree of Distribution following that portion of the Order distributing the residue without limitation and adding, "in accordance with the Last Will of the deceased" are descriptive only and do not impose limitations or conditions upon the unconditional language disposing of the residue.

In *Miller v. Walker Bank & Trust Company*, 17 Utah 2d 88, 404 P.2d 675 (1966), the Will bequeathed the residue to the appellant, "and I do this acknowledging all my children hereinafter named and for the reason that I know that my beloved wife will care for my children from the remainder of my estate, if there be any, share alike."

In the probate proceedings the Decree of Distribution distributed the residue to the wife with the addition of the phrase that the residue was distributed, "in accordance with the last Will and testament of the deceased."

The wife later died and left the residue of the estate she had received by said Decree to one of her children to the exclusion of the others. The disinherited children claimed that the phrase, "in accordance with the Will" had the effect of incorporating the terms of the Will which in turn imposed a trust upon the property for the benefit of all the children.

The District Court ruled in accordance with this contention and distributed the property one-fourth to each of the children.

This Court unanimously reversed and held that the words "in accordance with the terms of the Will" did not impose any conditions or restrictions on the Decree of Distribution. Held:

"We are constrained to disagree with the position espoused by the plaintiffs. The decree is clear enough in its terms. It unequivocally distributes the property in question to Nettie Knudsen Miller, and there is nothing uncertain or ambiguous in its doing so. The fact that it adds the recital, 'that [the decree] is in accordance with the last will and testament of the deceased' amounts only to a declaration of the basis for making the distribution, but it does not impose any condition or restriction upon the effect of the distribution. The probate of the estate was a proceeding in rem and the decree after the time for appeal expired became final and conclusive and is not subject to attack, except for fraud.

"Further persuading us to the conclusion we have reached is the fact that it is extremely doubtful that the language of the will would justify a conclusion that a trust was intended. Rather the language seems to indicate clearly an intention by the testator to leave to his wife all of his property to be used in accordance with her judgment."

It is submitted that the *Miller* case is controlling in the case at bar.

The Decree of Distribution in *Miller* orders distribution of the estate to the wife "in accordance with the last will and testament of the deceased."

The Decree of Distribution in the case at bar orders the residue of the estate distributed to appellant, "to be held and used by him in his discretion. . . ." So far this is an outright and unlimited gift. Then follow the words, ". . . in accordance with and pursuant to the provisions of paragraph 8 of the Will."

There is no significant difference in the language used in the two cases. The addition of "pursuant to" to "in accordance with" in the case at bar does not in any way change the meaning of the language as being identical with the *Miller* case.

The parallel to the *Miller* case is too clear to be avoided.

McGavin v. San Francisco P.O.A. Society, (Cal. 1917) 167 P. 182, held that a decree of distribution would not be set aside, even though property was distributed to the wrong beneficiary through mistake of law made by the executor's attorney, since the mistake was not extrinsic. The Court said:

“. . . a decree of distribution is a judgment in rem, and, although erroneous, is as conclusive against one who fails to appear, having the opportunity so to do, as it is against a party whose fault produced the error.”

“Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. *Westphal v. Westphal*, Cal. 126 P.2d 105, 107; *Cardozo v. Bank of America*, (Cal. 1953) 254 P.2d 949.”

So here, respondent A. C. Wallich expressly stipulated to the decree and all other respondents here had notice of hearing and opportunity to object before the decree was entered, but did not do so.

Therefore, it is concluded that the language in the Order of Partial Distribution dated February 24, 1959, “in accordance with and pursuant to paragraph 8 of the last will of said deceased,” amounts only to a declaration of the basis for making the distribution but does not impose any conditions or restrictions upon the effect of the distribution.

If the Order of Partial Distribution dated February 24, 1959 is construed as creating a trust as to that part of the estate then distributed, it is clear that the Decree of Final Distribution dated May 10, 1960, is an unlimited and unconditional distribution of the then residue of the estate and we will be faced with the anomalous situation of having the appellant receive under the same

clause of the Will a portion of the estate in trust and other portions of the estate free of the trust.

It is, therefore, concluded that neither Decree purported to create a trust but each vested the entire beneficial interest in the distributee so that said Decrees are final and conclusive and cannot be impeached by reference to the Will.

Finding No. 2 (R. 309) is the ultimate finding upon which the District Court's Order & Decree of January 28, 1966 is based. This Finding clearly violates the foregoing rules of law by using the Will to impeach the Decree of Partial Distribution.

This finding reads as follows:

"2. On February 24, 1959 this court did make and enter its order distributing to Fred R. Wallich as testamentary trustee the rest, residue and remainder of the estate to be held and used by him together with the income therefrom during the period of five years after the date of the death of the testator, in his sole and absolute discretion and without restriction or control of any kind whatsoever, to meet any emergencies that may arise in and for the use and benefit of the Wallich family, and at the end of said five year period, said Fred R. Wallich or his successor trustee should he be deceased, should distribute any of the trust fund that might then be on hand to the heirs at law of Claudius Wallich then living upon the principal of representation." (R. 309-310)

Hence, it is clear that Finding No. 2, upon which the Order & Decree appealed from is based, is in error. To be correct, the Finding should reach the opposite result, that is, that the Order of Partial Distribution of February 24, 1959, distributed the residue outright to appellant. The District Court's Order of January 28, 1966 should be reversed and the case remanded to the District Court with instructions to enter a Decree determining that the Order of Partial Distribution distributed the residue outright to appellant.

POINT III

UNDER THE DECREE OF DISTRIBUTION, APPELLANT IS NOT REQUIRED TO ACCOUNT AND CANNOT NOW BE REQUIRED TO ACCOUNT.

Finding No. 2 above quoted adopts some of the provisions from paragraph 8 of the Will and adds them to the original Order of Partial Distribution of February 24, 1959, but rejects other important portions of paragraph 8 of the Will. If it be determined that the Order of Distribution did incorporate paragraph 8 of the Will, it must incorporate all of its terms — not merely some of them.

The significant portion of paragraph 8 of the Will which was omitted from the Order of January 28, 1966 appealed from is the last sentence reading as follows, "My said nephew in the administration of the trust

herein imposed upon him shall act without the necessity of furnishing any bond or any other security and *without the necessity of making any accounting of any nature whatsoever to any person or party concerning the administration of this trust.*"

If paragraph 8 of the Will was incorporated in the Order of Distribution by reference, it follows that it also incorporated the provision that no accounting whatsoever be required. As thus incorporated, the Order of Distribution has become the final and conclusive monument as to the rights and duties of the parties and cannot now be modified, even though erroneous.

It follows that Finding No. 2 is not supported by the evidence. The evidence is paragraph 8 of the Will and Finding No. 2 adopts only a portion of it.

It, therefore, follows that the Order appealed from, insofar as it requires an accounting by the appellant, is contrary to the final and conclusive Order of Partial Distribution dated February 24, 1959, and the Order must be reversed.

POINT IV

APPELLANT IS NOT A TRUSTEE UNDER THE WILL.

Assuming that paragraph 8 of the Will was incorporated in the Order of Partial Distribution, then even

without the aid of extrinsic evidence, paragraph 8 of the Will does not create a trust but is an outright gift to appellant or an estate for years in appellant.

The following quotations from *Restatement of Trusts, Second*, are applicable:

“§ 125, If property is transferred to a person to be disposed of by him in any manner or to any person he may select, no trust is created and the transferee takes the property for his own benefit.

“(a) The general rule. Whether the transferor has manifested an intention to give the property to a person in trust or to give it to him for his own benefit is a question of interpretation of the transferor’s language in the light of all the circumstances.

“No trust is created if the transferor does not manifest an intention to impose enforceable duties upon the transferee. . . . (No trust is created) if settlor manifests an intention to impose merely a moral obligation, and to leave the transferee free from any legal obligation to apply the property to the purpose. His intention not to impose enforceable duties may appear from the fact that the purposes to which the property is to be applied are so broad as to show that the transferor intended that the transferee should be entitled to use the property for his own benefit.

“(b) If the transferor manifests an intention to give the property to a person for his own benefit, no trust arises and the transferee may do as he likes with the property.

"Illustration 2. A bequeaths \$100,000 to B, to be disposed of to such persons and in such manner and in such sum or sums of money as he in his discretion shall think proper. B takes the money for his own benefit."

"§ 187(k) *Discretion of Trustee*,

"It is true *the powers conferred upon a transferee may be so extensive as to indicate an intention not to create a trust but to give the beneficial interest in the property to the transferee.*"

"§ 172(d) *Duty to Account*,

"... The language of *the trust instrument*, however, *may manifest an intent that the property should be held free of trust*, in which case the (transferee) is the beneficial owner and incurs no liability no matter what use or disposition he makes of the property."

Hence, the basis for decision becomes: Does this Will show intent to impose *enforceable duties* on the donee? The Will here manifests lack of imposition of enforceable duties in the following respects:

1. Discretion. The Will says "sole and absolute" discretion and "without restriction or control of any kind whatsoever." Such broad discretion negates an enforceable duty per *Restatement of Trusts*, §187 (k).

2. Purpose. The purpose of the alleged trust is very, very vague and broad. By §125, *Restatement of Trusts*, such broad purpose negates manifestation of enforceable duties. The words, "emergency," "reserve" and "family" are vague and broad in themselves. Note also the trust purpose is not limited to emergencies. The Will says "... emergencies that may arise in, and for the use and benefit of, the Wallich family, . . ." The words "and for the use and benefit of" have no meaning whatever if the trust purpose is construed to be limited to emergencies. By 74-2-9, U.C.A. 1953, every expression in the will is to be given some effect, if possible. Therefore, the purpose of this alleged trust is also "for the use and benefit of the Wallich family," which is so broad as to entirely negate intent to create an enforceable duty.

3. Accounting. The Will waives accountings and bonds. By §172 (d), *Restatement of Trusts*, such negates enforceable duty.

4. Beneficiaries. "Family, that is, my blood relations, regardless of their degree of kindred or relationship to me," "Heirs-at-Law." The Will is very vague as to defining beneficiaries. Why leave a will at all if the bulk of the estate goes to one's heirs? "Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy," 74-2-10, U.C.A. 1953.

5. Inconsistency. This Will provides:

“... To Fred R. Wallich, In Trust, nevertheless,
(1) to be held and used by him in his sole and
absolute discretion and without restriction or
control of any kind whatsoever ... as a reserve
... for the use and benefit of ... family ... ;

(2) said fund ... to be held and used by my
said nephew ... for 5 years ... and ... my
said nephew ... shall distribute any part of the
Trust fund that may then be on hand ... to my
heirs ...” (numerals added).

The second and entirely independent clause *after the semicolon* creates no trust purpose and expressly says the fund may be “held and used by my nephew” and not for anyone else’s benefit during 5 years.

6. Disinheritance. Paragraphs 6 and 9 of the Will specifically disinherit heirs not specifically named. The testator can hardly have intended by paragraph 8 to create an enforceable duty under paragraph 8 to distribute the remainder of the alleged trust to “heirs-at-law” whom he has disinherited.

7. “Any Part.” The clause, “shall distribute any part of the Trust fund that may be then on hand” in

the Will recognizes expressly there may be no funds at all at the end of five years.

8. Term. The Will says: "... to be held and used by my said nephew until his death or for a period of five (5) years after the date of my death, whichever shall first occur." Only appellant can "hold and use" the fund. The testator would not have limited the term to the appellant's life unless he intended the appellant to use the funds himself for five years, which negates a trust. *Restatement of Trusts, Second*, §125(b).

The following authorities are applicable:

Collins v. Mosher, 91 F.2d 582 (C.C.A. 9th, 1937).

The Will gave property to the son and daughter, in trust, to be managed and controlled, as they deemed best for the beneficiaries, without the intervention of any court and without other authority than their own and after the payment of specific bequests that the residue be distributed to the son and daughter. It provided that if a vacancy occurred in the trusteeship the Court should appoint successors and waived bond.

The Decree of Distribution in the probate court awarded the property to the son and daughter, "as the will directed to be done." The son and daughter divided the property between themselves. After the death of the son, the assignee of one of his children commenced

action against the surviving daughter. The daughter testified that her mother named them as trustees for convenience so that they could convey title without the signature of their spouses. "My mother's main idea as she expressed to me was that when we were gone — that she wanted the land to go and descend to her blood heirs . . . these being the trust beneficiaries of her will."

Plaintiff claimed a trust was created for the benefit of testator's heirs at law.

Held: No trust.

"A 'trust' is 'a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.' *Restatement of the Law of Trusts, Section 2*. So far as shown there is no equitable duty resting on respondent to hold or deal with the property in question for the benefit of another person." (emphasis added).

In *Axtell v. Coons*, 89 So. 419 (Fla.) the will provided:

"I do give, devise and bequeath unto my husband James N. Coons, as trustee for my granddaughter Patricia Crossman and Josephine Crossman, her mother, share and share alike, all of my property

... I do give him full power to manage, control, sell, mortgage, encumber or lease in any way he may desire ... I do direct that he be not required to render or make any accounting to any court ... I do direct that my daughter-in-law, Josephine Crossman, do succeed to the said James N. Coons, as trustee ... not required to give any bond or make any accounting."

It was held that the broad powers of management and disposition coupled with the requirement that the trustee be not obliged to account negated intent to create an enforceable trust and in spite of the use of the word "trustee" in the Will Coons took the bequest free of any trust obligations. The Court said:

"Except for the use of the word 'trustee,' we fail to discover anything in the will to indicate the purpose of creating a trust for the benefit of any cestui que trust. It is contrary to the conception and purpose of a trust that the person designated as trustee be given absolute and unrestrained control over the property with the right to sell and use the proceeds of the sale as he may see fit without liability or accountability to a cestui que trust. The purpose of a trust is to provide some one to hold and manage the trust property or funds derived therefrom for the benefit of some person or persons to whom he shall be accountable, not only for the specific trust property, but for the proceeds of its sale, its accretions, its earnings, and any and all funds coming into his hands from, by, or through the property of which he is the trustee. (Coons) was given possession, control, the beneficial use and absolute

and uncontrolled dominion over the property. Such power defeats the creation of a trust for the benefit of any one else, and the mere designating of Coons as trustee is not sufficient to destroy the palpable purpose of the will to place the property in the control in Coons for his personal use and benefit, with the express provision empowering him to dispose of the property without court authority, and without accountability to the supposed cestuis que trust.

“One of the essential elements of a trust is that the trustee shall hold the property for a ‘specified or ascertainable object.’ Another rule governing trusts is that —

‘The disposition of the property must also be definitely stated; there can be no valid trust unless it is capable of being enforced even against the wish of the trustee; a mere honorary obligation which the trustee may perform or not at his will does not create a trust. . . .’” (Emphasis added)

In *Ponzelino v. Ponzelino*, 26 N.W.2d 330 (Iowa) the trust granted the trustee broad powers, similar to the above. The Court held the entire beneficial interest in the trust was vested in the trustee free of any trust obligations, saying:

“A trust is not created unless the settlor manifests an intention to impose upon the transferee duties which are enforceable in the courts. Restatement, Trusts, Section 25, Section 125, comment a; . . . Indeed a trust is defined as a fiduciary relationship with respect to property, sub-

jecting the person by whom the property is held to equitable duties to deal with it for the benefit of another. . . .

*"A corollary to the rule that a trust involves the imposition of enforceable duties upon the transferee is that there is no property which can be the subject of a trust where its application to the purposes of the trust depends upon the absolute and unconditional discretion of the person in control of the property. Obviously a court of equity cannot direct what disposition one shall make of property which is given to him to dispose of as he chooses. Unbridled discretion in a trustee not only negatives the necessary separation of legal and equitable ownerships, but is also objectionable, so far as the existence of a trust is concerned, by reason of the uncertainty it involves . . . See also *Restatement, Trusts, Section 125.**

"'While a trust is valid where it is imperative as to the amount to be used for the beneficiary, where the amounts, if any, which the beneficiaries are to receive are wholly discretionary with the alleged trustee, the trust is too uncertain to be enforceable.' 65 C.J. 273, Section 53."

In *Norman v. Prince*, 101 A. 126 (R.I.) the residue of the estate was left in trust "to pay the remaining or ninth share of income, in whole or in part, at such time or times as the trustee shall select to testator's said son Hugh or to Hugh's wife or to any child or children of Hugh, or to any other person or persons whosoever as the trustee for the time being in its uncontrolled absolute discretion or pleasure of said trustee shall see fit."

It was held that the ninth share did not create a trust because the Will imposed no enforceable obligation upon the trustees. Held:

“Said provision imposes no trust or obligation with respect to the disposition of said ninth share of income . . .

“From the very broad language of the provision as to the disposition of the said ninth share of net income the *testator's intent can readily be found not to bequeath said share in trust for indefinite beneficiaries; but the provision should be regarded rather as a bequest of said share to the trustees with an arbitrary power of disposition. The use of the words ‘trustee’ and ‘trustees’ in this clause of the will is not controlling* as to his or their character in the disposition of said ninth share, but said words must be regarded as descriptive. . . .”

Under the foregoing authorities, this Will, therefore, created an outright gift of the residue in appellant, or at least the Will creates an estate for five years with power to consume principal and interest in appellant.

The second clause of paragraph 8 of the Will reads:

“said fund and the income therefrom to *be held and used by my said nephew* until his death or for a period of five years after the date of my death . . . upon the occurrence of such event my said nephew . . . shall distribute *any part* of the Trust fund that *may be then on hand* to my heirs at law.”

The use of the words "fund and income" means principal and income.

"Any part that may then be on hand" indicates testator's intention that some part or all of the fund would have been used by his nephew during this period.

"By my said nephew" indicates a use of the property for the benefit of the nephew and not for others.

This second clause obviously creates a use for five years with power to invade and use the entire principal vested in appellant. To construe the will as an absolute trust is to ignore this second clause. Instead, the second clause modifies and expands the trust provisions in the first clause to reflect a trust for five years with interim power in the trustee to use the principal and interest himself for five years and thereafter to pay over the balance, if any, to the named beneficiaries. This is identical, except for term, to the often recognized trust duties in a life estate with power to use principal and interest in the trustee for his life.

To the extent it is argued the two clauses are irreconcilable and the first controls, then 74-2-5, U.C.A. 1953 applies:

"All the parts of a will are to be construed in relation to each other, and, if possible, so as to

form one consistent whole; but where several parts are absolutely irreconcilable, the later must prevail."

The rules for interpreting this clause are set forth in 33 Am.Jur. p. 724 as follows:

"The question whether the beneficiary of a life estate has an implied power to use the principal or corpus has most frequently arisen where the testator has used some form of expression indicating an expectation that the subject of the gift may undergo diminution during the continuance of the particular estate. Accordingly, a right on the part of the first taker to intrrench upon the principal or corpus has been inferred where the gift over is described as being of all, what, or so much as remains, or some very substantially similar expression, what is unused, not consumed, unexpended, or undisposed of, what is left, or substantially similar expressions, the residue, the balance, or very like terminology, the surplus, and all the property that may revert. Likewise, an inference of an intention that the first taker should have the right to use the corpus has been drawn from expressions making the gift over contingent upon the existence of property, as indicated by such expressions as if or should anything remain, be left, or remain unexpended."

In *In re Smythe's Estate*, (Cal. 1955) 282 P.2d 141. The Will left the remainder of the estate:

"... to Ruth Smythe for her during her lifetime, as she may need or see fit to use. If, upon her

death, any of my estate remains, it is my will that such remainder . . . (go to appellants)."

The Court held this to be a life estate with power to use and consume part or all of the principal, saying,

" . . . If she consumes it all 'as she may need or see fit to use' appellants get nothing. If she does not, they get what is left."

In *In re Nichols' Estate*, (1962) 19 Cal. Rptr. 93, the will provided:

"You (sister Bess and appellant) can serve as my executor without bond and after you get through with it if there is any left see that it goes to our Bro. and Sisters."

The trial court held the will disinherited appellant, the testator's only natural sister, since there was no express gift to her and "*our . . . sisters*" excluded her. Testimony was admitted that testator had said "Bess is all I have and I'll always take care of her." The Court of Appeal reversed, holding the gift to be a life estate to Sister Bess with power to invade corpus to the full extent of her own needs and pleasure, with remainder to "Bro. and sisters." In overruling the contention that a gift to an executor is in his representative capacity absent clear expression to the contrary, the Court approved *Estate of Karkeet*, Cal. 363 P.2d 896, which said:

“ . . . the mere use of the [technical] term may well be deemed to create an uncertainty or ambiguity. . . .

“In reading this testimony we have in mind that we are searching to find not only who the natural objects of his bounty were, but in what order of priority he naturally would have regarded them.

. . . There was no testimony that the testator ever expressed any intent whatever to make any (contestants) . . . beneficiaries of his estate. Nor is there any testimony that any of these persons have any need for, nor any expectation of receiving, *any* of his estate. . . . Others declined to join in the proceedings. The contestants, on the other hand, were those with the most casual contacts, or without any; persons with the least claims to his bounty.”

So, in this case, the grant to appellant to hold and use principal and income, and to distribute any part that may be on hand constitutes, not a life estate, but an estate for 5 years.

Appellant's verified Petition for Discharge, paragraph 7, (R. 229) alleges that within five years of the date of the decedent's death, he disposed of the entire principal and income in compliance with the Will of the decedent. Hence, there is nothing to account for and he should be discharged as testamentary trustee.

POINT V

THE WILL IS AMBIGUOUS AND THE COURT
ERRED IN EXCLUDING PAROLE EVIDENCE IN
INTERPRETING IT.

Assuming that the Order of Partial Distribution of February 24, 1959 does incorporate the provisions of paragraph 8 of the Will, the result is to create many ambiguities concerning the intent of the testator as to what he meant by paragraph 8. Under these circumstances it was error for the District Court to sustain respondents' objection to the introduction of extrinsic evidence offered for the purpose of interpreting paragraph 8 and resolving the ambiguities and conflicts so that the intent of the testator would be ascertained, declared and enforced.

It is axiomatic that when a provision in a will is ambiguous on its face, extrinsic evidence is admissible to explain or resolve the ambiguity. This type of evidence includes all of the facts and circumstances under which the Will was made, including the relationship and disposition of the decedent to the beneficiaries and the decedent's instructions to the scrivener, exclusive of his oral declarations of his intention. 74-2-2 U.C.A. 1953. The basic question in every instance is to determine the intent of the testator.

The ambiguities and inconsistencies in the Will in the interpretation of which the Court could have been assisted by extrinsic evidence are detailed in the Point IV. Perhaps the biggest ambiguity is that which arises when the word "trust" is used and then the Will proceeds, step by step, to take away every element of a

trust in law by manifesting an intent not to impose enforceable duties on the appellant. If the Court had the assistance of extrinsic evidence, it might have concluded that the testator did not intend to create a trust in the first instance and that the Probate Court in its Decree of Distribution dated February 24, 1959 did not intend to create a trust, even assuming that paragraph 8 of the Will was incorporated by reference in the Decree.

The extrinsic evidence offered by the appellants and rejected by the trial court is set forth in considerable detail in the Offer of Proof, Exhibit 1 in the record, and falls within the classification of the kind of extrinsic evidence which the Court finds useful in interpreting wills in order to ascertain the true intent of the testator. It particularly shows that appellant was the natural object of the decedent's bounty, that respondents were not, and that the decedent did not intend to create a trust with enforceable duties applicable to appellant.

It is urged by the appellant that if the Court had received the offered extrinsic evidence, the Court might have concluded that although the word 'trust' appears in paragraph 8, the real intent of the testator was to make an outright gift to the appellant.

Estate of Randall, 49 Cal. Rptr. 280, Feb. 8, 1966, holds that even though the word used in the Will is free from ambiguity in the dictionary sense it may be

ambiguous in the sense it was intended to be used by the testator. In that case, the will bequeathed "personal effects" to testator's grandniece and the residue to charity. The grandniece contended that "personal effects" included a deposit in the sum of \$5,569.08 in the patient's fund account in the Veterans Hospital. The trial court held that "personal effects" was free from ambiguity and rejected an offer to prove by extrinsic evidence that the decedent intended personal effects to include the cash deposit. On appeal the court held the words "personal effects," in and of themselves were not ambiguous, but that in the context and in the circumstances surrounding the testator, if established by extrinsic evidence, it could have been held that the testator in this instance intended personal effects to include the cash deposit and held that the ruling excluding the offered extrinsic evidence was error. Held:

"We agree then, with the trial court; there was no ambiguity in the words used that justified the receipt of extrinsic evidence. There are, however, other situations than the uncertainty of ambiguity that call for a second look at the real meaning of 'personal effects' or similar terms. . . . The function of words is to convey thought. Why, then, if our objective is to ascertain the testatrix' intention, should we not learn what she meant by what she said? It may be that she used words in a sense that they do not ordinarily convey.

“We have concluded that in order to give the will a construction according to the intent of the testatrix, the trial court should have admitted the proffered evidence in order that he might know if, as claimed, she had come to use the words ‘personal effects’ as embracing the sum she had on deposit in the hospital where she had the other personal effects.”

The logic of *Estate of Randall* compels the conclusion that the Trial Court erred in excluding the evidence contained in the Offer of Proof submitted on behalf of the appellant, for such could have explained the real intention of the decedent in using the word “Trust” in the Will.

The mere use of the word “trust” or “trustee” is not conclusive that the testator intended a trust as a matter of law. Indeed, the mere use of the word may, of itself, create the ambiguity. In the following cases, among others, the will said “Trust” or “Trustee,” but the courts held no trust was intended: *Collins v. Mosher*, *supra*; *Axtell v. Coons*, *supra*; *Ponzelino v. Ponzelino*, *supra*; *Norman v. Prince*, *supra*.

If the Trial Court in the case at bar had considered the extrinsic evidence offered and rejected, and the Stipulation for distribution which contains no provision for a trust (R. 49), and the Decree of Final Distribution dated May 10, 1960, (R. 217) which omit to make any provision for a trust or any reference to paragraph 8

of the Will, the Court might well have concluded that in the Order of Partial Distribution of February 24, 1959, the Court by its reference to paragraph 8 of the Will, did not intend to create a trust because the testator did not intend to create a trust and the reference in the Order of Partial Distribution to paragraph 8 of the Will should be treated as descriptive only.

POINT VI

THE EVIDENCE IS INSUFFICIENT TO REQUIRE APPELLANT TO ACCOUNT.

In the absence of fraud or dishonesty, the provisions of the Order of Partial Distribution dated February 24, 1959, waiving an accounting by the trustee by incorporating the provisions of paragraph 8 of the Will are valid and enforceable.

The provision of said Will incorporated in said Decree of Distribution reads as follows:

“... Without the necessity of making any accounting of any nature whatsoever to any person or party concerning the administration of this trust.”

It is clear that in the absence of provisions in the trust indenture waiving an accounting, a trustee is required to account. This rule is codified in 75-12-19, U.C.A. 1953.

However, there is nothing in the Code section which provides that the creator of the trust may not include in the trust provisions waiving the requirement of an accounting by the trustee.

The rule stated in the first paragraph is supported by *Restatement of Trusts, Second*, §172:

“Even though a trust is created, the necessity of formal accounting by the trustee may be dispensed with, unless this is prohibited by statute. Thus, it may be provided that the trustee shall not be under any duty to account to the court. Such a provision is effective, unless, as in the case of testamentary trusts in some states, there is a statutory requirement for accounting which cannot be dispensed with.

* * * * *

“If a trust is created, it is required by public policy that the trustee be answerable to the courts, so far at least as the honesty of his conduct is concerned.”

Whether or not it could have been argued that the inclusion in the Order of Partial Distribution of the provision for waiver of an accounting by the trustee was erroneous, it is established by the authorities, some of which are discussed in Point 1 of this brief, that the only remedy was by appeal from the Order of Partial Distribution and in the absence of appeal, the Decree has become final and conclusive even to the extent that it is erroneous and it is res adjudicata and binding upon

all persons. Indeed, the Executor has even been finally discharged. (R. 222).

In their Answer and Cross Petition, respondents do not allege fraud or dishonesty on the part of the trustee, nor did respondents offer any evidence which might tend to show any such fraud or dishonesty.

Therefore, whether the provision in paragraph 8 of the Will incorporated into the Decree of Distribution waiving accounting by the trustee is valid or invalid, there is no basis in the present proceedings after the Decree of Distribution has become final, for the Court to make its Order requiring appellant now to account as a condition to discharge.

As set forth *supra*, it is the primary function of the Probate Court to determine and enforce the true intentions of the testator.

From a reading of paragraph 8 of the Will, it becomes apparent that the testator made provision for the distribution of the trust fund to his relatives, regardless of degree of kindred to meet "emergencies" and "for the use and benefit of the Wallich family." Since it might prove embarrassing to the recipients of the funds to have their emergencies disclosed in the public record, the testator also inserted the provisions waiving an accounting. This delicate and thoughtful act of the testator should not lightly be disregarded.

It is, therefore, submitted upon all of the grounds herein set forth that the Order and Decree appealed from must be reversed.

POINT VII

APPELLANT IS NOT ESTOPPED TO ASSERT HE IS NOT A TRUSTEE.

Neither of the receipts signed by appellant (R. 199-201) are relevant because they were executed after the entry of the Order of Partial Distribution and they cannot impeach or modify that final judgment.

There is no evidence that respondents even knew of the receipts, or that they changed their position or relied thereon to their detriment.

In *Niccolls v. Niccolls*, Cal. 143 P.712, an intervivos conveyance in trust to be effective on death of the grantor, was not executed with the formality of a will; held, the trustee was not estopped to assert the trust was void.

Whether or not a trust exists depends upon the intent of the testator. The subsequent acts of appellant cannot supply the requisite intent of the testator.

Estoppel precludes one from denying or asserting a material fact, which by his words or conduct he intentionally or through culpable negligence *induces* another,

who was *excusably ignorant* of the true facts *to believe and act* upon them, thereby, as a reasonably anticipated consequence, *changing his position* in such a way that he suffers injury if such contrary assertion or denial were allowed. *Migliaccio v. Davis*, (1951) 120 Ut. 1, 232 P.2d 195. Here, there is no showing of inducement, no reliance by cross-petitioners, no change of position and no injury.

CONCLUSION

The Order of Partial Distribution of February 24, 1959, herein is not ambiguous, does not incorporate the will by reference and on its face distributed the residue of the testator's estate to appellant outright. The District Court erred in holding to the contrary by its Order of January 28, 1966, and the Order should be reversed and the case remanded to the District Court with instructions to enter a decree accordingly.

In the alternative, if the Order of Partial Distribution did incorporate the Will into its terms, then one of the terms so incorporated is the provision waiving an accounting by appellant. Therefore the District Court erred in its Order of January 28, 1966 requiring appellant to account and such should be reversed and the case remanded to the District Court with instructions to enter its Decree discharging appellant as a trustee without an accounting.

In the alternative, if the Order of Partial Distribution did incorporate the will into its terms, then the Will left the residue of decedent's estate to appellant either outright, or for five years with power to invade principal. If the latter, since principal and income has been disposed of during the five-year period, there is no need for an accounting. In either event, the District Court's Order of January 28, 1966, requiring appellant to account is in error and the case should be reversed and the case remanded with instructions to the District Court to discharge appellant as a trustee without an accounting.

In the alternative, the will of the decedent is ambiguous and the District Court erred in sustaining objections to offered extrinsic evidence to aid in resolving the ambiguity. Therefore, the District Court's Order of January 28, 1966 should be reversed and the case remanded to the District Court with instructions to receive extrinsic evidence to resolve the ambiguity in the Will as to whether an outright gift, an estate for five years or a gift in trust of the residue of the estate was intended by the decedent.

Respectfully submitted,
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